

NATIONAL COMPANY LAW APPELLATE TRIBUNAL, NEW DELHI
Company Appeal (AT) No. 236 of 2019

IN THE MATTER OF:

Triveni Turbine Ltd.

...Appellant

Vs

GE Triveni Ltd. & Ors.

....Respondents

Present:

For Appellant: Mr. S.N. Mookherjee and Mr. Sudipto Sarkar, Sr. Advocates with Mr. Abhijeet Sinha, Ms. Priyanka Goswami, Mr. Siddharth Naidu, Mr. Shubhankar, Mr. Bharat Monga, Mr. Shambho Nandy and Mr. Kamesh Vedula, Advocates.

For Respondents: Mr. A.S. Chandhiok, Sr. Advocate with Mr. V.P. Singh, Mr. Aditya Bhat, Ms. Roopali Singh, Mr. Abhijnan Jha, Mr. Devashish Marwah, Mr. Abhishek, Ms. Sweta Karkar, Ms. Priya Agarwal and Mr. Shivam, Advocates for R-4.

Mr. Arun Kathpalia, Sr. Advocate with Mr. Krishnendu Datta, Mr. Puneet Singh Bindra, Mr. Simran Jeet and Mr. S. Singh, Advocates for R-5.

Ms. Diksha Gupta and Mr. Kauser Husain, Advocates.

With

Company Appeal (AT) No. 237 of 2019

IN THE MATTER OF:

Triveni Turbine Ltd.

...Appellant

Vs

GE Triveni Ltd. & Ors.

....Respondents

Present:

For Appellant: Mr. S.N. Mookherjee and Mr. Sudipto Sarkar, Sr. Advocates with Mr. Abhijeet Sinha, Ms. Priyanka Goswami, Mr. Siddharth Naidu, Mr. Shubhankar, Mr. Bharat Monga, Mr. Shambho Nandy and Mr.

Kamesh Vedula, Advocates.

For Respondents: Mr. A.S. Chandhiok, Sr. Advocate with Mr. V.P. Singh, Mr. Aditya Bhat, Ms. Roopali Singh, Mr. Abhijnan Jha, Mr. Devashish Marwah, Mr. Abhishek, Ms. Sweta Karkar, Ms. Priya Agarwal and Mr. Shivam, Advocates for R-4.

Mr. Arun Kathpalia, Sr. Advocate with Mr. Krishnendu Datta, Mr. Puneet Singh Bindra, Mr. Simran Jeet and Mr. S. Singh, Advocates for R-5.

Ms. Diksha Gupta and Mr. Kauser Husain, Advocates.

With

Company Appeal (AT) No. 298 of 2019

IN THE MATTER OF:

Triveni Turbine Ltd.

...Appellant

Vs

GE Triveni Ltd. & Ors.

....Respondents

Present:

For Appellant: Mr. S.N. Mookherjee and Mr. Sudipto Sarkar, Sr. Advocates with Mr. Abhijeet Sinha, Ms. Priyanka Goswami, Mr. Siddharth Naidu, Mr. Shubhankar, Mr. Bharat Monga, Mr. Shambho Nandy and Mr. Kamesh Vedula, Advocates.

For Respondents: Dr. A. M. Singhvi, Sr. Advocate with Mr. Avishkar Singhvi, Mr. V. P. Singh, Mr. Aditya Bhat, Ms. Roopali Singh, Mr. Abhijnan Jha, Mr. Devashish Marwah, Mr. Abhishek Singh and Mr. Shivam, Advocates for R-2.

Mr. A.S. Chandhiok, Sr. Advocate with Mr. Aditya Bhat, Ms. Roopali Singh, Mr. Abhijnan Jha, Mr. Devashish Marwah, Mr. Abhishek and Mr. Shivam, Advocates for R-4.

Mr. Arun Kathpalia, Sr. Advocate with Mr. Abhijan Jha, Mr. Devashish Marwah and Ms. Vanya, Advocates for R-3.

