(2013) 03 BOM CK 0266

Bombay High Court

Case No: Arbitration Appeal No. 12 of 2013 in Arbitration Application No. 1 of 2012 and Civil Application No. 7 of 2013 in Arbitration Appeal No. 12 of 2013 and Arbitration Appeal No. 13 of 2013 in Arbitration Application No. 1 of 2012 and Civil Application No. 6

M/s. Goldstar Metal Solutions PVT. Ltd.	APPELLANT
Vs	
Shri Dattaram Gajanan Kavtankar, Shri Ravindra Sadanand Phatak and M/s. Vidharbh Mining Pvt. Ltd. M/s. Vidharbh Mining Pvt. Ltd. Vs Shri Dattaram Gajanan Kavtankar, Shri Ravindra Sadanand Phatak and M/s. Goldstar Metal Solutions Pvt. Ltd.	RESPONDENT

Date of Decision: March 13, 2013

Acts Referred:

- Arbitration and Conciliation Act, 1996 - Section 11, 16, 16(1), 2(e), 37
- Civil Procedure Code, 1908 (CPC) - Order 39 Rule 1, Order 39 Rule 2
- Contract Act, 1872 - Section 2(d)
- Mines Act, 1952 - Section 16, 17

Citation: (2013) 3 ABR 529 : (2013) 7 BomCR 543

Hon'ble Judges: R.D. Dhanuka, J

Bench: Single Bench

Advocate: Ravi Kadam, assisted with Mr. Premlal Krishnan, Mr. Chetan Kapadia, instructed by India law in Arbitration Appeal No. 12 of 2013 and Mr. D.D. Madon, assisted with Mr. Jose George in Arbitration Appeal No. 13 of 2013, for the Appellant; Atul Rajadhayaksha , a/w. Mr. S. Khandeparkar, instructed by . Mr. Amogh Karandikar for Respondent No. 1 and Mr. Prasad Dhakephalkar , a/w. Mr. Sangram D. Desai, Lokesh Zade, for the Respondent

Judgement

R.D. Dhanuka, J.

By these two appeals filed u/s 37 of the Arbitration and Conciliation Act, 1996, (for short ''Arbitration Act, 1996'') the appellant seeks to challenge the order dated 30th January, 2013 passed by the Learned District Judge - 1, Sindhudurg allowing the application filed by the 1st respondent, Mr. Dattataram Gajanan Kavtankar u/s 9 of the Arbitration Act, 1996, and granting injunction against the applicants (hereinafter referred to as Mr. Kavtankar). M/s. Goldstar Metal Solutions Pvt. Ltd., the appellant in Arbitration Appeal No. 12 of 2013 is hereinafter referred to as M/s. Goldstar. M/s. Vidharbh Mining Pvt. Ltd., the appellant in Arbitration Appeal No. 13 of 2013 is hereinafter referred to as M/s. Vidharbh. Mr. Ravindra Sadanand Phatak, the 2nd respondent in these two appeals is hereinafter referred to as Mr. Phatak. As both these appeals arise from the same order, by consent of parties, both these appeals were heard together and are being disposed of by a common order.

2. Some of the relevant facts for the purpose of deciding these appeals are as under:-

3. The Government of Maharashtra had executed mining lease for iron ore mines in Sindhudurg District, Maharashtra of admeasuring 20: 24 hectare vide agreement dated 9th July, 1987, admeasuring 36: 91 hectare vide agreement dated 29th June, 1976, admeasuring 52: 12 hectare vide agreement dated 30th October, 2004 in favour of the M/s. Deccan Minerals Pvt. Ltd. By an agreement dated 21st October, 2007 M/s. Deccan Minerals Pvt. Ltd. agreed to sell the entire ROM extracted from the mine, admeasuring 20: 24 hectare to M/s. Goldstar and M/s. Goldstar agree to purchase from the said M/s. Deccan on payment of royalty at the rate of Rs. 175/- PWMT upto 56% Fe grade in excess of the raising charges agreed between M/s. Deccan and M/s. Vidharbh M/s. Deccan simultaneously entered into a separate agreement with M/s. Vidharbh for raising iron ore from the said mines. It was provided that both these agreements were co-terminus with the period of extracted agreement dated 21st October, 2007. Both these agreements were valid for a period of five years. By a Memorandum of Understanding dated 28th December, 2008 entered into between M/s. Goldstar and Mr. Phatak, M/s. Goldstar appointed Mr. Phatak as a facilitator. Under the said agreement, M/s. Goldstar agreed to share 30% of net profit arrived from the sale of iron ore excavated from the mines admeasuring 20.24, 36.91 and 52.12 hectares with Mr. Phatak. In the said agreement it was provided that the tenure of the said agreement would be co-terminus with the period of ore raising agreement and sale/purchase agreement executed between M/s. Goldstar and M/s. Deccan from the said mines. It was provided that Mr. Phatak and M/s. Goldstar would make joint efforts to ensure smooth operation and would ensure that all legal requirements were duly and timely complied with and would jointly ensure all responsibilities as provided by M/s. Deccan to M/s. Goldstar vide ore raising and sale/purchase agreement. The said agreement was signed by the director of M/s. Goldstar Mr. Prem Prakash Saraogi on behalf of M/s. Goldstar and was also signed by Mr. Phatak.

4. On 10th May, 2011, M/s. Deccan Pvt. Ltd. entered into a sale purchase agreement with M/s. Goldstar thereby agreeing to sale ore raised by M/s. Vidharbh under the ore raising agreement to M/s. Goldstar only on the terms and conditions recorded therein. The parties referred to earlier agreement dated 21st October, 2007, in the said agreement M/s. Goldstar had deposited a sum of Rs. 5 lacs as deposit in the said mines with M/s. Deccan which continued to be held by as such by M/s. Deccan. By efflux of time, earlier agreement dated 21st October, 2007 came to an end. The period of the said agreement was to be co-terminus with the period of ore raising agreement of even date between M/s. Deccan and M/s. Vidharbh. Under the said agreement, M/s. Goldstar agreed to pay the consideration to M/s. Deccan at different rates as mentioned in clause 6 of the said agreement. The said agreement was signed by Mr. Prem Prakash Saraogi on behalf of M/s. Goldstar. Pursuant to the board resolution dated 9th May, 2011 passed by M/s. Goldstar. Similarly M/s. Deccan also signed the said agreement pursuant to the Board resolution dated 9th May, 2011 passed by M/s. Deccan. Similarly M/s. Deccan entered into a separate agreement dated 10th May, 2011 with M/s. Vidharbh for raising ore on payment of certain consideration amount mentioned in clause 6 of the said agreement. The said agreement was also agreed to be co-terminus with the period of agreement with M/s. Goldstar. The said agreement was also signed by Mr. Prem Prakash Saraogi, one of the directors of the said M/s. Vidharbh pursuant to the board resolution dated 9th May, 2011. Both these agreements referred to the board resolution passed by M/s. Goldstar as well as M/s. Vidharbh authorising Mr. Prem Prakash Saraogi to execute the said agreement on behalf of M/s. Goldstar and M/s. Vidharbh respectively.

5. Similarly there was a separate sale agreement between M/s. Raw and Finished Products and M/s. Goldstar executed on 10th May, 2011 in respect of 36.91 hectare, sale purchase agreement between M/s. Global Minerals & Ores Pvt. Ltd. and M/s. Goldstar on 4th December, 2012. M/s. Raw and Finished Products also entered into a separate agreement for ore raising with M/s. Vidharbh in respect of 36.91 hectare dated 10th May, 2011. On 1st November, 2011 M/s. Deccan appointed Mr. Jillella Nagaraju as the mines manager in respect of iron ore mines and Mr. O. Kishore Kumar as mines manager in respect of iron ore mines 40.37 hectare of M/s. Deccan Minerals Pvt. Ltd. under the provisions of Metalliferous Mines Regulation 1961.

