INDRAJIT .MAHANTY, J.

ARBA NO.7 & 9 OF 2008 (Decided on 01.07.2008)

DUSHASAN SAHOO & ANR. ….. …. Appellants.

.Vrs.

GEETARANI MOHANTY & ORS. …… Respondents.

ARBITRATION & CONCILIATION ACT, 1996 (ACT NO.26 OF 1996) – S. 9.

For Appellants - Mr. P.C.Chatterji, Sr.Advocate
M/s. U.C.Patnaik, A.J.Mohanty, P.K.Swain & S.Patnaik.
For Respondents- Mr. R.K.Rath, Sr. Advocate
M/s. S.P.Sarangi,B.C.Mohanty,P.P.Mohanty, D.K.Das & P.K.Dash.
For Appellant - Mr. Jayanta Mitra, Sr. Advocate
M/s. D.K.Dey, C.K.Dey & A.K.Das.
For Respondents- Mr. R.K.Rath, Sr.Advocate.
M/s. S.P.Sarangi, B.C.Mohanty, P.P.Mohanty, D.K.Das, P.K.Dash & A.Patnaik.

I.MAHANTY, J. The aforesaid appeals, under section 37(1)(a) of the Arbitration and Conciliation Act, 1996 (in short "1996 Act") have been filed by two sets of Defendants, against a common judgment and order dated 17.3.2008, passed by the learned Dist. Judge Khurda at Bhubaneswar, on an application filed by the Respondents under section 9 of the said Act which was registered as Arbitration Petition No.15 of 2008.

2. The operative part of the impugned order of the learned Dist. Judge, Khurda at Bhubaneswar is quoted hereunder:

> " That the arbitration petition u/s. 9 of the Act is allowed on contest against the O.Ps., but in the circumstances without any cost. As an interim measure of protection the scheduled mines are not to be operated by the partners of the reconstituted partnership firm comprising of the Opposite Parties under the partnership deed dated 1.4.93 and the partnership firm constituted under the partnership deed dated 3.8.91 comprising of the petitioner and the O.P.No.1 in which the O.P.No.1 is the Managing Partner is at liberty to carry on mining business in the scheduled mines in terms of the partnership deed dated 3.8.91 comprising of the petitioner and the O.P. No.1 in which the O.P.No.1 is the Managing Partner is at Liberty to carry on mining business in the scheduled mines in terms of the partnership deed dated 3.8.91, till the dispute is decided by arbitration. The petitioner is directed to take steps within three months hence for appointment of arbitrator for settlement of the dispute, failing which this order shall stand automatically vacated."

Whereas, Sri Dushasan Sahoo and Smt. Suprasanna Sahoo (opposite parties 2 and 3 in Arbitration Petition No.15 of 2008) have sought to challenge the same by way of

Arbitration Appeal No.7 of 2008. Sri Srinivash Sahoo (opposite party no.1 in Arbitration Petition No.15 of 2008) has filed Arbitration Appeal No.9 of 2008 challenging the self-same order.

3. The facts as revealed in the pleadings leading to the application under Section 9 of the Act are noted as follows: -

30th March 1981 : Smt. Geetarani Mohanty (Respondent-1) filed an Application for obtaining Mining lease at Raikela.

14th November 1990 : Government of Orissa granted mining lease to Smt. Geetarani Mohanty.

10th January 1991 : Smt. Geetarani Mohanty-Respondent No.1 Executed a General Power of Attorney in favour of Srinivas Sahoo (Appellant in ARNA No.9/2008).

2nd July 1991 : State of Orissa executed a Lease Deed in respect of the said area in favour of Smt. Geetarani Mohanty (Respondent No.1).

3rd August 1991 : Partnership firm in the name and style of "M/s. Geetarani Mohanty" was formed with M/s. Geetarani Mohanty and Srinivash Sahoo having 55% and 45% shares respectively.

3rd February 1992 : Smt. Geetarani Mohanty made an application to the Government of Orissa for transfer of the mining lease in favour of the partnership firm.

17th October 1992 : Government of Orissa accorded permission for transfer of the mining lease in favour of the partnership firm-M/s. Geetarani Mohanty.

13th February 1993 : Smt. Geetarani Mohanty executed a Deed of Transfer in Form C of the mining lease in favour of partnership firm. The Deed of Transfer was executed by Geetarani Mohanty through her constituted Attorney Sushanto Sahoo (Annexure-5).

31st March 1993 : Smt. Geetarani Mohanty issued a letter of Resignation for the partnership firm acknowledging having received her share as per books of account upon 31st March 1993. Deed of Retirement executed by Smt.Geetarani Mohanty retiring as a partner from the partnership firm. Her husband, a Senior Govt. Officer signed the Deed of Retirement. (Annexure-5) as a witness.

1st April 1993 : Deed of Reconstitution of the partnership firm M/s. Geetarani Mohanty inducting Dushashan Sahoo and Smt. Suprasanna Sahoo as partners in the reconstituted firm. The said deed is also signed by Smt.Geetarani Mohanty as well as her constituted attorney

Sushanto Kumar Sahoo as witnesses.

16th January 2006 : Smt. Geetarani Mohanty purportedly issued a letter purportedly canceling the general Power of Attorney dated 10th January, 1991 in favour of Srinibash Sahoo.

17th February 2006 : Mr.Srinivash Sahoo as the Managing Partner of M/s.Geetarani Mohanty filed Civil Suit No.9 of 2006 in the Court of Civil Judge (Jr. Division), Bhubaneswar for permanent injunction against M/s. Geetarani Mohanty restraining her from interfering with the business, administration and activities in the firm.

21st February 2006 : the Civil Judge (Jr.Division), Bhubaneswar passed order of "status quo" in C.S. No.49 of 2006.

2nd January 2008 : Smt. Geetarani Mohanty sought to invoke the arbitration clause by appointing an Arbitrator.

7th January 2008 : Smt. Geetarani Mohanty filed Arbitration Petition No.15 of 2008 before the court of District Judge, Khurda under Section 9 of the Arbitration and Conciliation Act, 1996.

17th March 2008 : The impugned judgment was passed by the learned District Judge, Khurda at Bhubaneswar.