J U D G M E N T**SUDHANSU JYOTI MUKHOPADHAYA, J.**

The Appellant/ Petitioner filed application under Sections 241-242 of the Companies Act, 2013 alleging prejudicial action and oppression on the part of the Respondents. The National Company Law Tribunal (“Tribunal” for short), Bengaluru Bench, initially passed interim order on 12th June, 2019. However, subsequently on the application moved by the Respondents, the Tribunal by impugned order dated 23rd August, 2019, vacated the interim order, relevant of which reads as follows:

“16. In the result, both IA. Nos. 341 & 342 of 2019 in C.P No. 102 of 2019 are disposed of by vacating the interim orders passed on 12.06.2019 with immediate effect, with reference to Para (c) of the order viz. “An order to ad-interim injunction is granted restraining Respondent No.5 from altering, in any manner whatsoever, the shareholding composition of Respondent No.4 or causing the same to be altered in any manner and to direct the Respondent No. 2 to 5 to give access to the Petitioner Company/GETL immediate

access to all of the Company's data including electronics data and emails of employees of the Company which are saved on/ available on the servers of Respondent No.5 and/or its group Companies”.

2. The aforesaid order is under challenge in Company Appeal (AT) Nos. 236 & 237 of 2019.

3. In the said Company Petition under Sections 241-242 of the Companies Act, 2013, Interlocutory Applications were filed by the Appellant/ Petitioner. In one of them, prayer was made for investigation to find out as to who is the actual owner. Initially, when the Appellant/ Petitioner moved before this Appellate Tribunal, this Appellate Tribunal by order dated 25th September, 2019 asked the Tribunal to decide the issue.

4. However, in the meantime, 2nd and 3rd Respondents moved application under Section 45 of the Arbitration & Conciliation Act, 1996. The Tribunal without deciding the pending Interlocutory Application Nos. 494 and 495 of 2019 preferred by the Appellant/ Petitioner, by impugned order dated 27th September, 2019 issued notice on the petition filed under Section 45 of the Arbitration & Conciliation Act, 1996. The said order is under challenge in Company Appeal (AT) No. 298 of 2019.

5. Learned Senior Counsel for the Appellant submitted that the 5th Respondent – ‘General Electric Company’ approached the Appellant- ‘Triveni Turbine Limited’ for a business partnership to manufacture steam turbines in

the above 30-100 MW category. 'General Electric Company' proposed setting up a 50:50 joint venture with 'Triveni Turbine Limited' where 'General Electric Company' would provide - (i) relevant technology, (ii) marketing services, international sales network, (iii) access to global technological resources / research centers, (iv) non-competition and 'Triveni Turbine Limited' would undertake manufacturing in India and provide its domestic supply chain network. The 1st Respondent- 'GE Triveni Limited' was thus set up as a joint venture between 'General Electric Company' and 'Triveni Turbine Limited'. 'General Electric Company' applied for and was granted FIPB approval for investment in it by the Government of India after which it remitted funds for acquiring shares in 'GE Triveni Limited'. At the inception, 'General Electric Company' held its shares in 'GE Triveni Limited' through 'GE Pacific Mauritius', an affiliate of 'General Electric Company' who became party to the joint venture *eo nomine*. Subsequently this was transferred to 'GE Pacific Mauritius'.

6. It was submitted that 'General Electric Company' chose its affiliate 3rd Respondent- 'Nuovo Pignone Spa' to enter into a (a) technology license agreement with 'GE Triveni Limited' for 'General Electric Company's providing relevant technology; and (b) Marketing Services Agreement for providing 'General Electric Company's international sales and marketing network to 'GE Triveni Limited'. 'GE Triveni Limited' was also granted a license to use General Electric Company's trademarks and tradenames.