6. On 21st January, 2013, Mr. Jillella Nagaraju filed an affidavit in the court of Principle District Judge, Sindhudurg stating that he was working as mines manager for M/s. Deccan for last one and half years. The mines situated at Village Sateli, Taluka Sawantwadi, Dist. Sindhudurg and lease in respect of 52.12 hectares was under his supervision. It was stated that M/s. Vidharbh was doing work of excavation with M/s. Deccan. It is also stated that Mr. Dattaram Kavtankar, the 1st respondent herein has no right to excavate the iron ore from the said mine as he supplies machines on hire to work under mines manager directions. He further stated that he had not seen any machines in this season which started from

September, 2012. It is stated that the work of excavation must be carried out under his supervision as per the provisions of Mines Act. The deponent stated that w.e.f. 3rd January, 2013 Mr. Kavtankar started illegal excavation from the said mines, without his permission and without notice to him. The deponent has lodged complaints to the statutory authorities in these regard. The said affidavit was part of the record before the learned Principle District Judge in Arbitration Application No. 1 of 2012.

7. On 13th October, 2012 M/s. Goldstar passed a resolution appointing Mr. Phatak and one Mr. Tusharkumar J. Panchal as additional director of the company w.e.f. 13th October, 2012 on payment of remuneration/commission equivalent to 25% of the final net profit from mines admeasuring 40.37, 52.12, 36.91, 20.24 and 74.45 hectares at village Sateli, during the period 13th October, 2012 to 31st March, 2013 and further accounting period i.e. April to March thereof.

8. On 29th October 2012, M/s. Goldstar, Mr. Kavtankar and Mr. Phatak alleged to have entered into Memorandum of Understanding (MOU) by which it was alleged to have been agreed that the Iron ore Stack at the mining site would belong to Mr. Kavtankar and he would become exclusive owner of the same. It was alleged to have been agreed that in consideration of the alleged dues payable by M/s. Goldstar to Mr. Kavtankar, the said MOU was entered into. Mr. Kavtankar strongly placed reliance upon the said alleged MOU in support of his claim that he derived various rights in the said MOU including his right, title and interest in Iron ore Stack at the mining site and also to sell the same in future and to appropriate his alleged dues payable by M/s. Goldstar against the other creditors to him. It was alleged that the said MOU was signed by Mr. Phatak in his individual capacity as well as on behalf of M/s. Goldstar which would include M/s. Vidharbh. M/s. Goldstar as well as M/s. Vidharbh have disputed the existence and contents of such alleged MOU dated 29th October 2012. On 29th December 2012, Mr. Kavtankar filed petition u/s 9 of the Arbitration Act, 1996 being Arbitration Application No. 1 of 2012 in the Court of Principal District Judge, Sindhudurg against M/s. Goldstar, M/s. Vidharbh and Mr. Phatak.

9. On 29th October 2012, the learned District Judge passed an ex-parte interim order against M/s. Goldstar as well as M/s. Vidharbh temporarily restraining the said two companies from continuing any type of excavation work of mine and creating third party rights in the stock of iron ore lying on the suit property.

10. On 7th January 2012, M/s. Goldstar filed a reply stating that they had not executed the alleged MOU dated 29th October 2012 and that Mr. Kavtankar had no right to file any proceedings against M/s. Goldstar. On 7th January 2013, the District Judge passed an order temporarily restraining Mr. Kavtankar from transporting materials excavated from the suit mine on the basis of agreement dated 29th October 2012 till the appointment of arbitrator in the matter.

11. M/s. Vidharbh filed a separate affidavit in reply to the said petition filed u/s 9 before the learned District Judge pointing out that there was no arbitration agreement between Mr. Kavtankar and M/s. Vidharbh and also disputed existence and contents of the MOU dated 29th October 2012. Mr. Phatak filed a separate affidavit before the learned District Judge supporting the case of Mr. Kavtankar.

12. By an order dated 30th January 2013, the District Judge allowed the arbitration application filed by Mr. Kavtankar u/s 9 and directed M/s. Goldstar, M/s. Vidharbh and Mr. Phatak to issue legal documents such as passes and permissions to Mr. Kavtankar for excavation and transportation of iron ore on the basis of agreement dated 29th October 2012 till the appointment of arbitrator in this matter. The learned District Judge also restrained the said parties from excavating and transporting the material on the basis of agreement dated 29th October 2012 till the appointment of arbitrator and also from selling, alienating and creating third party rights in respect of excavated iron ore lying in the mine premises till the appointment of arbitrator. Being aggrieved by the said order dated 30th January 2013 passed by District Judge, M/s. Goldstar and M/s. Vidharbh have filed two separate appeals u/s 37 of the Arbitration and Conciliation Act, 1996 being Appeal No. 12 of 2013 and 13 of 2013 respectively.

13. Mr. D.D. Madon, the learned senior counsel appearing on behalf of M/s. Vidharbh submits that M/s. Vidharbh had not executed the alleged MOU dated 29th October 2012 with Mr. Kavtankar or Mr. Phatak. It is submitted that Mr. Phatak who was the Director of M/s. Goldstar at the relevant time, in collusion and connivance with Mr. Kavtankar, had alleged to have entered into MOU without any authority and knowledge of M/s. Goldstar. It is submitted that M/s. Vidharbh had never signed the said MOU nor was a party to the same. Application u/s 9 of the Act thus filed by Mr. Kavtankar against M/s. Vidharbh was not at all maintainable It is submitted that in view of the fraud committed by Mr. Phatak, M/s. Goldstar has expelled Mr. Kavtankar from its Board and has filed various criminal complaints under various provisions of Indian Penal code. It is submitted that no dispute exists between Mr. Kavtankar and M/s. Vidharbh nor any amount is outstanding from M/s. Vidharbh to Mr. Kavtankar. It is submitted that the learned District Judge has virtually allowed the entire claim of Mr. Kavtankar and has restrained M/s. Vidharbh from further excavation. It is submitted that the District Judge has exceeded his jurisdiction by allowing application filed u/s 9 by Mr. Kavtankar. It is submitted that trial Court has virtually adjudicated the disputes under the alleged MOU u/s 9 of the Act, which is not permissible and has exceeded his jurisdiction. By the impugned order, the learned Judge has thus allowed Mr. Kavtankar to dispose off the stock and further excavation of mines though such rights could be exercised only by M/s. Vidharbh.