4. Mr. J.Mitra, learned senior advocate appearing for the Appellant in ARBA No.9/2008, submitted that the judgment and order dated 17.3.2008 passed by the learned District Judge, Khurda at Bhubaneswar is not only erroneous on facts as well as law, but is also wholly without jurisdiction. He submitted that the application under Section 9 of the Act which is in the nature of interlocutory application and could only have been sought as an aid to the main relief in an arbitration proceeding, whereas the prayer in the application U/s.9 has been made seeking in effect "substantive relief" which is impermissible in law. It is further submitted that, since the Partnership Deed of 1991 had came to an end with the retirement of Smt. Geetarani Mohanty (Respondent) on 31.3.1993, neither was an arbitration there under any longer possible nor could any order on an application under Section 9 of the Arbitration Act be passed on the said basis.

5. It is submitted that original partnership deed dated 3rd August, 1991 came to an end on 31st March, 1993 with Smt.Geetarani Mohanty issuing a "Letter of Resignation" and signing the "deed of retirement" where after on 1st April 1993, the partnership firm was reconstituted by inducting Shri Dushashan Sahoo and Smt. Suprasanna Sahoo (Appellant in ARBA No.7/2008) as partners. It is contended that, so long as the Deed of Retirement dated 31st March 1993 and the Deed of Reconstitution dated 1st April 1993 remain valid and operative in law and are not declared void and inoperative, Smt. Geetarani Mohanty, can not be permitted to seek any relief on the basis of the earlier partnership deed dated 3rd August, 1991 in order to claim any relief there under or arising there from. In essence, Mr. Mitra, learned Senior Counsel submitted that it is absolutely essential for Smt. Geetarani Mohanty to have the Partnership Deed dated 1st April, 1993 and the Deed of Retirement dated 31st March, 1993 declared illegal, void and inoperative and to have the same delivered and cancelled. Such relief can only be

granted by the Civil Court in a civil suit and not by the Arbitrator under the original partnership deed. It is only thereafter, it becomes lawfully possible for Smt. Geetarani Mohanty if at all to seek for appointment of an Arbitrator under Clause-15 of the Partnership Deed dated 1st April 1993.

6. The learned counsel for the Appellant further submitted that, the learned District Judges' judgment and order dated 17th March, 2008, becomes wholly without jurisdiction and the interim measure of protection that has been directed by the District Judge, directing the partnership firm of 3.8.1991 comprising Smt.Geetarani Mohanty and Sri Srinivash Sahoo to carry on mining business in the scheduled mines, was in effect in final award, in so far as the status of the Deed of Retirement and Deed of Reconstitution are concerned. Learned counsel submits that the impugned order passed by the District Judge was entirely beyond/outside his jurisdiction and was therefore, liable to be set aside. Mr. Mitra, learned counsel for the appellant placed reliance upon the decision of the Hon'be Supreme Court in the case of Atul Singh and others v. Sunil Kumar Singh and others, AIR 2008 SC 1016 in support of his contentions.

7. It is further submitted that, the impugned order passed by the learned District, Judge, effectively seeks to restrain the Respondent Nos.2 and 3 (Shri Dushashan Sahoo and Smt.Suprasanna Sahoo) who are partners of the reconstituted firm under the Deed of Reconstituted Partnership dated 1st April, 1993, from participating in the operation of the mines. It is submitted that the partners of the reconstituted firm (apart from Srinivash Sahoo) who are obviously not parties to the arbitration agreement contained in the earlier Partnership Deed dated 3rd August, 1991. Therefore, there being no privacy of contract between Smt. Geetarani Mohanty on the one hand and Shri Dushashan Sahoo and Smt. Suprasanna Sahoo on the other, no order could have been passed by the learned District Judge, which would directly or indirectly, affect the interest of Shri Dushashan Sahoo and Smt. Suprasanna Sahoo who were admittedly not parties to the Arbitration Agreement dated 3rd August, 1991. Therefore, learned counsel submits that the order of the learned district Judge is to be held to have been passed without jurisdiction.

8. In support of the aforesaid submissions, learned counsel for the appellants placed reliance upon a decision of the apex Court in the case MD. Army Welfare Housing Organisation Vrs. Sumangal Services Pvt. Ltd., (2004) 9 SCC 619 and in particular, the dicta of the Hon'ble Supreme Court in paragraph-58 of the said judgment which is quoted herein below:

> " A bare perusal of the aforementioned provisions would clearly show that even under Section 17 of the 1996 Act the power of the arbitrator is a limited one. He can not issue any direction which would go beyond the reference or the arbitration agreement. Furthermore, an award of the arbitrator under the 1996 Act is not required to be made a rule of court; the same is enforceable on its won force. Even under Section 17 of the 1996 Act, an interim order must relate to the protection of the subject matter of dispute and the order may be addressed only to a party to the arbitration. It can not be addressed to other parties. Even under Section 17 of the 1996 Act, no power is conferred upon the Arbitral Tribunal to enforce its order nor does it provide for judicial enforcement thereof. The said interim order of the learned arbitrator, therefore, being coram non judice was wholly without jurisdiction and, thus, was a nullity."

Learned counsel further placed reliance on another decision of the Hon'ble Supreme Court in the case of Sukanya Holdings Pvt. Ltd. Vrs. Jeyesh H. Pandya and another, (2003) 5 SCC 531 and in particular, the dicta of the apex Court in paragraphs-13,14 and 15 of the said judgment which are quoted herein below :

> "13. Secondly, there is no provision in the Act that when the subject matter of the suit includes subject-matter of the arbitration agreement as well as other disputes, the matter is required to be referred to arbitration. There is also no provision for splitting the cause or parties and referring the subject-matter of the suit to the arbitrators.
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> 14. Thirdly, there is no provision as to what is required to be done in a case where some parties to the suit are not parties to the arbitration agreement; As against this, under section 24 of the Arbitration Act, 1940, some of the parties to a suit could apply that the matters in difference between them be referred to arbitration and the court may refer the same to arbitration provided that the same can be separated from the rest of the subject-matter of the suit. The section also provided that the suit would continue so far as it related to parties who have not joined in such application.
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> 15. The relevant language used in section 8 is "in a matter which is the subject of an arbitration agreement". The court is required to refer the parties to arbitration. Therefore, the suit should be in respect of "a matter" which the parties have agreed to refer and which comes within the ambit of arbitration agreement. Where, however, a suit is commenced – "as to a matter" which lies outside the arbitration agreement and is also between some of the parties who are not parties to the arbitration agreement, there is no question of application of section 8. The words "a matter" indicate that the entire subject-matter of the suit should be subject to arbitration agreement."