7. It was further submitted that in October 2016, 4th Respondent- 'Baker Hughes LLC, A GE Company' was incorporated for the purpose of facilitating

the merger of Baker Hughes Inc. and the oil and gas operating segment of 'General Electric Company' ("**Merger**"). In 2017, 'General Electric Company' informed 'GE Triveni Limited' that *as part of the integration plan for the intended GE Oil & Gas merger with Baker Hughes Inc* GE Mauritius proposed to transfer its shareholding to 2nd Respondent- 'DI Netherlands BV'. 'GE Triveni Limited' was however *specifically assured that this will not change the business relationship in any way. Ultimately all entities will be (and will remain) controlled affiliates of General Electric Company.* As a result of the Merger, the relevant steam turbine business of 'General Electric Company' and 'Baker Hughes Inc.' was transferred to 4th Respondent- 'Baker Hughes LLC, A GE Company' and 5th Respondent- 'General Electric Company' was now linked to 1st Respondent- 'GE Triveni Limited' through 4th Respondent- 'Baker Hughes LLC, A GE Company'.

8. Learned Senior Counsel for the Appellant submitted that 'General Electric Company' failed to keep up its promise of providing business to 'GE Triveni Limited'. On the contrary, 'General Electric Company'; (a) used its internal processes to divert business from 'GE Triveni Limited' and competed against it; (b) ensured that its nominee directors on 'GE Triveni Limited's board breached their fiduciary duties; (c) ensured that, in the process, key management personnel of 'GE Triveni Limited', i.e. the CTO and CFO colluded with 'General Electric Company', 'Baker Hughes LLC, A GE Company' and their nominees / appointees in 'GE Triveni Limited'.

After acting as above, 'General Electric Company' proposed to transfer its shareholding in 4th Respondent- 'Baker Hughes LLC, A GE Company' which would result in 'General Electric Company's complete de-linking /exit from the 'GE Triveni Limited' partnership.

9. It was submitted that the Appellant thus filed CP No. 102 of 2019 before the Tribunal where it sought, urgent interim reliefs. The Tribunal was pleased to make an interim order on 12th June, 2019 restraining 'General Electric Company' from altering shareholding composition of 4th Respondent, and directing access to all of 'GE Triveni Limited's data.

10. Learned counsel for the Appellant submitted that the 4th & 5th Respondents approached the Hon'ble High Court of Karnataka against the interim order on the ground that they are foreign companies and the Tribunal lacks jurisdiction over them. The Hon'ble High Court asked the Respondents to file appropriate applications seeking vacation of the interim order before the Tribunal and directed it to hear the matter. In the course of hearing such applications filed by 4th & 5th Respondents, The Tribunal asked them to file an affidavit explaining how they will ensure that Triveni's apprehensions as set forth in para 373 of the company petition are addressed. The 4th and 5th Respondents filed a joint affidavit of undertaking stating that if the interim order was vacated, they would ensure that - (a) within 21 days the shareholding of 2nd Respondent- 'DI Netherlands BV' is transferred to a fully owned affiliate of 5th Respondent- 'General Electric Company'; and (b) agreements entered with 'GE Triveni Limited' will remain fully enforceable. By

filing such an Affidavit, 4th and 5th Respondents in fact submitted to the jurisdiction of Tribunal. Although the Tribunal did not accept this Affidavit, it vacated the interim order on the ground that it lacked jurisdiction over 4th and 5th Respondents who were foreign companies.

11. The Appellant- 'Triveni Turbine Limited' challenged the impugned order by way of the instant appeals. On 27th August 2019, when the appeals were heard for the very first time, the 4th and 5th Respondents reiterated their proposed undertaking before the Tribunal. After noting their submission, this Appellate Tribunal permitted 4th and 5th Respondents to transfer the title of all the shares to any party provided that the said Respondents comply with the following directions:

- (a) the share transfer shall not affect the business of 'Triveni Turbine Limited' and 'GE Triveni Limited';
- (b) the share transfer would not affect all the five agreements entered into between the parties;
- (c) obligations of the 4th and 5th Respondents existing on 12th June 2019 shall be performed.

It further observed that all transactions of shares if made shall be subject to the decision of these appeals. This Appellate Tribunal also directed that the necessary data for running the business of 'GE Triveni Limited', be provided by the concerned Respondents to 'GE Triveni Limited', as recorded in the order.