14. The learned senior counsel submits that as there was no arbitration agreement between M/s. Vidharbh and Mr. Kavtankar and M/s. Vidharbh not being party nor having signed any alleged MOU which was a document fabricated by Mr. Kavtankar

and Mr. Phatak, Mr. Phatak had no authority to execute any such alleged MOU on behalf of M/s. Goldstar. It is submitted that in any event, Mr. Phatak was never the Director of M/s. Vidharbh and thus, the said agreement could not have been considered as agreement on behalf of M/s. Vidharbh. The learned senior counsel submits that the learned District Judge has erroneously proceeded on the footing that Mr. Prem Prakash Saraogi had signed the alleged MOU on behalf of M/s. Goldstar and also M/s. Vidharbh. It is submitted that Mr. Prem Prakash Saraogi had not signed any such MOU and thus, interim orders could not have been passed by the learned District Judge against M/s. Vidharbh. The learned senior counsel submits that once an existence of arbitration agreement itself is under challenge while opposing application u/s 9 of the Act of 1996, the District Judge ought to have decided that issue itself even before considering the grant or refusal of interim measures u/s 9 of the Act. The learned senior counsel submits that however, the District Judge has held that validity of the said agreement would be considered by the arbitral tribunal as per the provisions of the said Act and the issue of jurisdiction also would be decided by the arbitral tribunal. After rendering such erroneous and perverse finding, the learned District court held that it could not be said that the District Judge has no jurisdiction to pass any interim relief and that Court was empowered to grant interim relief in favour of Mr. Kavtankar on the basis of arbitration agreement dated 29th October 2012. The learned senior counsel thus, submits that the entire order is on the face of it perverse and is vitiated by not deciding the issue of jurisdiction and leaving the said issue open to be decided by the arbitral tribunal and in proceeding with grant of interim measures. The learned senior counsel then submits that in view of serious allegations of fraud and malpractice made by M/s. Vidharbh and M/s. Goldstar against Mr. Phatak and Mr Kavtankar, such issues even otherwise cannot be referred to arbitration and the interim relief being in aid of final relief, the learned District Judge could not have granted any interim relief in favour of Mr. Kavtankar in the facts of this case. The learned senior counsel referred to the Judgment of Supreme Court in case of N. Radhakrishnan Vs. Maestro Engineers and Others, .

15. The learned senior counsel then submits that the learned District Judge did not deal with the Judgment of Supreme Court in case of M Radha (supra) on the ground that party had not led any evidence to show that agreement dated 29th October 2012 was false and bogus and in absence of the oral evidence or any other evidence, it could not be said that really the said agreement was bogus and false one. It is erroneously held that validity of said agreement was required to be considered by the arbitral tribunal as per the provisions of the Act.

The learned senior counsel, then submits that the mining operation was regulated under the Mining Laws and nobody can enter into mine and operate without proper permission issued by the authority appointed under such law. M/s. Deccan Group has already appointed a Mine Manager. Though the said Mining Manager had filed affidavit before the learned District Judge pointing out about his appointment by

M/s. Deccan Group, lessee of the mines and pointing out that that illegal excavation was being carried on by Mr. Kavtankar, the learned District Court has not dealt with the said affidavit at all in the impugned order. The learned senior counsel then submits that even the disputed MOU states that the said MOU was co-terminus with the ore raising agreement and sale purchase agreements dated 21st October 2007 entered into between M/s. Deccan Group and M/s. Vidharbh and M/s. Goldstar and the said agreement had come to an end by efflux of time. The learned senior counsel submits that ownership in respect of the excavated ore would be transferred only upon M/s. Goldstar making payments as per the invoices raised by original lessee, Deccan group and thus, the said ores could not have been allowed to be sold by Mr. Kavtankar under the alleged MOU. The learned senior counsel submits that no prudent businessman would enter into MOU bartering goods worth Rs. 30 crores and above against the alleged claim of Rs. 6 crores. No board resolution was passed by M/s. Goldstar or by M/s. Vidharbh authorising Mr. Phatak to enter into any such alleged MOU. It is submitted that M/s. Vidharbh is a separate legal entity and even if Mr. Phatak had acted on behalf of M/s. Goldstar in executing MOU in favour of Mr. Kavtankar, same would not bind M/s. Vidharbh.

16. Mr. Madon, the learned senior counsel then submits that no specific performance could be granted by the District Judge at the ad-interim stage or at any stage u/s 9 of the Act and that also against M/s. Vidharbh who was not even party to the arbitration agreement. The learned counsel submits that it was not even the case of Mr. Kavtankar that any agreement was entered into between him and M/s. Vidharbh. It is submitted that observations of the District Judge is contrary to the pleadings of Mr. Kavtankar filed u/s 9 of the Act. Mr. Madon, the learned senior counsel then submits that the directions given by the District Judge to M/s. Vidharbh for issuance of pass for excavation or transportation of iron ore is contrary to even alleged MOU. Even the said alleged agreement does not provide for issuance of passes by M/s. Goldstar or in any event by M/s. Vidharbh for carrying out excavation. No passes were required to be issued or could be issued for excavation as the same were required only for transportation.

17. The learned senior counsel submits that the impugned order passed by the District Judge is contrary to the principles of law and guidelines laid down by the Supreme Court in case of Dorab Cawasji Warden Vs. Coomi Sorab Warden and others, of the said judgments read thus:-

14. The relief of interlocutory mandatory injunctions are thus granted generally to preserve or restore the status quo of the last non-contested status which preceded the pending controversy until the final hearing when full relief may be granted or to compel the undoing of those acts that have been illegally done or the restoration of that which was wrongfully taken from the party complaining. But since the granting of such an injunction to a party who fails or would fail to establish his right at the trial may cause great injustice or irreparable harm to the party against whom it was

granted or alternatively not granting of it to a party who succeeds or would succeed may equally cause great injustice or irreparable harm, courts have evolved certain guidelines. Generally stated these guidelines are:

(1) The plaintiff has a strong case for trial. That is, it shall be of a higher standard than a prima facie case that is normally required for a prohibitory injunction.

(2) It is necessary to prevent irreparable or serious injury which normally cannot be compensated in terms of money.

(3) The balance of convenience is in favour of the one seeking such relief.

15. Being essentially an equitable relief the grant or refusal of an interlocutory mandatory injunction shall ultimately rest in the sound judicial discretion of the Court to be exercised in the light of the facts and circumstances in each case. Though the above guidelines are neither exhaustive or complete or absolute rules, and there may be exceptional circumstances needing action, applying them as prerequisite for the grant or refusal of such injunctions would be a sound exercise of a judicial discretion.

18. Relying upon said judgment of the Supreme Court, the learned senior counsel submits that the learned District Judge did not apply the test laid down by the Supreme Court in the said judgment. The prima-facie opinion of the District Judge is based on the erroneous footing that M/s. Vidharbh was signatory to the alleged MOU. It is submitted that unless there was arbitration agreement and the strong case of trial, no interim injunction could be passed against M/s. Vidharbh. It is submitted that even if M/s. Vidharbh is joined as party respondent to the application filed u/s 11 by Mr. Kavtankar, still no interim relief could be granted by the District Judge against M/s. Vidharbh as the same was not party to any arbitration agreement. It is submitted that the order passed by the District Judge that interim order would operate till appointment of arbitrator is totally perverse and is contingent upon the appointment of the arbitrator by the party which would not take place in so far as atleast M/s. Vidharbh is concerned.

19. The learned senior counsel placed reliance upon section 7 of the Arbitration and Conciliation Act in support of his plea that as no arbitration agreement was signed between M/s. Vidharbh and Mr. Kavtankar or no other conditions required to be satisfied for the purpose of arbitration agreement referred to u/s 7 of the Act were satisfied, there was no arbitration agreement between them and thus the entire proceedings filed by Mr. Kavtankar against M/s. Vidharbh were totally without jurisdiction and the order passed by the District Court on such application which was thus also without jurisdiction is also patently illegal.

20. The learned senior counsel then submits that on execution of agreement dated 10th May, 2011 between M/s. Deccan and M/s. Vidharbh which was for a period of 10 years with renewal period of five years, agreement of 21st October, 2007 came to

an end by efflux of time. Agreement entered into between M/s. Goldstar in the year 2008 with Mr. Phatak thus came to an end on 10th May, 2011 and no agreement thus could be entered into by Mr. Phatak based on MOU of 2008 between him and M/s. Goldstar in the year 2012.