9. Prior to the application under Section 9 of the 1996 Act being filed before the District Judge, it appears that the appellants have filed Civil Suit No.49 of 2006 before the learned Civil Judge (Jr. Divn.), Bhubaneswar seeking an order of permanent injunction against the present respondents from interfering with their mining operations. In the said proceeding, respondents herein have raised objections under section 8 of the 1996 Act challenging its maintainability. Apart from these two proceedings, learned counsel for the respondents submitted that the respondents have also filed a section 11 application before this High Court for appointment of an arbitrator. In other words, it is apparent that the question of existence of arbitral clause is a question which has been raised in all the aforesaid proceedings.

A seven Judges Bench of the Hon'ble Supreme Court by way of majority judgment in the case of ***SBP & Co. Vrs. Patel Engineering Ltd. and another*** (2005) 8 SCC 618 have taken note of the fact that a question regarding existence or validity of the arbitration agreement may arise in an application under section 8 of the 1996 Act as well as in the process of adjudication of an application under section 9 of the 1996 Act. It would, therefore, relevant to quote paragraph-19 of that judgment which reads as follows :

> " 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 8 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 Fair Air Engineers (P) Ltd. V. 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."

Therefore, in terms of the aforesaid judgment of the Hon'ble Supreme Court, since the appellants who were Opp.Parties in the proceeding before the learned District Judge, in the application filed by the respondents under section 9 of the 1996 Act, disputed the existence of an arbitration agreement and raised a further plea that the dispute raised is not covered under the arbitration clause, that court had the necessary obligation to decide, whether there exists an arbitration agreement, which is valid in law and further as to whether the dispute sought to be raised is covered under that agreement. The present appeal under section 37 also casts a similar obligation on the appellate court.

10. Mr. P.C. Chatterjee, learned senior counsel appearing for the appellants-Sri Dushashan Sahoo in ARBA 7 of 2008 submitted that the impugned order had been passed by the learned District Judge, in an application under Section 9 of the Act, purportedly, relying upon an Arbitration Clause contained in the partnership deed dated 3.8.1991. He submitted that these appellants, namely, Sri Dushashan Sahoo and Smt. Suprasanna Sahoo, were not parties to the partnership deed of 1991 and, therefore, the

appellants could neither have been made parties to the application under Section 9 of the Act, nor any order could have been passed against the present appellants. Learned counsel asserted that the purported Arbitration Clause in the partnership deed dated 3.8.1991, is obviously confined to the partners who were existing at the said time and does not bind the present appellants, who came to be inducted as the partners of the firm, pursuant to the reconstituted partnership deed dated 1.4.1993. It is submitted that Respondent No.1-Smt. Geetarani Mohanty, no longer being a partner of the reconstituted firm, is incompetent to raise any dispute under the Arbitration Clause contained in the earlier partnership deed dated 3.8.1991.

11. Learned counsel for the appellants strenuously urged that the respondent-Smt.Geetarani Mohanty had executed a deed of retirement dated 31.3.1993 which was signed not only by her, but was also, signed by her husband (a Government servant) as a witness and, therefore, the validity of the subsequent reconstituted partnership deed to which the respondent-Geetarani Mohanty is a witness, can not be questioned by her through any arbitration proceeding. In other words, it is asserted that no relief against these appellants is or can be made subject matter to an arbitration proceeding, initiated by Smt. Geetarani Mohanty, since they were not parties to the arbitration agreement.

12. Mr. Chatterjee asserted that Section 9 of the Arbitration Act, empowered the civil court to pass limited protective orders in respect of "subject matter of the reference" and since no relief of any kind can be claimed against the present appellant, consequently the civil court acting on an application under Section 9 does not possess the necessary jurisdiction to pass any order, directly or indirectly affecting the rights of the appellants whose rights arise out of the deed of reconstituted partnership dated 1.4.1993. He further asserted that the impugned order directly and severely affects the rights of the appellants to carry on business under the partnership deed dated 1.4.1993, which business they have been carrying on for over fifteen years and more and the consequential order of restraining the appellants or directing status quo as existing prior to 1.4.1993, effectively amounts to a direction dispossessing the appellants from the properties in which they have been peacefully carrying on business for over fifteen years.

13. It is further submitted that the learned District Judge has given findings which are, inter alia, final in nature and it also appears that the District Judge has also sought to exercise jurisdiction of the Civil Judge (Junior Division) before whom the Civil Suit No.49 of 2006 is pending, apart from actually exercising the jurisdiction of an arbitrator, by giving his finding regarding the merit of the application filed by the appellants. Mr. Chatterjee, has also assailed the finding of the learned District Judge at pages-36 and 37 of the judgment wherein, learned District Judge has observed that "it can not be said that the deed of reconstitution is a genuine document and it has been held that the partnership dated 3.8.1991 is still subsists". Apart from that the District Judge has further held that the deed of retirement and the deed of reconstituted partnership are not in operation. He further assails the finding of the learned District Judge at Page-40 of the judgment, to the effect that, the learned District Judge has held that the Civil Judge (Jr.Division) has no jurisdiction to continue the suit once an appeal under Section 7 of the Act has been filed. Learned counsel asserts that, the learned District Judge has no jurisdiction to give any finding upon a matter pending before another court, which is admittedly a court of competent jurisdiction. Mr. Chatterjee draws the attention of this Court to the finding of the learned District Judge at pages-40 and 41 of the judgment,

where in, the learned District Judge has held that Section 9 of the proceeding is maintainable "as the appellants are necessary parties." He asserts that since the learned District Judge has come to a conclusion that "appellants are necessary parties", the learned District Judge had, in fact, no other alternative but to dismiss the said Section 9 application, since "the necessary parties" were not parties to the arbitration agreement.

14. Mr. Chatterjee in conclusion of the argument, placed reliance on various decisions including the case of ***Hindustan Papers Corporation Ltd. Vs. Keneilhouse Angami,*** 1990 (1) CAL. L.T. 200: Vol.68, Company Cases, 361 wherein, the Calcutta High Court in paragraph-9 of the judgment in which matter arose out of an application seeking an injunction from invoking the bank guarantee held that although the arbitration agreement may be very wide but that certainly does cover the dispute arising under "a separate agreement with a separate party". Mr. Chatterjee also placed reliance on the judgment of the Apex Court in the case ***of MD. Army Welfare Housing Organisation Vs. Sumangal Services Pvt. Ltd.,*** (2004) 9 SCC 619 and in particular, observations of the Court in Paragraphs-43 and 69 thereof, wherein, the Apex Court has observed that "an Arbitral Tribunal is snot a court of law. It's orders are not judicial orders. Its functions are not judicial functions. It can not exercise its power *ex debito justiae*. The jurisdiction of the arbitrator being confined to the four corners of the agreement, he can only pass such an order which may be the subject matter of reference."