12. Learned counsel for the Appellant submitted that the 4th and 5th Respondents proceeded to transfer shares of 5th Respondent in 4th Respondent- 'Baker Hughes LLC, A GE Company', without complying with this Appellate Tribunal's order dated 27th August 2019. As a result of the transfer, business carried out by 4th Respondent- 'Baker Hughes LLC, A GE Company' and its subsidiary, 3rd Respondent- 'Nuovo Pignone Spa' has gone out of 'General Electric Company' altogether. Yet, 4th and 5th Respondents have refused to disclose, despite repeated written requests, as to how and who out of the two will carry out obligations to 'GE Triveni Limited' in view of the share transfer. This fundamentally affects GE Triveni's ability to conduct its business and affairs. But for this Appellate Tribunal's order dated 27th August 2019, technology and marketing services of 3rd Respondent- 'Nuovo Pignone Spa' and resources of 'General Electric Company' would not be available to 'GE Triveni Limited'.

13. It was further submitted that the limited data of 'GE Triveni Limited' was received from the CTO, a 'General Electric Company' appointee, after this Appellate Tribunal's order dated 27th August 2019. This data confirms the Appellant's claims of fraud, oppression, collusion and breach of fiduciary duty'. Curiously, data was never supplied to 'GE Triveni Limited' despite Tribunal's interim order of 12th June 2019. At the time, upon inquiry, it was learnt that the CTO's laptop had crashed and took over 2 weeks to be repaired.

14. It was also submitted that upon receipt of data, it was found that data for one whole year, i.e. June 2017 to September 2018 was completely missing. This was an extremely crucial period for 'GE Triveni Limited' when Appellant raised several concerns with 4th and 5th Respondents relating to various acts of fraud, oppression and prejudice.

15. According to the counsel for the Appellant, the Appellant believes that the missing data was deliberately destroyed / tampered with and that the data which has so far been received is only the tip of the iceberg. It is necessary to get the complete data and review the same.

16. Further, it was submitted that in the Board meeting held on 30th October 2019, 'GE Triveni's' Board was reminded of a past request made to 4th and 5th Respondents to provide to 'GE Triveni Limited' details of the enquiries / orders falling within the output range of 'GE Triveni Limited', for the past three years. Even though the information was vital to 'GE Triveni's' sustainability, it has not been provided. It was further proposed that a special audit be conducted by a third-party agency on the data, with the scope being to examine the integrity and completeness of the data and identify if there are any conflicts in "corporate governance" related matters. Nominee directors of 4th and 5th Respondents serving on the Board, however, opposed this proposal.

17. The Appellant was, therefore, constrained to file IA No. 4019/2019 seeking various directions including *inter alia* an investigation or third-

party audit in relation to emails which have been made available and the missing and/or deleted emails sent and received by the CFO and CTO.

18. Learned counsel for the Appellant submitted that an investigation and/or audit is necessary for regulating the conduct of the Company's affairs because such an investigation / audit will make available the complete data which would help determine:

- (a) the orders / enquiries received by 'General Electric Company' which fell within the output range of 'GE Triveni Limited';
- (b) how 4th and 5th Respondents and their nominees / appointees concealed such orders from 'GE Triveni Limited';
- (c) the orders / enquiries that were diverted from 'GE Triveni Limited' to 'General Electric Company's international affiliates such as 3rd Respondent- 'Nuovo Pignone Spa', GE Thermodyne, Alstom and others;
- (d) to what extent business opportunities and profits were denied to 'GE Triveni Limited' from product and life time spares and service sales;
- (e) the employees and officers of 'GE Triveni Limited' were / are part of the diversion of business.;
- (f) the changes that ought to be brought about in running the affairs of the company including - (i) providing access to 'GE Triveni Limited' to sales and marketing opportunities / enquiries received by GE which fall within 'GE Triveni Limited' product range, (ii) removal of employees / nominees of 'General Electric Company' / 'Baker Hughes LLC, A GE

Company' in 'GE Triveni Limited' who are found to be in breach of their fiduciary duties and / or engaged in fraudulent or collusive conduct;

(iii) access to requisite 'General Electric Company' technology enabling 'GE Triveni Limited' to address the market.