21. The learned counsel submits that at most, even if arbitration agreement exist between the parties, the District Judge could have granted preventive reliefs and not mandatory reliefs as passed by the learned District Judge. The District Judge ought to have considered the issue whether M/s. Vidharbh could have been at all impleaded as party respondent to the petition filed u/s 9 or not before granting any interim relief against M/s. Vidharbh.

22. Mr. Kadam, the learned senior counsel appearing for M/s. Goldstar in Appeal No. 12 of 2013 referred to various agreements entered into between the parties between M/s. Deccan and M/s. Goldstar, agreements between M/s. Deccan and M/s. Vidharbh, MOU of 2008 between M/s. Goldstar and Mr. Phatak. The learned senior counsel submits that under MOU of 2008 between Mr. Phatak and M/s. Goldstar, Mr. Phatak was appointed as facilitator and the title in the iron ore always vested in M/s. Deccan. It is submitted that no rights of any nature whatsoever was created in favour of Mr. Phatak under the said MOU except monetary rights to claim 30% in the margin. It is submitted that unless M/s. Deccan was party to any such alleged MOU and was signatory, no rights could be created in favour of Mr. Kavtankar. It is not in dispute that M/s. Deccan was not joined as a party nor any consent or authority was obtained by Mr. Kavtankar from M/s. Deccan before entering into any such alleged MOU. It is submitted that rights of M/s. Deccan could not be assigned without consent and signature of M/s. Deccan and no relief u/s 9 could have been granted in respect of the mine in absence of M/s. Deccan before the District Judge. It is submitted that in any event, MOU between M/s. Goldstar and Mr. Phatak was co-terminus with the agreement with M/s. Deccan and the said agreement of 2007 came to an end by efflux of time. Mr. Phatak therefore could not have entered into any agreement fraudulently representing M/s. Goldstar with Mr. Kavtankar. It is submitted that under MOU of 2008 executed with Mr. Phatak, no other powers/rights vested in Mr. Phatak by M/s. Goldstar. It is submitted that as director of M/s. Goldstar, no authority was given to Mr. Phatak to enter into any agreement with Mr. Kavtankar or any other party by passing a board resolution or otherwise.

23. Mr. Kadam, the learned senior counsel then invited my attention to draft agreement forwarded to M/s. Goldstar by Mr. Kavtankar which was in the nature of alleged mining agreement. Under the said draft agreement sent to M/s. Goldstar, Mr. Kavtankar who was partner of Om Sai Resources he proposed to be a contractor for extraction of iron ore. It is not in dispute that no agreement was entered into between M/s. Goldstar and Mr. Kavtankar pursuant to such draft agreement sent to M/s. Goldstar by e-mail by Mr. Kavtankar. It is submitted that the fact that within 10 days from the date of such draft agreement sent by Mr. Kavtankar to M/s. Goldstar

proposing to be a mere contractor for extraction of iron ore which proposal was not accepted, how could there be a fulfleged MOU entered into on 29th October, 2012 between Mr. Kavtankar and Mr. Phatak fraudulently representing M/s. Goldstar purporting to give all the rights in the suit mine including right of extraction, sale of existing stock, sale of iron ore for future. It is submitted that without admitting the existence and contention of this alleged MOU, even the alleged MOU records that continuous threats were received by M/s. Goldstar from the contractor including Mr. Kavtankar that they would stop their work at the mining site unless the dues were settled and would not allow any outside agency to work at the site. The learned senior counsel submits that the alleged MOU also records appropriation of payment liable to be made by Mr. Kavtankar against the alleged liability of M/s. Goldstar to him and other alleged creditors without those alleged creditors being party to the said MOU and without proof of any such liability and also quantification thereof. It is submitted that no amount was due and payable by M/s. Goldstar to Mr. Kavtankar. It is submitted that under statue, M/s. Deccan have right to appoint mine manager and notice u/s 16 of the Mines Act was mandatory to be issued to the Government. Even for appointment of mine manager, one month notice was required to be issued by the lessee i.e. M/s. Deccan in this case. It is submitted that no notice was either given by the owner or the agent or manager. It is submitted that u/s 17 of the Mines Act, all instructions have to be given by the mines manager. Though the mines manager appointed by M/s. Deccan filed affidavit before the District Judge pointing out about his appointment and he acting as mines manager on behalf of M/s. Deccan and taking various steps and pointing out the illegal extraction of iron ore since last few days by Mr. Kavtankar, the learned District Judge did not refer to the said affidavit in the impugned order. The learned counsel then submits that the agreement between M/s. Goldstar and Global Minerals & Ores Pvt. Ltd. for sale of ore which was on record before the District Judge indicates that the basic rate agreed for sale of ore by M/s. Goldstar to the said party was at US dollar 70 per metric tone whereas the alleged MOU records sale of ore at 20 or 25 US dollars.

24. Mr. Kadam, the learned senior counsel submits that agreement dated 10th May, 2011 placed on record before the District Judge executed by and between M/s. Deccan and M/s. Goldstar and M/s. Deccan and M/s. Vidharbh in respect of the same mine were executed by Mr. Prem Prakash Saraogi pursuant to the board resolution authorising him to execute such agreement on behalf of both these companies. It is submitted that Mr. Phatak was admittedly not a director of M/s. Vidharbh. It is submitted that no sooner the fraudulent activity of Mr. Phatak came to the notice of M/s. Goldstar, he was immediately removed as director by M/s. Goldstar by passing a board resolution.

25. Mr. Kadam, the learned senior counsel then submits that Mr. Phatak who had filed his affidavit before the District Judge indicates that he is residing at Thane and thus it was totally false on his part to allege that he was solving the problems of M/s. Goldstar at site at Sindhudurg day and night. The learned senior counsel submits

that except sharing profit in M/s. Goldstar, Mr. Phatak did not have any other right or authority on behalf of M/s. Goldstar and in any case, no right or authority on behalf of M/s. Vidharbh to enter into any MOU with Mr. Kavtankar. The learned senior counsel submits that all documents before the District Judge where M/s. Goldstar or M/s. Vidharbh were parties were executed by Mr. Prem Prakash Saraogi himself except the disputed MOU. It is submitted that what was the amount payable by M/s. Goldstar to Mr. Kavtankar is not stated anywhere in the correspondence. The statement annexed on record before the District Judge does not indicate that the amount of Rs. 2.5 crores was payable by M/s. Goldstar to Mr. Kavtankar. The entire alleged MOU is based on alleged liability of Rs. 6 crores. It is submitted that in affidavit of Mr. Phatak before the District Court, the liability of M/s. Goldstar is alleged to be at Rs. 7 crores. It is submitted that for money alleged to be due to unknown party, M/s. Goldstar is alleged to have given up its right in the valuable assets of M/s. Goldstar which no prudent businessmen would do it. The learned senior counsel submits that on the perusal of alleged MOU, it is clear that the execution of such alleged MOU is on the face of it fraudulent. The learned senior counsel submits that the District Judge without going into various contentious issue raised by M/s. Goldstar has decided the entire matter by granting mandatory relief which is in the nature of specific performance based on such fraudulent MOU which was not executed by M/s. Goldstar or by M/s. Vidharbh.