15. Mr. Chatterjee, further placed reliance on the judgment of the Apex Court in the case of ***Sukanya Holdings Pvt. Ltd. Vs. Jeyesh H. Pandya and another*** (2003) 5 SCC 532, and in particular, on the observations of the Apex Court in Paragraphs 12 to 15 thereof, wherein the learned Supreme Court has held that "no matter which is not the subject matter of the arbitration agreement can be referred to arbitration that is why there is no provision in the said Act to the effect that when the subject matter of the suit includes subject matter of the arbitration agreement as well as other disputes, the matter is required to be referred to arbitration". The Hon'ble Supreme Court has further observed that there is no provision for spitting the cause or parties for referring the subject matter to arbitration".

16. Mr. R.K.Rath, learned senior counsel appearing for the respondent-Smt.Geetarani Mohanty in both the appeals, laid emphasis on the facts leading to the present case. He asserted that the mining lease has been granted in the name of Smt. Geetarani Mohanty, as an individual whereafter, the same has been transferred to the name of a firm- M/s. Geetarani Mohanty comprising of partners Smt. Geetarani Mohanty and Sri Srinivash Sahoo having shares of 55% and 45% respectively. He further submitted that permission was sought for by Geetarani Mohanty under the letter dated 3.2.1992, with an affidavit on the basis of which the Govt. of India granted permission for transfer of the mining lease in favour of the firm on 23.9.1992. He submitted that the transfer deed of the mining lease from Smt.Geetarani Mohanty an individual to the firm M/s. Geetarani Mohanty was executed on 17.10.1992. Therefore, Mr. Rath laid great emphasis on the letters dated 8.5.1992 and 17.10.1992 issued by the Director of Mines and the State Government, to the fact of Smt. Geetarani Mohanty, retaining her share and substantial interest in the firm and in the lease has been clearly mentioned and submitted that such permission for transfer was granted only on the condition that the transfer firm shall undertake the mining operation after the actual transfer.

17. Mr. Rath asserted that the partnership firm has no legal entity, since it is an association of partners carrying on business of the partnership and in law, the name of

firm is a compendious method of describing the partners and, therefore, the firm is not like a company and has no legal entity in the sense of a corporation or a company. He further asserted that the partners are individually called partners and the name under which the partners carry out their business is called the firm name. Therefore, Mr. Rath asserted that what is recognized is the firm comprising of partners Smt. Geetarani Mohanty and Sri Srinivash Sahoo and since the Govt. of India accorded permission under Rule 37 of the Mineral Concession Rules, 1960, the firm is only through the partners Smt. Geetarani Mohanty and Sri Srinivash Sahoo, who are the lessees and are authorized to carry on mining operation under the lease.

18. Mr. Rath, submitted that the partners of the reconstituted firm, formed by the deed of reconstitution dated 1.4.1993 can not be taken to be lessees under the Mineral Concession Rules, since no permission has been granted under Rule 37 by the State Govt. for transfer of the lease in the name of the new partners and, therefore, the entire attempt to transfer Smt. Geetarani Mohantys' rights to the newly reconstituted firm is void ab initio. Consequently, he asserted that deed of reconstitution of partnership dated 1.4.1993 is not required to be set aside being completely void as per the provisions of Rule-37 of the Mineral Concession Rule. In this respect, Mr. Rath submitted that whenever a partnership is reconstituted in violation of law, the said reconstitution is to be held void ab initio. In support of his contention. Mr. Rath placed reliance on a decision in the case of ***Krishna Cermics and Refractories, Rajahmundry v. K.V. Narayana and others***, (2004) ALD 121 : AIR 1974 SC 1892.

19. Mr. Rath further submitted that a void document can not be utilized for any purpose being a nullity and is not required to be set aside at all. In support of this contention, Mr. Rath placed reliance on the decisions reported in :

(i) AIR 2001 SC 2552
(ii) 2005 (5) SCC 353
(iii) 2004(8) SCC 706 and
(iv) 2006(10) SCC 96.

20. Mr. Rath next contended that the issue whether partnership has come to an end or not has to be adjudicated by an Arbitrator and whether the contract has come to or not on grounds of fraud/compulsion/coercion as alleged – such matter has to be decided in the arbitration itself. In support of this contention has placed reliance on various judgments noted herein:

(i) AIR 1980 Orissa 198
(ii) AIR 1980 CAL. 354
(iii) 2004 (2) SCC 663
(iv) 2006 (4) (64) ARBLR 288 and
(v) 1994 (1) OLR 155

21. It is next contended by Mr. Rath that Respondent No.1 – Smt.Geetarani Mohanty has filed writ application being W.P.(C) 5537 of 2008 before this Court with a prayer to direct the State Govt. and its agencies to ensure that she is able to exercise her leasehold right strictly in conformity with the Govt. proceeding dated 17.10.1992 and the transfer deed dated 13.1.1993 and participate in the operation of the schedule mines and a Division Bench of this Court, headed by the Hon'ble Chief Justice by its order dated 21.4.2008 has been pleased to pass the following order:

'Heard learned counsel for the petitioner.

Mr. D.K.Dey, learned counsel accepts notice on behalf of opposite party no.5 and Mr.Umesh Patnaik, learned counsel accepts notice on behalf of opposite parties 6 and 7. Let extra copies of the writ petition be served on them by tomorrow who shall file their counter affidavit by 23.4.2008. Reply to the same shall be filed within a week.

Mr. Khuntia, learned State Counsel accepts notice on behalf of opposite parties 1, 2 3 and 4. Let extra copies of the writ petition be served on him by tomorrow who shall file the counter affidavit by 6th May,2008.

The matter shall appear in the list on the 9th May, 2008.

In the meantime, the position as reflected in annexure-3, which is a Government order dated 17.10.1992 shall continue till 12th May, 2008. This Court makes it clear that this order will not in any way affect the pending proceedings between the parties either before the civil courts or before the appellate forum of this Court in a proceedings under Section 37 of the Arbitration and Conciliation Act."

22. In conclusion, Mr. Rath submitted that the rights of Smt. Geetarani Mohanty as a lessee, under the State in partnership with Sri Srinivash Sahoo, continues till date and that such a right can not be extinguished or taken away by any reconstituted deed, as the same does not have any sanction of law. Mr. Rath supported the order passed by the District Judge, directing Sri Srinivash Sahoo to carry on the business in the name of partnership which was created on 3.8.1991 and since the same had duly being approved by the State Govt. it can not be faulted.