(g) whether all enquiries between above 30-100 MW received by 4th and 5th Respondents or their affiliates are being forwarded to 'GE Triveni Limited' for manufacture and supply.

(h) measures that ought to be taken for ensuring that company's affairs are conducted in a manner which ensures that it does not lose out on any business opportunity going forward;

(i) whether, to what extent and how 'General Electric Company' / 'Baker Hughes LLC, A GE Company' will remain involved in the affairs of GE, what would their respective obligations be towards 'GE Triveni Limited' and how these will be performed;

19. Mr. Arun Kathpalia, learned Senior Counsel appearing on behalf of 'Nuovo Pignone Spa' and 'General Electric Company'; Dr. Abhishek Manu Singhvi, learned Senior Counsel appearing on behalf of 'DI Netherlands BV' and Mr. A.S. Chandhiok, learned Senior Counsel appearing on behalf of 'Baker Hughes LLC, A GE Company' opposed the prayer.

20. Learned counsel appearing on behalf of 'General Electric Company'- (5th Respondent) submitted that the ex-parte order was passed without jurisdiction and thus rightly vacated by the impugned order. The subject matter of the ex-

parte Order was an injunction over a proposed transfer of shares which had their situs outside India and the said proposed transfer of shares was between foreign entities. The subject matter of the ex-parte order, i.e. transfer of 5th Respondent's shareholding in 4th Respondent, did not have any nexus with India, as the situs of the shares was not India. Consequently, the said ex-parte order was passed wholly without jurisdiction.

21. It was submitted that the Companies Act, 2013, does not provide the NCLT and this Appellate Tribunal with powers to pass orders having extra-territorial effect as there is no express provision to this effect. It is settled law that a statute does not operate in relation to foreigners or foreign property, unless the contrary is stated.

22. It was further submitted that the Tribunal is constituted under the Companies Act, 2013. Therefore, it must exercise its powers under the Companies Act within the four corners of the Act.

23. Learned counsel for 'General Electric Company'- (5th Respondent) submitted that the 4th and 5th Respondents are incorporated outside India and are not amenable to the jurisdiction of the Tribunal under the Companies Act. The scope of applications under sections 241 and 242 of the Act are limited to the regulation of the affairs of companies incorporated under the Act and not the affairs of companies incorporated outside India. 4th and 5th Respondents are incorporated outside India and have no nexus with the affairs of 1st Respondent.

- i. Section 1(4)(a) of the Act affirms that the Act only applies to companies incorporated under the Act or any previous company law.
- ii. Section 2(20) of the Companies Act, 2013 defines a 'Company' as a company incorporated under this Act or under other previous company law.
- iii. Sections 241/242 of the Companies Act, 2013 grant powers to the NCLT to pass orders in relation to the company in which the oppression/mismanagement allegedly occurred. However, such orders relate to the Company and cannot be directed against foreign entities which are not even shareholders in the company.

24. It was also submitted that Section 228 is not applicable in the present case. Section 228 of the Companies Act, 2013 read with section 213 of the Companies Act, 2013 is limited to those companies that fall within the definition of "foreign companies" under section 2(42) of the Companies Act, 2013 and is limited for the purposes of inspection, inquiry or investigation only, i.e. Chapter XIV of the Companies Act, 2013.

25. It was submitted that the Section 384(5) of the Companies Act, 2013 makes it clear that the *mutatis mutandis* application of Chapter XIV (i.e. to the extent necessary), even in the case of a 'foreign company' is limited to such a company's Indian business, which is not the case in the present matter. As neither the ex-parte Order nor the Impugned Order concerned

itself with inspection, inquiry or investigation into the affairs of any of the parties, Section 228 of the Companies Act, 2013 is not applicable in the present matter.

26. It was further submitted that the Appellant cannot seek the relief of investigation at this stage. The Appellant did not even agitate any relief relating to investigation at the time of passing of the ex-parte order. The ex-parte order, which was passed in favour of the Appellant, does not even record any submission relating to the prayer for investigation, let alone reject such prayer. Consequently, the Appellant cannot now, at the stage of the Appeal, seek any relief for investigation.