26. Mr. Rajadhayaksha, the learned senior counsel appearing on behalf of Mr. Kavtankar supports the reasoning rendered by the learned District Judge in the impugned order. It is submitted that Mr. Prem Prakash Saraogi who is admittedly director of M/s. Goldstar and M/s. Vidharbh and the entire shareholding of the said two companies is exclusively held by Mr. Prem Prakash Saraogi and his family members and in eyes of law, thus both these companies are one and the same. The learned senior counsel submits that it is not in dispute that Mr. Phatak was appointed as a director of M/s. Goldstar and continued to be the director when the MOU was executed by Mr. Phatak on behalf of M/s. Goldstar. The learned senior counsel invited my attention to the agreement between M/s. Deccan and M/s. Vidharbh and M/s. Deccan and M/s. Goldstar entered into on 21st October, 2007 to demonstrate that both these companies viz. M/s. Goldstar and M/s. Vidharbh were one and the same and were exclusively controlled by Mr. Prem Prakash Saraogi. It is submitted that though under the said agreements, entered into with M/s. Goldstar, it was for the sale of iron ore, no price was prescribed for extraction in the agreement entered into between M/s. Deccan and M/s. Vidharbh. It is submitted that the agreement was signed by Mr. Prem Prakash Saraogi on behalf of M/s. Vidharbh. It is submitted that both these agreements did not indicate that any board resolution was passed in favour of Mr. Prem Prakash Saraogi on behalf of either of these companies before executing the said documents on behalf of the companies. The learned senior counsel then submits that even consideration mentioned in the agreement between M/s. Deccan and M/s. Goldstar payable by

M/s. Goldstar to M/s. Deccan, indicates that raising charges chargeable by M/s. Vidharbh were not specified. The learned senior counsel referred to various clauses from agreement dated 10th May, 2011 between M/s. Deccan and M/s. Vidharbh and simultaneously entered into between M/s. Deccan and M/s. Goldstar. It is submitted that the power of attorney was granted in favour of Mr. Prem Prakash Saraogi in both the matters. It is submitted that under the said MOU entered into between M/s. Goldstar through Mr. Phatak, Mr. Kavtankar is required to pay for sale of iron ore in future at the market rate. It is submitted that M/s. Goldstar and M/s. Vidharbh were indebted to Mr. Kavtankar and thus MOU was entered into by Mr. Phatak authorised by M/s. Goldstar and M/s. Vidharbh. It is submitted that stand of M/s. Goldstar and M/s. Vidharbh in pleadings is inconsistent with the submissions made before the learned District Judge. It is submitted that in the agreement dated 26th December, 2008 entered into with Mr. Phatak, M/s. Goldstar and M/s. Vidharbh were described collectively as M/s. Goldstar. It is submitted that Mr. Prem Prakash Saraogi was authorised representative of M/s. Goldstar as well as M/s. Vidharbh. The learned senior counsel submits that MOU dated 26th December, 2008 and more particularly paragraphs 17 and 18 thereof clearly indicates that all authorities were given to Mr. Phatak by the companies and he was authorised to do everything on behalf of companies. It is submitted that Mr. Kavtankar was a contractor working for M/s. Goldstar and M/s. Vidharbh in the name of SEM Mining Services. He was the principal contractor with the said two companies since 2008. The learned senior counsel submits that Mr. Phatak exercised his rights under MOU dated 26th December, 2008 and also as a director while executing the said MOU on behalf of the companies in favour of Mr. Kavtankar. The learned senior counsel submits that the liability of M/s. Goldstar are taken over by Mr. Kavtankar under clause 8 of the said MOU and in lieu of various obligations cast on Mr. Kavtankar, he was conferred with various rights under the said MOU. It is submitted that by way of securities, Mr. Kavtankar had also issued and handed over two blank cheques under the said MOU to M/s. Goldstar.

27. Mr. Rajadhayaksha fairly concedes that part of the order passed by the learned District Judge that existence of the arbitration agreement can be decided by the Arbitral Tribunal is contrary to the law laid down by the Supreme court in case of S.B.P. and Co. Vs. Patel Engineering Ltd. and Another, The learned senior counsel submits that whether M/s. Vidharbh was covered by the arbitration agreement recorded in disputed MOU had to be decided by the District Judge u/s 9 and could not have been left open to be decided by the arbitrator as directed by the Learned District Judge. The learned senior counsel placed reliance upon para (18) in the case of S.B.P. & CO. (supra) which reads thus:-

18. It is also not possible to accept the argument that there is an exclusive conferment of jurisdiction on the arbitral tribunal, to decide on the existence or validity of the arbitration agreement. Section 9 of the Act contemplates a judicial authority before which an action is brought in a matter which is the subject of an

arbitration agreement, on the terms specified therein, to refer the dispute to arbitration. A judicial authority as such is not defined in the Act. It would certainly include the court as defined in Section 2(e) of the Act and would also, in our opinion, include other courts and may even include a special tribunal like the Consumer Forum (See M/s. Fair Air Engineers Pvt. Ltd. and another Vs. N.K. Modi, . When the defendant to an action before a judicial authority raises the plea that there is an arbitration agreement and the subject matter of the claim is covered by the agreement and the plaintiff or the person who has approached the judicial authority for relief, disputes the same, the judicial authority, in the absence of any restriction in the Act, has necessarily to decide whether, in fact, there is in existence a valid arbitration agreement and whether the dispute that is sought to be raised before it, is covered by the arbitration clause. It is difficult to contemplate that the judicial authority has also to act mechanically or has merely to see the original arbitration agreement produced before it, and mechanically refer the parties to an arbitration. Similarly, Section 9 enables a Court, obviously, as defined in the Act, when approached by a party before the commencement of an arbitral proceeding, to grant interim relief as contemplated by the Section. When a party seeks an interim relief asserting that there was a dispute liable to be arbitrated upon in terms of the Act, and the opposite party disputes the existence of an arbitration agreement as defined in the Act or raises a plea that the dispute involved was not covered by the arbitration clause, or that the Court which was approached had no jurisdiction to pass any order in terms of Section 9 of the Act, that Court has necessarily to decide whether it has jurisdiction, whether there is an arbitration agreement which is valid in law and whether the dispute sought to be raised is covered by that agreement. There is no indication in the Act that the powers of the Court are curtailed on these aspects. On the other hand, Section 9 insists that once approached in that behalf, "the Court shall have the same power for making orders as it has for the purpose of and in relation to any proceeding before it". Surely, when a matter is entrusted to a civil Court in the ordinary hierarchy of Courts without anything more, the procedure of that Court would govern the adjudication [See AIR 1948 12 (Privy Council)]

28. Mr. Rajadhayaksha, the learned senior counsel however submits that as M/s. Goldstar and M/s. Vidharbh are one and the same, arbitration agreement entered into between Mr. Kavtankar and M/s. Goldstar would extend to and should be construed as an arbitration agreement between Mr. Kavtankar and M/s. Vidharbh.

29. Mr. Rajadhayaksha, the learned Senior counsel submits that as control and shareholding of M/s. Goldstar and M/s. Vidharbh is in the hands of Mr. Prem Prakash Saraogi and his family members and both the companies being one and the same, this court shall lift the corporate veil of both these companies and shall hold that arbitration agreement existed between Mr. Kavtankar and M/s. Vidharbh. The learned counsel submits that the doctrine of indoor management would apply to the fact of this case and in view of Mr. Prem Prakash Saraogi having control of the management and the shareholding of both companies, M/s. Vidharbh cannot be

allowed to plead that it is a separate legal entity or that the arbitration clause between Mr. Kavtankar and M/s. Goldstar cannot be extended to M/s. Vidharbh.

30. Learned counsel placed reliance upon the following judgments in support of his plea:-

1. State of U.P. and Others Vs. Renusagar Power Co. and Others,

2. M.S.D.C. Radharamanan Vs. M.S.D. Chandrasekara Raja and Another,

3. (1997) 2 BCR 257 (Para 10)

4. M.R.F. Ltd. Vs. Manohar Parrikar and Others,

5. (1992) 2 BCR 406 (para 40).