23. Before proceeding to analyze and consider the rival contentions advanced before me, it now becomes necessary to take note of the pleadings made in the application under Section 9 of the Act before the Dist. Judge, especially pertaining to the alleged fraud/misrepresentation and dishonest actions of the appellant. Accordingly, relevant portions of the pleadings are quoted hereinunder:

> "8. That in less three months from the date of transfer of the original Mining Lease (13.01.1993) in favour of M/s. Geetarani Mohanty, the partnership firm comprising of the petitioner and the Opposite Party No.1, as stated in para 5,6 and 7 above, the Opposite Party No.1 taking full advantage of the extremely cordial and good relationship he enjoyed with the petitioner and also because of her absolute faith and trust in him, fraudulently obtained and made her executed a deed of retirement on 31.03.1993 and also a letter of resignation of the even date from the Partnership Firm (M/s. Geetarani Mohanty formed on 3.8.1991) relinquishing her share in favour of Opposite Party No.1 as the petitioner was a semi-literate and innocent house wife which she executed and signed without understanding the true purport and implication, farless knowing the nature of those documents.
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> 8.2. That for her status as a semi-literate housewife, more so in the field of mining business and activities which require great deal of expertise and acumen, and her impeccable faith and trust in Opposite Party No.1, the latter successfully managed to keep the deed of retirement dt.31.3.1993 and letter of resignation off the scent and beyond the knowledge of the petitioner till early part of the year 2006 (when opposite party no.1 filed a civil suit). The petitioner remained bliss fully ignorant of this foulplay practiced upon her by way of obtaining this deed of

retirement dt.31.03.1993 and the letter of resignation of the even date as the Opposite Party no.1 cunningly doled out few thousands of rupees intermittently to the Petitioner during 1993 to 2006 in the name of profit towards her shape in the deed of partnership dt.3.8.1991 and there by opposite party no.1 impressed upon the petitioner that she continued to be the partner of the firm constituted on 3.8.1991.

13……..That even though opposite party no.1 has successfully concealed the so called retirement and resignation and the connected documents tainted with the plea of fraud from the knowledge of the petitioner from March 1993 till early part of 2006, the cat was eventually out of bag when the fraudulent activities practiced by them were unearthed and discovered by the children of the petitioner who had come off age by then.

20. That your petitioner humbly submits that she came to understand from various sources which she believes to be true that the opposite parties have mis-utilized the funds of the partnership firm M/s. Geetarani Mohanty comprising of this petitioner and Opposite Party no.1 and has committed various irregularities by obtaining her signatures on different papers with the impression to utilize the same in the business activities of the said partnership firm and on good faith she handed over some unsigned papers to the opposite party which are found to have been mis-utilized subsequently. There fore the opposite party no.1 has not acted faithfully and honestly but also surreptiously utilized the signed papers, detrimental to the interest of the petitioner and thereby committed fraud on the petitioner as well as on the state government for claiming his absolute right over the said mines together with two imposters (Opposite Party no.2 and opposite Party No.3), it is plainly clear that Opposite Party No.2 and Opposite Party No.3 can not and could not have made a back door entry through the reconstituted deed of partnership dt.1.4.1993 to act, perform and operate as lessee of the scheduled mines without prior approval of the State Government. Needless to say, by virtue of being partners of under the reconstituted deed of partnership dt.1.4.1993 which is otherwise an invalid and fraudulent document, those two Opposite Parties have been operating and functioning as co-lessees of the Scheduled Mines without the prior consent and approval of the Lessor."

It is now well settled in law that, fraudulent misrepresentation as regards the character of a document may render the document as "void", but a fraudulent misrepresentation, as regards the contents of a document is "voidable". (See ***Ningawwa v. Byrappa Shiddappa Hireknrabar and others,*** AIR 1968 SC 956).

From the nature of the allegation contained in the petition under Section 9 of the 1996 Act, it would be clear that challenge has been made by the respondent on the ground of "fraudulent misrepresentation" as regards the contents of the documents, i.e., letter of resignation, deed of retirement, reconstitution of partnership and, therefore, these documents/transactions have to be held in law as to be "voidable" and not "void". This principle of law has been reiterated by a Division Bench of the Hon'ble Supreme Court comprising of Hon'ble S.B.Sinha and Hon'ble P.K.Balasubramanyan,JJ, in the case ***of Prem Singh and others v. Birbal and others*** reported in (2006) 5 SCC 353.

24. On a conjoint reading of the aforesaid averments, whereas the respondent Smt.Geetarani Mohanty has alleged that opposite party no.1 Srinivas Sahoo "fraudulently obtained and made her execute a deed of retirement on 31.3.1993 and also a letter resignation of the even date from the partnership firm relinquishing her share in favour of opposite party no.1 as the petitioner was a "semi-literate and innocent house wife", she executed and signed without understanding the true purport and implication, farless knowing the nature of those document". Therefore, she proceeded to state that the "remained blissfully ignorant of this faulplay practice upon her by way of obtaining the deed of retirement dated 31.3.1993 and the letter of resignation of the even date as the opposite party no.1 cunningly doled out few thousands rupees intermittently to the petitioner during 1993 to 2006 in the name of profit towards her share in the partnership dated 3.8.1991, thereby giving the petitioner an impression that she continued to be the partner of the firm constituted on 3.1.1991. She further alleged that the letter of resignation and reconstitution are sham documents since no reason whatsoever has been cited in none of the document for her retirement and resignation. Whereas it is pleaded that the opposite party no.1 has successfully concealed the so-called letter of resignation and such fraudulent practice was "unearthed by children of the petitioner who had come off age by them". Ultimately, it is seen from the pleadings that the petitioner came to understand from various sources which she believes to be true that the opposite parties have mis-utilized the funds of the partnership firm and has committed various irregularities by obtaining her signatures on different papers which the impression to utilize the same in the business activities of the said partnership firm and on good faith, she handed over some " unsigned papers" to the opposite party which are found to have been mis-utilized. Subsequently, it is further alleged by the petitioner is that opposite party no.1 has not acted faithfully and honestly and committed fraud on the petitioner.

Pleadings make only allegations or averments of facts. Mere pleadings do not by themselves make out a strong case or prima facie case of fraud. The material and evidence has to show it. It is important to note herein that no material whatsoever is referred to by the learned District Judge in the impugned order in support of the plea of fraud and the petition does not contain any material in support of such allegation. (See ***Svenske Handelsbanken v. Indian Charge Chrome***, (1994) 1 SCC 502).