27. It was submitted that in the absence of any finding of oppression/mismanagement by the Tribunal, even on a prima facie basis, no relief of investigation can be made out. The Appellant seek investigation in the hope of obtaining material in relation to its case of alleged oppression/mismanagement. This is not permissible. It is settled law that investigation cannot be granted if it tantamounts to a *roving/fishing enquiry*.

28. Learned Senior Counsel appearing on behalf of 2nd and 3rd Respondents submitted that the appeal deserves to be dismissed. The Impugned Order merely issues notice on the Applications and observes that the Applications should be heard first. This is an innocuous order and also a logical one wherein the Tribunal correctly decided that matters relating to

jurisdiction ought to be heard first. The 2nd Respondent ought to be given a chance to place arguments on the Application before the Tribunal, and not before this Appellate Tribunal in the first instance.

29. It was submitted that the allegations set out in the Company Petition all arise out of or in connection with or relate to the JVA and the Ancillary Agreements. Article 29.1 of the JVA is a widely worded dispute resolution clause having the widest amplitude. Article 29.1 is also incorporated in the Articles of Association as Article 140. The ancillary agreements and Service Level Agreement contain identical dispute resolution clauses. This indicates that the JVA and the ancillary agreements formed one common understanding, and disputes arising out of the JVA and the ancillary agreements may be referred to arbitration.

30. It was further submitted that it is settled law that if disputes set out in a petition filed under Sections 241-242 of the Companies Act, 2013, arise out of a contract, they ought to be referred to the contractually agreed dispute resolution mechanism. The dispute raised in the Company Petition is purely *in personam* in character and thus, by its very nature, ought to be arbitrable. The Company Petition does not trigger Section 241, Companies Act, 2013, at all.

- (i) The disputes do not relate to the regulation of affairs of 1st Respondent Company.

- (ii) In fact, the allegations made are against the joint venture partner of the Appellant, i.e. 2nd Respondent, and 3rd Respondent which is the service provider under the ancillary agreements.
- (iii) It is settled law that allegations of breach of contractual obligations do not trigger Sections 241-242 of the Companies Act, 2013.

31. It was further submitted that the Company Petition is thus nothing but a dressed up petition to evade the agreed dispute resolution mechanism. The Impugned Order followed the legislative mandate set out under Section 45 of the Arbitration & Conciliation Act. Unless the grounds set out under Section 45 are attracted, a judicial authority must mandatorily refer parties to arbitration.

32. Learned Senior Counsel appearing on behalf of 2nd and 3rd Respondents submitted that in any event, an objection to the maintainability of the arbitral proceedings ought to be heard by the arbitral tribunal. Without prejudice to the above, the Appeal arises out of an order passed under the Arbitration & Conciliation Act, 1996 and is not maintainable as the Arbitration Act does not provide for an appeal against such an Order. The Impugned Order was passed in respect of an application filed under Section 45 of the Arbitration & Conciliation Act, 1996, and was thus passed under Section 45 of the Arbitration & Conciliation Act, 1996.

33. According to learned counsel, once it is established that the Impugned Order was passed under Section 45 of the Arbitration & Conciliation Act, 1996, it must necessarily follow that such an order would only be appealable if such an appeal was expressly provided for against such an order under Section 50 of the Arbitration & Conciliation Act, 1996.

34. Further, it was submitted that the Appellant has not approached this Appellate Tribunal with clean hands. The Appellant has deliberately not disclosed the fact that it is challenging the maintainability of the arbitration proceedings before the arbitral tribunal itself. It is settled law that an action ought to be dismissed if the party bringing the action approaches the Court with unclean hands by suppressing material documents.

35. It was submitted that the order dated 24th October, 2019 passed by this Appellate Tribunal, ought to be vacated as it is in conflict with Section 41(1)(a) of the Specific Relief Act.