31. The learned counsel placed reliance upon the passage from Buckley on the Companies Acts on what indoor management means.

32. The learned senior counsel then submits that at the stage of application u/s 9 of the Arbitration and Conciliation Act, principles of Order 39 Rule 1 of CPC shall be applicable and once Mr. Kavtankar was able to make out prima facie case, injunction had to follow and was rightly granted by the learned District Judge in favour of Mr. Kavtankar. The learned counsel placed reliance upon the judgment of Madras High Court reported in (2005) 3 ALR 52 and more particularly para 9 which reads thus:-

9. It is obvious that while considering the question of grant of any interim relief in the nature of injunction, underlying principles for grant of injunction as applicable in proceedings under Order 39 Rules 1 and 2 of the CPC would be applicable. So far as the grant of injunction under Order 39 Rules 1 and 2 is concerned, law is more or less well settled that the grant of injunction is a discretionary relief and while granting such injunction, the court is required to satisfy itself that there is a prima facie case in favour of the party asking for injunction and irreparable injury or damage would be caused if injunction is not granted and balance of convenience lies in favour of the applicant. For considering as to whether there is a prima facie case or not, the applicant is not expected to prove his case to the hilt and the Court is only required to satisfy itself that there is a serious question to be tried and there is probability of the applicant being entitled to the relief asked for. Once prima facie case is found, the court is further required to consider whether any irreparable injury would be caused. Irreparable injury in such sense would mean that there is no other remedy available to the applicant except injunction. Irreparable injury in such context would mean that a material injury which cannot be adequately compensated by way of damages. Apart from these two aspects, the Court is further required to conclude that balance of convenience lies in favour of the applicant and to find out comparative hardship, mischief or inconvenience, which is likely to occur if injunction is with-held and if the Court finds that the comparative hardship, mischief or inconvenience is likely to be greater, if it is to be withheld, the court in its

exercise of sound judicial discretion may grant injunction. The aforesaid well settled principle would be equally applicable to the matters relating to grant of injunction as envisaged u/s 9 of the Arbitration and Conciliation Act.

33. The learned counsel also placed reliance upon the judgment of Delhi High Court and more particularly para (11) in case of C.J. International Hotels Ltd. Vs. New Delhi Municipal Council, which reads thus:-

11. At the state of deciding the application for temporary injunction, the Court is not required to go into the merit of the case in detail. What the court has to examine is: i) the plaintiff has a prima facie case to go for trial: ii) protection is necessary from that species of injuries known as irreparable before his legal right can be established. and iii) that the mischief of inconvenience likely to arise from withholding injection will be greater that what is likely to arise from granting it. The principles governing the grant of injection are well settled. The power is discretionary and is to be exercised on sound judicial principles. Where no violation of the rights of the plaintiff was involved, the interim injunction should not be granted. It is on these principles that the Court has to examine the respective case of the parties.

34. The learned senior counsel then submits that in appropriate case, court has discretionary power to grant mandatory injunction if situation is so warranted and submits that in this case, the learned District Court was right in issuing various directions of that nature. Reliance is placed on judgment of Gujarat High Court on this issue and more particularly paragraph 7 of judgment reported in case of Jivanbhai Jerambhai Patadia Vs. Bhavanjee Vinasjee Thakkar, which reads thus:-

7. True, when there is contest or controversy between the parties about the status, the Court normally refrains from granting the final relief at an interlocutory stage, but Court is certainly entitled to scan the so-called defence about the denial of status of tenancy raised by the other side, otherwise Court would be encouraging the dishonest defence and allowing the party to live at the mercy of the opponent till his rights are finalised at the end of the trial and thereafter, in appeal and what not? It is very easy for the opponent in any case to deny the status of one party who goes to Court after doing illegal acts and then to contend that no final relief be granted at an interlocutory stage. The Court in such situation cannot sit and watch the proceedings as a silent spectator and show its helplessness. The Court in this situation can certainly take recourse to the guidelines narrated by the Supreme Court in Dorab Cawasji Warden Vs. Coomi Sorab Warden and others, , namely, whether the plaintiff has a strong case for trial which shall be of a higher standard than a prima facie case that is normally required for a prohibitory injunction? Whether it is necessary, to prevent irreparable or serious injury which normally cannot be compensated in terms of money? Whether the balance of convenience is in favour of the one seeking such relief?

35. The learned senior counsel then submits that once discretion has been exercised by the court at the first instance by granting injunction, the appeal court should maintain order passed by the trial Court by exercising discretion. The learned senior counsel place reliance upon para 16 of the judgment in case of Skyline Education Institute (Pvt.) Ltd. Vs. S.L. Vaswani and Another, reads thus:-

16. The ratio of the above noted judgments is that once the court of first instance exercises its discretion to grant or refuse to grant relief of temporary injunction and the said exercise of discretion is based upon objective consideration of the material placed before the court and is supported by cogent reasons, the appellate court will be loath to interfere simply because on a de novo consideration of the matter it is possible for the appellate court to form a different opinion on the issues of prima facie case, balance of convenience, irreparable injury and equity.

36. The learned senior counsel then submits that Mr. Phatak had agreed to do various acts under the agreement of 2008 entered into between M/s. Goldstar and Mr. Phatak which would amount to consideration u/s 2(d) of the Contracts Act. It is submitted that Mr. Phatak was authorised to deal with the suit mines under the said agreement.

37. Mr. Dhakephalkar, the learned senior counsel appearing on behalf of Mr. Phatak relied upon the affidavit in reply filed by Mr. Phatak before the Learned District Judge. It is submitted that Mr. Phatak was director of the company admittedly, when he executed the MOU in favour of Mr. Kavtankar and was authorised to sign the said document. It is submitted that Mr. Prem Prakash Saraogi has not filed any personal affidavit bringing the true and correct facts on record. It is submitted that notice under Mines Act was not required to be issued as the mine was already in operation. The learned senior counsel thus submits that appeal filed by M/s. Vidharbh and M/s. Goldstar shall not be entertained by this Court.

38. The questions that arise for consideration of this court in the present proceedings are:-

(1) in case of any dispute about the existence of an arbitration agreement raised by a party to the proceedings u/s 9 of the Arbitration and Conciliation Act before a court, whether that court has to decide the issue of existence of arbitration agreement, whether the said agreement is valid in law, whether dispute sought to be raised is covered by the agreement or the same can be decided only by the Arbitral Tribunal.

(2) Whether the learned District Judge could have passed interim order against M/s. Vidharbh though the said company was not a party to any arbitration agreement in the facts of this case.

(3) If there are serious allegations of fraud and fabrication in respect of the arbitration agreement itself made by a party to the arbitration petition u/s 9, the

learned District Judge could himself decide that issue u/s 9 or such issue could be decided only by a civil court ?

(4) Whether in the facts of this case, the learned District Judge was justified in granting mandatory injunction against both the appellants in application u/s 9 of the Arbitration and Conciliation Act.

39. Supreme Court in case of M/s. S.B.P. & Co. vs. M/s. Patel Engineering (supra) has held that section 9 enable a court, when approached by a party before the commencement of a arbitration proceedings to grant interim reliefs and when opposite party disputes the existence of the arbitration agreement or raise a plea that a dispute involved was not covered by arbitration clause or that the court which was approached had no jurisdiction to pass any order in terms that the court has necessarily to decide whether it has jurisdiction, whether there is an arbitration agreement which is valid in law and whether the dispute sought to be raised is covered by that agreement. Considering these principles of law laid down in case of M/s. S.B.P. & Co. (supra), this court has to examine whether in the facts of this case, whether learned District Judge has decided the issue of existence of arbitration agreement raised by the opposite party in the application u/s 9.