25. On a reading of the aforesaid averments the very least that can be derived therefrom is that there is absolutely no consistency in the pleadings and details of the alleged fraud are totally lacking. Apart from it, what remains totally unexplained, is the fact that, not only had Smt. Geetarani Mohanty signed the deed of retirement, but her husband, a senior Govt. officer had also signed the same as a witness to the reconstituted partnership apart from the signature of Shri Sushant Sahoo, the earlier power of attorney holder of Smt. Geetarani Mohanty. Not a single word has been stated in the petition explaining this aspect.

Another fact that becomes evident from the petition under Section 9, is that it has been verified by one Manoj Kumar Agarwal who states that he is the power of attorney holder of the petitioner and has been authorized to sign the verification. Said Manoj Kumar Agarwal who is aged about 39 years and is a permanent resident of Kolkata has solemnly stated that the facts stated in the petition are true to the best of "his knowledge and based on the documents."

It appears from the documents annexed that said Manoj Kumar Agarwal has been granted power of attorney by Smt. Geetarani Mohanty on 16.11.2007. On a perusal of the said "power of attorney", it appears that the power of attorney holder has been granted the authority to represent Smt. Geetarani Mohanty in connection with all matters and issues relating to the business of the firm and inter se relationship between the partners of the said firm and more importantly the power of attorney declares as follows:

> "This general power of attorney is being executed pursuant to the partnership deed executed by me on 16th November, 2007 with Shri Manoj Kumar Agarwal and Shri Nirmal Kumar Agarwal and as stipulated in the said agreement it shall be irrevocable."

This declaration contained in the power of attorney clearly indicates the "real" reason behind the issue of such power of attorney. The said reason being the alleged execution of another partnership deed by Smt. Geetarani Mohanty on 16.11.2007 with the said Manoj Kumar Agarwal and Nirmal Kumar Agarwal, which has not been disclosed in the petition and does not form the basis of filing of the application.

26. It is most important to note now that while there has been various allegations of fraud taken in the petition, the petition itself has not been verified and supported by any affidavit filed by Smt. Geetarani Mohanty herself, but by one Manoj Kumar Agarwal claiming to be the power of attorney holder. The power of attorney in favour of Shri Manoj Kumar Agarwala is dated 16.11.2007 and is stated to have been executed in his favour pursuant to a "partnership deed", executed by Smt. Geetarani Mohanty with him on 16.11.2007. Therefore, obviously the verificant can not claim to have any personal knowledge of any matter prior to the said date and in absence of any explanation in the affidavit/verification, as to the source of knowledge of the fraud practiced, a plea of "fraud" can not/does not arise for consideration. Presently, there has been contradictory and sketchy allegation of fraud without the necessary details/particulars as required in law, nor has the same have been raised by the person against whom fraud is alleged to have been committed, but instead by a power of attorney holder who obviously, can not claim to have any personal knowledge of any event that took place more than 15 years prior to the issue of the power of attorney.

27. The next issue that is germane in this case relates to apparent lack of explanation for the delay of more than 15 years in initiating any lawful proceeding. There has been a feeble attempt made by the appellants to explain the delay by stating that, Sri Srinivas Sahoo has been paying few thousands from time to time and therefore Smt. Geetarani Mohanty, "remained under the impression", that she is continuing as a partner. It is important to note that no documentary evidence whatsoever is available on record to establish such payments (if at all) and, therefore, the delay of more than 15 years remains totally unexplained. The reconstituted partnership has been admittedly operating the mines for more than 15 years with the knowledge and consent of the State Govt. for all these years and no challenge has been until filing of the petition under Section 9 of 1996 Act.

28. At this stage it becomes extremely important to take note of the judgment of the Hon'ble Supreme Court in the case ***Atul Singh & Ors. V. Sunil Kumar Singh & Ors,*** reported in AIR 2008 SC 1016, which was relied upon by Mr. Jayanta Mitra, learned senior counsel appearing for one set of appellant.

The conclusion arrived at by their Lordships and in particular para-9 of the said judgment is quoted below for reference:-

> " The first relief claimed by the plaintiffs in the suit is a decree for declaration that the reconstituted partnership deed dated 17.2.1992 was illegal and void and there was no intention or desire of Shri Rajendra Prasad to retire from the partnership and further that the plaintiffs being heirs of Shri Rajendra Prasad Singh will be deemed to be continuing as partners to the extent of his share. It is true that the plaintiffs have also sought rendition of accounts and their share of profits from the partnership as well as interest over the unsecured loan and the principal amount of unsecured loan on rendition of accounts. For getting his relief, the plaintiffs undauntedly rely upon the partnership deed dated 13.1.1989. However, this deed of 1989 could be relied upon and from the basis of the claim of the plaintiffs only if the partnership deed dated 17..2.1992 was declared as void. If the deed dated 17.2.1992 was not declared as void and remained valid and operative, the plaintiffs could not fall back upon the earlier partnership deed dated 13.1.1989 to claim rendition of accounts and their share of profits. Therefore, in order to get their share of profits from the partnership business, it was absolutely essential for the plaintiff appellants to have the partnership deed dated 17.2.1992 declared as illegal, void and inoperative. The relief for such a declaration could only be granted by the civil Court and not by an arbitrator as they or Shri Rajendra Prasad Singh through whom the plaintiff derive title, are not party to the said deed. The trial Court had, therefore, rightly held that the matter could not be referred to arbitration and the view to the contrary taken by the High Court is clearly illegal."

29. Mr. Mitra, learned senior counsel for the appellant submitted that the facts of the present case are "pari material" with the facts dealt with by the Hon'ble Supreme Court in the aforesaid judgment. He asserted the essential challenge made by the defendants-petitioners in their application under Section 9 of the Arbitration and Conciliation Act, 1996 before the learned District Judge, Khurda at Bhubaneswar, was to question the letter of Resignation and Deed of Reconstitution of the partnership firm M/s. Geetarani Mohanty dated 1st April 1993 as illegal and void and account of fraud and misrepresentation. The respondent-Smt. Geetarani Mohanty has pleaded in her petition filed under Section 9 of the Arbitration and Conciliation Act, 1996 that she had no intention to retire from the partnership firm and therefore, based her claims upon an arbitration clause in the original Partnership Deed dated 3rd August 1991. In other words the entire basis of the claim of the respondent was on the partnership deed dated 3rd August 1991, from which the defendant resigned on 31st March 1993 and signed the Deed of Retirement on the self same date, where after the deed of reconstitution of the partnership firm between the present appellant and respondents was signed on 1st April, 1993. Therefore, it is absolutely essential for the respondent (petitioner) to have the reconstituted partnership deed dated 1st April, 1993 declared as illegal, void and inoperative and such declaration could only be granted by the Civil Court and not by an Arbitrator.