36. It was further submitted that the Impugned Order does not amount to a review of previous orders passed by the Tribunal in the Company Petition. This is a clear attempt at misleading this Tribunal. The Section 45 Application was filed on 25th September, 2019 and placed before the appropriate bench of the Tribunal on 27th September, 2019, for the first time. As the arbitration agreements were brought to its notice, the Tribunal, acting in the capacity of a 'judicial authority' under Section 45 of the Arbitration & Conciliation Act, 1996, passed the impugned order issuing notice on the application and deciding to hear the Section 45 application first. It is submitted

that the course undertaken by the Tribunal was in consonance with established principles as enunciated above and ought not to be faulted.

37. Learned counsel for the 2nd and 3rd Respondents also submitted that the Impugned Order does not violate principles of natural justice. The Appellant erroneously contends that it was not provided with an opportunity to make submissions on the Application filed by the Respondent. On the contrary, by way of the Impugned Order, the Tribunal directed parties to complete pleadings in respect of the Application. In terms of the Impugned Order, the Appellant has the opportunity to file its objections/reply to the Application.

38. It was submitted that the Section 45 Application was not belatedly filed. It is established law that Section 45 does not even require the filing of a formal application.

39. He relied on the decision of the Hon'ble Supreme Court in ***“Chloro Controls India Private Limited v. Severn Trent Water Purification Inc. and Ors.— (2013) 1 SCC 641”*** wherein the Hon'ble Supreme Court observed:

“131. Another very significant aspect of adjudicating the matters initiated with reference to Section 45 of the 1996 Act, at the threshold of judicial proceedings, is that the finality of the decision in regard to the fundamental issues stated under Section 45 would

further the cause of justice and interest of the parties as well:

131.1. *To illustratively demonstrate it, we may give an example. Where party 'A' is seeking reference to arbitration and party 'B' raises objections going to the very root of the matter that the arbitration agreement is null and void, inoperative and incapable of being performed, such objections, if left open and not decided finally at the threshold itself may result in not only parties being compelled to pursue arbitration proceedings by spending time, money and efforts but even the arbitral tribunal would have to spend valuable time in adjudicating the complex issues relating to the dispute between the parties, that may finally prove to be in vain and futile. Such adjudication by the arbitral tribunal may be rendered ineffective or even a nullity in the event the courts upon filing of an award and at execution stage held that agreement between the parties was null and void inoperative and incapable of being performed. The Court may also hold that the arbitral tribunal had no jurisdiction to entertain and decide the issues between the parties.*

131.2. *The issue of jurisdiction normally is a mixed question of law and facts. Occasionally, it may also be a question of law alone. It will be appropriate to decide such questions at the beginning of the proceedings itself and they should have finality.*

131.3. *Even when the arbitration law in India contained the provision like Section 34 of the 1940 Act which was somewhat similar to Section 4 of the English Arbitration Act, 1889, this Court in the case of Anderson Wright Ltd. (supra) took the view that while dealing with the question of grant or refusal of stay as contemplated under Section 34 of the 1940 Act, it would be incumbent upon the Court to decide first of all whether there is a binding agreement for arbitration between the parties to the suit or not.*

131.4. *Applying the analogy thereof will fortify the view that determination of fundamental issues as contemplated under Section 45 of the 1996 Act at the very first instance by the judicial forum is not only appropriate but is also the legislative intent. Even, the language of Section 45 of the 1996 Act suggests that unless the Court finds that an agreement is null and*

void, inoperative and incapable of being performed, it shall refer the parties to arbitration.”

40. Dr. Abhishek Manu Singhvi, learned Senior Counsel appearing on behalf of the Respondent referred to the decision of this Appellate Tribunal in **“Thota Gurunath Reddy and Others v. Continental Hospitals Pvt. Ltd.— 2018 SCC OnLine NCLAT 885”**. However, the said Judgment is not applicable for the present as merely notice has been issued in an application under Section 45 of the Arbitration & Conciliation Act, 1996.