40. M/s. Goldstar as well as M/s. Vidharbh had in their affidavits filed before the learned District Judge disputed the existence of the arbitration agreement between Mr. Kavtankar and M/s. Goldstar and M/s. Vidharbh. Perusal of para (22) and para (24) of the impugned order indicates that the learned District Judge while dealing with this issue held that considering the scope of section 16(1) of the Arbitration Act, 1996, Arbitral Tribunal is competent to decide the objection or validity of the arbitration agreement which would mean that the arbitrator would decide validity of the arbitration agreement and the court will not decide the validity of the arbitration agreement as per the provisions laid in the said Act. It is also held that the court was empowered to grant interim relief in favour of the petitioner on the basis of the arbitration agreement dated 29th October, 2012 as the validity of the said agreement would be considered by the Arbitral Tribunal as per the provisions of the Arbitration Act, 1996. It is held that the question of jurisdiction would also be decided by the Arbitral Tribunal and at this stage, it could not be said that the District Judge had no jurisdiction to pass such interim relief on the basis of the agreement dated 29th October, 2012. Perusal of these two paragraphs of the impugned order makes it clear that though existence of arbitration agreement was seriously disputed by M/s. Goldstar as well as M/s. Vidharbh, the learned District Judge proceeded on a erroneous premise that the said issue has to be decided by the Arbitral Tribunal u/s 16 of the Arbitration and Conciliation Act, 1996 and not by the Court u/s 9 of the Act.

41. In my view, the learned District Judge was bound to decide the said issue about existence of arbitration agreement before proceeding with the matter on merits and before granting any interim relief u/s 9. In my view, the court would have

jurisdiction to grant interim measures u/s 9 of the Arbitration Act, 1996 only if an arbitration agreement exist between the parties and not otherwise. The learned District Judge therefore could not have left that issue to be decided by the Arbitral Tribunal and could not have proceeded with grant of interim measures. In my view, the entire order passed by the learned District Judge refusing to decide the said issue and keeping the same open to be decided by the Arbitral Tribunal u/s 16 of the Act is totally perverse and contrary to law laid down by the Supreme Court in case of M/s. A.S.B.& CO. (supra).

42. Perusal of para 21 of the impugned order indicates that the learned District Judge has rendered a finding that the agreement dated 29th October, 2012 had been executed between Mr. Kavtankar and M/s. Goldstar and M/s. Vidharbh. The learned judge has also proceeded on the premise that Mr. Phatak was director of M/s. Goldstar as well as M/s. Vidharbh and had signed the said agreement. In para 22 of the impugned order, the learned District Judge has rendered a finding that M/s. Goldstar and M/s. Vidharbh had given full power to Mr. Prem Prakash Saraogi as per agreement dated 26th December, 2008 and on that basis Mr. Prem Prakash Saraogi had signed the agreement dated 29th October, 2012 for M/s. Goldstar and M/s. Vidharbh. The record produced by both the parties which were forming part of the record before the learned District Judge and this Court clearly indicates that the alleged agreement dated 29th October, 2012 had not been executed by M/s. Vidharbh. Mr. Phatak was also admittedly not a director of M/s. Vidharbh nor did he sign the said alleged agreement on behalf of M/s. Vidharbh. Question as to whether Mr. Phatak signed on behalf of M/s. Goldstar or not or whether the said alleged agreement dated 29th October, 2012 was executed between Mr. Kavtankar and M/s. Goldstar or not is being separately dealt with in the later part of this order.

43. The record also indicates that the alleged agreement dated 29th October, 2012 was not signed by Mr. Prem Prakash Saraogi in any capacity on behalf of either M/s. Goldstar or M/s. Vidharbh. In my view the entire order passed by the learned District Judge proceeded on such erroneous premise which is on the face of it contrary to the documents produced by the parties and even contrary to the case of Mr. Kavtankar himself. It was not the case of Mr. Kavtankar that the alleged agreement dated 29th October, 2012 was signed by Mr. Prem Prakash Saraogi or that Mr. Phatak was director of M/s. Vidharbh. The findings of the learned District Judge in this regard is thus in my view on the face of it perverse and contrary to the pleadings and documents submitted by both parties before the learned District Judge.

44. Considering the record produced by both parties, it is clear that M/s. Vidharbh was not a party to the alleged agreement dated 29th October, 2012 nor was signatory to the said alleged agreement nor Mr. Phatak was admittedly a director of M/s. Vidharbh. It is clear beyond reasonable doubt that M/s. Vidharbh was not a party to any arbitration agreement between Mr. Kavtankar and M/s. Vidharbh and

thus interim order passed by the learned District Judge against M/s. Vidharbh is in my view totally without jurisdiction.

45. The question arises for consideration of this court is whether in the facts of this case where M/s. Goldstar had seriously disputed the existence of the alleged agreement dated 29th October, 2012 and had alleged fraud and fabrication of the said documents on the part of Mr. Kavtankar and Mr. Phatak and had produced material in that behalf for consideration of the learned District Judge, whether it was proper on the part of the learned District Judge to grant interim measures by exercising power u/s 9 or ought to have directed Mr. Kavtankar to approach the civil court for adjudication of such serious allegations of fraud and fabrication raised by the opposite party against Mr. Kavtankar.

46. Mr. Rajadhayaksha, the learned senior counsel appearing for Mr. Kavtankar argued that doctrine of the indoor management would apply to the fact of this case and therefore this court shall lift the corporate veil of both these companies and take a view that both these companies were one and the same and therefore M/s. Vidharbh was also party to the MOU alongwith M/s. Goldstar. Mr. Madon and Mr. Kadam, the learned senior counsel appearing on behalf of M/s. Vidharbh and M/s. Goldstar objected to this submission being advanced across the bar by Mr. Rajadhayaksha on the ground that no such plea was raised before the learned District Judge on the issue of doctrine of indoor management or for lifting the corporate veil by the court. In my view, the learned counsel appearing for M/s. Goldstar and M/s. Vidharbh are right in raising this objection and in pointing out from the record that no such plea was raised by Mr. Kavtankar in the proceedings filed before the learned District Judge. I am of the view that this court, therefore, cannot permit Mr. Kavtankar to raise such issue across the bar for the first time in the present proceedings. This court therefore need not deal with various judgments relied upon by Mr. Rajadhayaksha on this issue in this order. In my view, both companies are separate legal entities in the eyes of law. Arbitration clause if any entered into between third party and a company would not bind a sister concern of that company, unless the terms and conditions of that agreement executed between the third party and the company are incorporated in the agreement between such third party and the sister concern of such company. It is not the case of Mr. Kavtankar that the alleged arbitration agreement between Mr. Kavtankar and M/s. Goldstar was incorporated in any separate agreement between Mr. Kavtankar and M/s. Vidharbh.