The newly inducted partners namely, Sri Dushasan Sahoo and Smt. Suprasanna Sahoo-appellants in Arbitration Appeal No.7 of 2008 not being parties/signatories to the original deed of partnership dated 3.8.1991, under the terms of which, the respondents have sought to exercise their purported rights. Therefore, it is submitted that the trial court

should not have entertained the application filed under Section 9 of the Arbitration and Conciliation Act, 1996 and should have rejected the same being without jurisdiction and premature.

30. Learned counsel for the respondents Mr. R.K.Rath, Sr. Advocate in course of argument submitted that there is no lawful necessity for the respondents to approach the civil Court and to seek to declare the reconstituted partnership deed, as void, since the said reconstitution was opposed to the law and prohibited in law and therefore the same was void ab initio.

31. In this respect, Sri Rath, learned counsel for the respondent relied upon the decision in the case of ***Biharilal Jaiswal and Ors. V. Commissioner of Income Tax and Ors.*** Reported in (1996) I SCC 443. On a perusal of the said decision of the Apex Court it is seen that the said case arose out of a proceeding under the Income Tax Act, in which a licence for retail sale of country spirit had been obtained by a person in respect of certain out-still shops, in a public auction, where after the successful bidder entered into a partnership with certain other persons to conduct the business under the said licnece. The Hon'ble Supreme Court came to hold that in terms of Madhya Pradesh Excise Rules, 1960 and General Licence Conditions there under, a holder of licence/privilege was debarred from entering into a partnership for the working of such privilege with any other person or in any manner without the "written permission" of the Collector. Considering the aforesaid provisions of law and the fact no such prior written permission of the Collector had been obtained,, the Hon'ble Apex Court came to hold that the partnership agreement was prohibited by law and was declared under Section 23 of the Contract Act as un-lawful and void.

32. Learned counsel for the respondent on this very issue also relied upon a judgment of the High Court of Andhra Pradesh at Hyderabad in the case ***Krishna Ceramics*** (supra) rendered by an Hon'ble Single Judge of the Andhra Pradesh High Court and from the facts that emanate there from it is to be found that the plaintiff had obtained a lease for fire clay mines from the State Government where after he entered into a further contract with the defendant and assigned his interest under the lease agreement to the defendant, without "prior consent" of the Government, thereby violating Rule-37 (1)(a) of the Mineral Concession Rules, 1960. On such a finding the Hon'ble Court came to a conclusion that the assignment being without the prior approval of the Government was opposed to the public policy and therefore declared the contract of assignment as violative of Section 23 and unenforceable in a Court of law.

33. From the facts of the present case, it is clear that a mining lease was granted in favour of Smt. Geetarani Mohanty on 2nd July 1991 and thereafter the lessee made an application to the Government of Orissa on 3rd February 1992 for transfer of the said mining lease to a partnership firm M/s. Geetarani Mohanty. Based on such an application, Government of Orissa "accorded written permission" for transfer of mining lease in favour of the partnership firm of M/s. Geetarani Mohanty on 17th October 1992, where after a deed of transfer of the mining lease in favour of the partnership firm was executed on 13th January 1993. From these facts it is clear that necessary permission having been accorded for such transfer, the present case is distinguishable from the cases cited by the learned counsel for the respondent and the present case is not a case where the transfer was effected without necessary permission.

34. The partnership deed on the basis of which application under section 9 of the 1996 Act was filed contained the following clauses :

> "10. New Partner or Partners may be admitted to the firm on the mutual agreement among the existing partners on such terms and conditions and will be agreed upon by the partners.
>
> 2. The retirement or death of any partner shall not have the effect of dissolving the partnership between the other partners and the share of such retiring or deceased partner shall be purchased by one or more of the remaining partners, provided that in no case shall the right of the heirs and legal representatives of a deceased partner be prejudicial and in all such cases they shall be given the first preference to take the place of the deceased or retiring partners.
>
> 3. Every partner shall have a right to sell or mortgage his share or interest, but such partner before selling or mortgaging his share or interest to a stranger shall make the offer to other partners who shall have the first option to purchase the same at a valuation to be made in the manner as will be decided by the partners."

This partnership deed had been submitted before the State Government on 3.2.1992 by the respondent-Smt. Geetarani Mohanty while seeking permission from the State Government to transfer her lease in favour of the said partnership firm and by order dated 8.5.1992, the State Government was pleased to permit transfer of the mining lease in favour of the partnership firm in terms of Rule 37 of the Minerals Concession Rules, 1960.

From the above it is clearly established that in terms of the deed of partnership, the partnership would not cease with the death of either partner and either partners could retire as well as new partners could be included with the consent of the existing partners. It would be important to note herein that the State Government having given its consent for the transfer of the lease also obviously consented to the terms of the deed of partnership.

35. The learned counsel for the Appellant on the other hand contended that not only had the respondent issued a letter of resignation on 31st March 1993 and signed the deed of retirement on the same date, but also her husband (a senior Government officer) has signed as a witness to the said deed retirement. It is further evident that on 1st April 1993 when the deed of reconstitution of the partnership firm M/s. Geetarani Mohanty was executed inducting Shri Dushasan Sahoo and Smt.Suprasanna Sahoo as partners, the said deed of reconstitution itself was also signed by Smt. Geetarani Mohanty as a witness along with her earlier power of attorney Shri Sushanta Sahoo as a witness to the said deed of reconstitution.

36. It is further submitted by the appellants that vide letter dated 21.5.1993 they had informed the Additional Secretary, Government of Orissa regarding the reconstitution of the firm with copies addressed to the Director of Mines and Deputy Director of Mines (Annexure-7). Further it appears that the appellant put in an advertisement in daily news paper "Prajatantra" on 16.7.1993 bringing to public notice the fact that the respondent Smt. Geetarani Mohanty had resigned from the partnership firm and that the newly inducted partners had joined as new partners. It is further contended that these acts on the part of the appellant, of informing the Additional Secretary to the Government of

Orissa and the Director of Mines as well as the advertisement of the resignation of the respondent and induction of the new partners, in terms of Rule 62 of the Mineral Concession Rules, 1960 and Rule 37 has no application to the facts of the present case. It is submitted that Rule 62 castes upon the appellant an obligation to inform the State Government, if any changes occur in the constitution of the partnership firm, which they have duly complied with.