41. Taking into consideration the interest of the Company, this Appellate Tribunal by order dated 27th August, 2019 already passed following order:

“.....6. Having heard learned counsel for the Appellant and Contesting Respondent Nos. 4 & 5 and taking into consideration the aforesaid fact, we allow 4th and 5th Respondents to transfer the title of all the shares to any party without affecting the business of Appellant- ‘Triveni Turbine Limited’ and the 1st Respondent Company- ‘GE Triveni Limited’ and should not affect all the five agreements entered into between parties as referred to in their undertaking before the Tribunal and recorded above.

7. *In so far as providing data is concerned, the necessary data for running the business of 1st Respondent Company- 'GE Triveni Limited', if required to be provided pursuant to the aforesaid five agreements, be provided by concerned Respondents to the 1st Respondent Company- 'GE Triveni Limited', if available. All transactions of shares if made shall be subject to the decision of these appeals.*

8. *The obligation of 4th ('Baker Hughes LLC, A GE Company') and 5th Respondent ('General Electric Company') as existing on 12th June, 2019, shall also continue till the next date.*

Post both the appeals 'for admission (after notice)' on 25th September, 2019 on the top of the list."

42. The aforesaid interim order having already passed, we find no further order is required to be passed and the impugned order dated 23rd August, 2019 passed by the Tribunal stands substituted by the interim order already passed by this Appellate Tribunal, as recorded above. The said interim order shall continue till the pendency of the petition under Sections 241-242 of the Companies Act, 2013.

43. So far as the impugned order dated 27th September, 2019 is concerned, the Tribunal has merely issued notice under Section 45 of the Arbitration & Conciliation Act, 1996.

44. In the aforesaid background, we are not inclined to interfere with the impugned order dated 27th September, 2019. The Tribunal is required to decide the Interlocutory Applications filed under Section 45 after hearing the parties without being influenced by the order passed by the Tribunal or this Appellate Tribunal. It is expected that the Tribunal will pass such order on the petition under Section 45 of the Arbitration & Conciliation Act, 1996 after hearing the parties on an early date preferably within two months.

As the allegations and counter allegations and other facts are to be looked into by the Tribunal, we are not deliberating on such issues which are left open to the parties to argue before the Tribunal.

45. The grievance of the Appellant/ Petitioner is that once the application under Section 45 of the Arbitration & Conciliation Act, 1996 is allowed, then the Tribunal will become *functus officio* and must pass order for investigation to find out as who is the actual owner of the Company.

46. Section 216(1) of the Companies Act, 2013 empowers the Central Government to go for such investigation under Section 216(2). Such power is also vested with the Tribunal, as follows:

“216. Investigation of ownership of company.— (1)

Where it appears to the Central Government that there is a reason so to do, it may appoint one or more inspectors to investigate and report on matters relating to the company, and its membership for the purpose of determining the true persons—

(a) who are or have been financially interested in the success or failure, whether real or apparent, of the company; or

(b) who are or have been able to control or to materially influence the policy of the company;

(2) Without prejudice to its powers under sub-section (1), the Central Government shall appoint one or more inspectors under that sub-section, if the Tribunal, in the course of any proceeding before it, directs by an order that the affairs of the company ought to be investigated as regards the membership of the company and other matters relating to the company, for the purposes specified in sub-section (1).

(3) While appointing an inspector under sub-section (1), the Central Government may define the scope of the investigation, whether as respects the matters or the period to which it is to extend or otherwise, and in

particular, may limit the investigation to matters connected with particular shares or debentures.

(4) Subject to the terms of appointment of an inspector, his powers shall extend to the investigation of any circumstances suggesting the existence of any arrangement or understanding which, though not legally binding, is or was observed or is likely to be observed in practice and which is relevant for the purposes of his investigation.”

47. However, that question does not arise at this stage and may be raised and decided by the Tribunal at appropriate stage when I.A. Nos. 494 & 495 of 2019 which are pending will be decided, if such issue has been raised by the Appellant. No further order is required to be passed in this appeal.

All the appeals stand disposed of.

[Justice S. J. Mukhopadhaya]
Chairperson

[Justice Bansi Lal Bhat]
Member (Judicial)

NEW DELHI

17th February, 2020

/AR/