47. In my prima-facie view, Mr. Kadam, the learned senior counsel appearing for M/s. Goldstar is right in his submission that Mr. Phatak was not authorized to enter into any such alleged MOU on behalf of M/s. Goldstar or in any event on behalf of M/s. Vidharbh. Perusal of the MOU entered into between M/s. Goldstar and Mr. Phatak prima facie indicates that no such authority was given to Mr. Phatak by M/s. Goldstar to enter into any agreement on behalf of M/s. Goldstar. It is the case of

M/s. Goldstar that Mr. Phatak was only given monetary right to get part of the profit in M/s. Goldstar and had no other power or authority. Mr. Kavtankar or Mr. Phatak were unable to produce any copy of the board resolution passed by M/s. Goldstar or M/s. Vidharbh authorizing Mr. Phatak to enter into any agreement on behalf of those two companies. It is not in dispute that Mr. Phatak was subsequently removed by M/s. Goldstar as a director of the said company. In my prima-facie view, even Mr. Rajadhayaksha or Mr. Dhakephalkar could not demonstrate from the record that Mr. Phatak was authorised to execute any such agreement on behalf of M/s. Goldstar or M/s. Vidharbh. On the contrary, Mr. Kadam, the learned counsel appearing on behalf of M/s. Goldstar demonstrated that all agreements forming part of the record in the proceedings were signed by Mr. Prem Prakash Saraogi on behalf of M/s. Goldstar and thus it is obvious that when alleged MOU was not signed by Mr. Saraogi, it would prima facie indicate that the same was fraudulently signed by Mr. Phatak by fraudulently representing M/s. Goldstar.

48. Mr. Kadam, the learned counsel appearing for M/s. Goldstar in my view is right in his submission that prior to 10 days of the execution of the alleged MOU dated 29th October, 2012, Mr. Kavtankar himself had sent a draft agreement to M/s. Goldstar by e-mail by which Mr. Kavtankar had proposed to be a mere contractor for extraction of iron ore which proposal was not accepted by M/s. Goldstar and therefore after 10 days, execution of alleged full fledged MOU by which M/s. Goldstar had alleged to have transferred all its right in the suit mine including right of extraction, sale of existing stock, sale of iron ore in future would not have been entered into through Mr. Phatak.

49. In my prima facie view, no prudent person would have executed such alleged MOU giving exclusive rights to a contractor to extract iron ore, make him owner of the existing stock and would give him right to sell iron ore in future. In my prima facie view, the fact that the said alleged MOU itself records that M/s. Goldstar was threatened by the contractor including Mr. Kavtankar that they would stop their work at the mining site unless the dues were settled and would not allow any outside agency to work at the site itself indicates that the said alleged MOU prima facie appears to be fraudulent. Perusal of the alleged MOU also indicates that the party who were witness of the alleged MOU also belong to family of Mr. Kavtankar.

50. On comparison of the consideration of the iron ore mentioned therein with the other contracts entered into between M/s. Goldstar and the third party indicates that no prudent businessmen like M/s. Goldstar would enter into such agreement if M/s. Goldstar was being paid at the rate of dollar 70 per metric tone, the same party would agree to sale the iron ore at the rate of 20 or 25 US dollars.

51. I am of the prima facie view that there is nothing on record to indicate that M/s. Goldstar or M/s. Vidharbh was indebted to Mr. Kavtankar in the sum of Rs. 2.5 crores or to any third party in the sum of Rs. 3.5 crores as alleged to have been recorded in the said MOU. Mr. Kadam, the learned senior counsel is right in his

submission that such alleged third party creditors were not even party to such alleged MOU nor any alleged liability of M/s. Goldstar in favour of such third party were indicated in detail with proof in the said MOU. Without admitting the existence of the said alleged MOU, both the companies invited my attention to various provisions of the said MOU to demonstrate that no prudent businessmen would enter into such alleged transaction with a contractor within 10 days of the refusal of M/s. Goldstar to accept his proposal to act as a contractor. In my prima-facie view, the learned counsel appearing for M/s. Goldstar is right in his submissions that in view of such serious allegations of fraud, fabrication and manipulation which are prima facie demonstrable on record, even if there existed any arbitration agreement between Mr. Kavtankar and M/s. Goldstar, the learned District Judge could not have granted by interim measures u/s 9 as such serious allegations could be adjudicated by a civil court. In my view, the learned counsel is right in his submission that though the learned District Judge referred to the judgment of the Supreme Court in case of N. Radhakrishnan (supra) however overlooked the law laid down by the Supreme Court in the said judgment and rejected the submission of M/s. Goldstar M/s. Vidharbh merely on the ground that party had not laid any evidence to show that agreement dated 29th October, 2012 was false and bogus and in the absence of such oral evidence, it could not be said that merely the said agreement was bogus and false.

52. Mr. Kadam, the learned senior counsel in my view is right in his submission that in view of such serious allegations which were prima facie demonstrable, such issue could not be left open to be decided by the Arbitral Tribunal. In my prima facie view, there is substance in the allegation of fraud and fabrication made by M/s. Goldstar and M/s. Vidharbh as demonstrated by producing various documents and also from the pleadings. The existence of such MOU would also have bearing on the existence of the arbitration clause between Mr. Kavtankar and M/s. Goldstar. Therefore, in view of such serious allegations made by M/s. Goldstar and in my prima facie view appears to have substance, it was not proper on the part of the learned District Judge to refer the said issue or keep those issues open to be decided by the Arbitral Tribunal. In my prima facie view such allegations do not lack any credential and can be decided by Civil Court and could not have been considered in arbitration proceedings while deciding application u/s 9.

53. Perusal of the order also indicates that the learned District Judge has decided on merits of the matter while hearing the application u/s 9 and has issued a mandatory injunction against M/s. Goldstar and M/s. Vidharbh to issue passes and permit Mr. Kavtankar for excavation and transportation and restrain those parties from excavating and transferring excavated material till the appointment of arbitrator. In my view, unless the learned District Judge could have decided the issue about existence of arbitration agreement, the learned judge could not have granted by interim measures and that also to make such order operative till the appointment of arbitrator. The impugned order, in my view disclose the perversity and deserves to

be set aside. In my view u/s 9 of the Arbitration and Conciliation Act, court can take a prima facie view in the matter and cannot decide the matter on merits of the claim which can be decided only by the arbitrator if arbitration clause exist.

54. In my view Mr. Madon, the learned senior counsel was right in placing reliance upon the judgment of the Supreme Court in case of Dorab Cawasji Warden (supra) in support of his plea that the plaintiff has to make out a strong case for trial and unless such case is made out, no interim relief can be granted. In my view, the learned senior counsel is also right in his submission that the relief of interlocutory mandatory injunctions are granted generally to preserve or restore the status quo of the last non-contested status and such discretion shall be based on sound exercise of a judicial discretion and such grant of mandatory based on the sound discretion of the court has to be exercised in the light of the facts and circumstances of the case. The learned senior counsel submits and is right in my view that in this case, no such case is made out by Mr. Kavtankar to grant any such interim measures and more particularly in the nature of mandatory injunction which has effect of grant of specific performance at the stage of deciding application u/s 9 of the Act.

55. For the aforesaid reasons, I am of the view that the impugned order passed by the learned District Judge is totally perverse and is contrary to law laid down in the judgment of the Supreme Court in case of S.B.P. & Co. (supra) and deserves to be set aside in toto.

I, therefore, pass the following order:-

(a) Appeal Nos. 12 and 13 of 2013 are allowed. Order dated 30th January, 2013 passed by the learned District Judge - 1, Sindhudurg in Arbitration Application No. 1 of 2012 is set aside.

(b) Arbitration Application No. 1 of 2012 (Ex. 42) is dismissed.

(c) There shall be no order as to costs.

(d) In view of the disposal of the Arbitration Appeals, Civil Application Nos. 7 of 2013 and 6 of 2013 taken out by the applicants are also disposed of accordingly.

The learned counsel appearing for the 1st respondent seeks stay of the operation of this order which is vehemently opposed by the counsel for the appellants. Hence, application for stay is refused.