37. The next contention raised by Mr. Rath, learned senior counsel for the respondent is that the letter of resignation of the respondent as well as deed of retirement and reconstitution of firm being "void documents" on account of fraud and misrepresentation can not be used for any purpose being a nullity in the eyes of law and is not required to be set aside at all. In this respect Mr. Rath, learned counsel for the respondent relied upon the judgment in thecase of ***Dhurandhar Prasad Singh v. Jaiprakash University and others,*** AIR 2001 SC 2552.

I am of the view that this judgment does not support the contentions of the petitioner and on the contrary in paragraph-21 of the said judgment the Hon'ble Supreme Court has laid down the following dicta: -

> " …….If it is proved that the document is forged and fabricated and a declaration to that effect is given a transaction becomes void from the very beginning. There may be a voidable transaction which is required to be set aside and the same is avoided from the day it is so set aside and not any day prior to it. In cases, where legal effect of a document can not be taken away without setting aside the same, it can not be treated to be void but would be obviously voidable."

Therefore, this judgment and the facts of the present case and the challenge made herein pertain to a letter of resignation, deed of transfer and deed of reconstitution of the partnership firm, on the ground of fraud and misrepresentation. Therefore, these documents are "voidable" documents/transactions and unless such a transaction/document is declared void by a Civil Court of competent jurisdiction to be invalid in law, the same continue to be binding effective, and operative in law and the legal effect of such document/transaction can not be taken away without setting aside the same.

38. Mr. Rath, learned counsel for the respondent relied upon the decision of the Hon'ble Supreme Court in the case of ***Balvant N.Viswamitra and Ors. V. Yadav Sadshiv Mule(dead) through LRS***., (2004)8 SCC 706. In the aforesaid judgment Hon'ble Supreme Court has declared that, where a court lacks inherent jurisdiction in passing a decree or making an order, any decree or order passed by such court would be without jurisdiction, non est and void ab initio. A defect of jurisdiction of the court goes to the root of the matter and strikes at the very authority of the court to pass a decree or make an order. Such defect has always been treated as a basic and fundamental defect and a decree or order passed by a court or an authority having no jurisdiction is nullity.

In the present case at hand, there is no challenge to any order/decree of any court or authority on the ground of "lack of jurisdiction". Therefore, the citation is not of any much assistance in deciding the present dispute.

39. Before concluding, it would be necessary for me to note that I have refrained from giving any finding on certain issues raised and noted herein since there is a possibility of the parties approaching a competent Civil Court for adjudicating such rights and in order to prevent any possible prejudice likely to occur to the parties.

40. It is incumbent upon me also to take note the direction of the Division Bench presided by the Hon'ble Chief Justice in W.P.(C) No.5537 of 2008, which has been quoted hereinabove and keeping in view the observation of the Court that the pendency of the said writ application and the orders passed therein would not in any manner affect the pending proceedings between the parties, either before the Civil Court or the appellate forum in a proceeding under Section 37 of the Arbitration and Conciliation Act, 1996, therefore, I have proceeded to hear the matter and to pronounce my judgment in appeal.

41. I am of the considered view that, the present appeals are covered by the judgment of the Hon'ble Supreme court, rendered in the case of ***Atul Singh*** (supra). In order to get her share of the profits from the partnership business, it was absolutely essential for the profits from the partnership business, it was absolutely essential for the respondent Smt. Geetarani Mohanty, to have her 'letter of resignation" and "deed of retirement" dated 31.3.1993 as well as "deed of reconstitution" dated 1.4.1993, declared illegal, void and inoperative. Accordingly, the relief for such a declaration can only be granted by a Civil Court of competent jurisdiction and not by an arbitrator since the respondent Smt. Geetarani Mohanty is not a party to the deed of reconstitution. Therefore, since an arbitrator under the partnership deed dated 1.4.1993 as illegal, void and inoperative, consequently, the learned District Judge was incompetent to pass any interim order on the application under section 9 of the 1996 Act, filed by the respondent Smt. Geetarani Mohanty.

I am further of the view that the present case is also covered by the judgment of the Hon'ble Supreme Court in the case ***MD Army Welfare Housing Organisation*** (supra). The Hon'ble Supreme Court has clarified that even under section 17 of the 1996 Act, an arbitrator's jurisdiction to issue an "interim order" must relate to the protection of the subject matter of dispute and such a matter may only be addressed to the party to the arbitration and it can not be addressed to other parties. Accordingly, the impugned order of the learned District Judge is violative of such direction, inasmuch as, it has sought to exercise jurisdiction over a subject matter (deed of reconstitution dt.1.4.1993) which is outside the scope of the partnership deed dt.3.8.1991, on the basis of which the petition under section 9 was filed. Further, the learned District Judge has also sought to address the appellants (in Arbitration Appeal No.7 of 2008) and in effect take away their rights as partners of the firm which they acquired by virtue of the reconstituted partnership deed of 1.4.1993., therefore, amounting to addressing parties who are not parties to the arbitrator agreement, as well.

Apart from the above, the present lis is also covered by the judgment of the Hon'ble Supreme Court in the case of Sukanya Holding Pvt. Ltd.(supra). The respondents in their application under section 9 of the 1996 Act have sought for "multifarious reliefs" not only against the party to the arbitration agreement (vide partnership deed dated 3.8.1991 i.e. Shri Srinivas Sahoo) but also against "third parties" (Appellants Shri Dhusasana Sahoo and Smt. Suprasanna Sahoo in Arbitration Appeal No.7 of 2008) who are admittedly strangers to the aforesaid arbitration agreement.

42. For the reasons as noted hereinabove, I hold that the impugned order dated 17.3.2008 under Annexure-1, passed by the learned District Judge, Khurda in Arbitration Petition No.15 of 2008 has been passed without jurisdiction and/or prematurely and is, therefore, set aside as being unsustainable in law. I further hold that there exists no legal

impediment for the proceeding in C.S. No.49 of 2006 pending before the learned Civil Judge (Jr. Divn.), Bhubaneswar from continuing and accordingly, direct the learned Civil Judge (Jr.Divn.) to proceed with the matter and also consider the objections raised by the respondent (defendant in the said suit), under Section 8 of the 1996 Act on its own merit and in accordance with law.

Both the appeals are allowed in terms of the directions given hereinabove. There shall be no order as to costs.

Appeals allowed.