Bombay High Court
Mitsui Osk Lines Ltd. vs Orient Ship Agency Pvt Ltd on 28 January, 2014
Bench: R.D. Dhanuka

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

ARBITRATION PETITION NO.446 OF 2003

Mitsui OSK Lines Ltd., (Japan)
6-32, 3-Chome, Nakanoshima,
Kita-Ku, Osaka-shi, Japan. ... Petitioner

V/s.

Orient Ship Agency Pvt Ltd.,

(India), 4th Floor, Orient House,
Adi Marzban Path, Ballard Estate,
Mumbai 400 038. ... Respondents.

With
SUIT NO.2570 OF 2003.

Orient Ship Agency Pvt Ltd.,

(India), 4th Floor, Orient House,
Adi Marzban Path, Ballard Estate,

Mumbai 400 038. ... Plaintiff.

Vs.

Mitsui OSK Lines Ltd., (Japan)
6-32, 3-Chome, Nakanoshima,
Kita-Ku, Osaka-shi, Japan. ... Defendant.

Mr Dara Zaiwala, Senior Advocate a/w Zuben Behramkamdin a/w Abhishek

Singh i/b M/s Mulla & Mulla for Petitioner and for defendant in suit.

Mr Ashish Kamat a/w Ms Pooja Kshirsagar i/b M/s Karikeya & Associates for the Respondent and for plaintiff in suit.

CORAM : R.D.DHANUKA J.
JUDGMENT RESEERVED ON: DECEMBER 23, 2013

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JUDGMENT PRONOUNCED ON : JANUARY,28, 2014

JUDGMENT :

(M/s Mitsui OSK Lines Ltd. is referred to as petitioner and M/s Orient Ship Agency Pvt. Ltd. is referred to as the respondent in the later part of this judgment.) ARBP No. 446/03 is filed by M/s Mitsui O.S.K. Ltd. U/s 45 of the Arbitration and Conciliation Act 1996 inter alia praying for an order and direction that the parties to the said petition shall be referred to arbitration, the disputes and

differences which had arisen between the parties referred to in the petition including the alleged claims of the respondents in suit No.2570/03 and in accordance with Arbitration and Conciliation Act 1996. Suit No.2570/03 is filed by Orient Ship Agency against the petitioner herein interalia praying for an order and declaration that agency agreement dated 01/04/1964 has come to an end by efflux of time and has been novated/substituted and that the terms and conditions contained in the agency agreement dated 01/04/1964 are not binding upon the parties. The respondents seeks a decree against the petitioner herein for recovery of various amounts claimed in prayer (b) of the suit. Some of the relevant facts for the purpose of deciding these two proceedings are as under :

2. The petitioner company is incorporated under the laws of Japan and is engaged in shipping business. Respondent Company is carrying on business of agency of ocean transportation. On or about 1st April 1964, petitioner and the respondent entered into an agency agreement by which the petitioner appointed the respondent as an agent of ship's business, cargo business, passenger business and other related activities and duties in the Asmita 2/22 .. 3 .. ARBP-446/03 @ Suit No.2570/03 Western Coast of India and in North Calicut. Article 17 of the said agreement provided for disputes to be adjudicated upon by arbitration. Article 17 of the said agreement is extracted as under :

> "ARTICLE 17 : any difference of opinion or any claim or dispute arising out of this Agreement shall be settled by arbitration in Tokyo. Each party shall appoint one arbitrator with power to such arbitrators to appoint, if necessary, an umpire. Any such arbitration shall be deemed a reference to arbitration under the provisions of the 'Code of Civil Procedure of Japan 1890 regarding Arbitration Proceedings' or any statutory modification or re-enactment thereof for the time being in force."

3. The said agency agreement dated 1st April 1964 was amended in the years 1972, 1973, 1974, 1975, 1987, 1993 and 1997 for the purpose of altering agency fee, commission and retainer fee. All other terms of the said agency agreement remained unchanged.

4. It is the case of petitioner that in the month of January 2001, petitioner noticed various irregularities in the General Statement of Account prepared by the respondent and the petitioner therefore called upon the respondent for explanation and for correcting the irregularities. Dispute arose between the parties. On 2nd January 2002, petitioner called upon the respondent to pay various amount. Vide letters dated 5 th April 2002 and 5th June 2002, petitioner terminated the agency agreement. Petitioner thereafter filed an application under Section 9 of the Arbitration and Asmita 3/22 .. 4 .. ARBP-446/03 @ Suit No.2570/03 Conciliation Act, 1996 in this Court inter alia praying for injunction against the respondent from operating the bank account bearing No.4400053-1 with the Sumitomo Mitsui Banking Corporation. By an order dated 1 st November 2002, the said arbitration petition was disposed of by this Court.

5. On 10th June 2002, petitioner invoked arbitration clause and nominated Mr Mitsuhiro Toda as arbitrator and called upon the respondent to appoint their arbitrator. Respondent did not appoint any arbitrator. Petitioner filed an application under Section 11 of the Arbitration Act before the Supreme Court. In those proceedings, it was contended by the respondent that Section 11(6), (8) and

(12) of the Arbitration Act would not be applicable as the arbitration agreement provided that arbitration was to be conducted in Tokyo (Japan) and was governed by law of arbitration applicable in Japan, particularly Code of Civil Procedure of Japan, 1890. By an order dated 24th July 2002, the Supreme Court held that the proposed arbitration was to be governed by Japanese law and the place of arbitration was also Tokyo and thus Indian Courts did not have jurisdiction to pass any orders for appointment of arbitrators. By letter dated 14 th August 2002, petitioner informed the respondents that they would apply to Japanese Court for nomination of an arbitrator on behalf of the respondents. Since respondents did not appoint any arbitrator, petitioner applied to the Tokyo District court for nomination of an arbitrator as per the terms of agency agreement and provisions of Code of Civil Procedure of Japan 1890 regarding arbitration proceedings. The respondents appeared through their advocate in those proceedings. Tokyo District Court nominated Mr Hiroki Okabe as arbitrator on behalf of the respondents by an Order and Judgment dated 9 th Asmita 4/22 .. 5 .. ARBP-446/03 @ Suit No.2570/03 February 2005. Respondents impugned the said Order and Judgment dated 9th February 2005 passed by the Tokyo District Court in the Tokyo High Court. By an order dated 22 nd June 2005, the Tokyo High Court upheld the order of Tokyo District Court. Respondents challenged the order of Tokyo High Court before the Supreme Court of Japan. By an Order dated 25 th October 2012, the Supreme Court of Japan upheld the order passed by the Tokyo High Court.

6. The arbitral tribunal have rendered an award in the said arbitration proceedings on 02/02/2009. Petitioner has filed arbitration petition No. 842/09 in this Court under Sections 46 to 49 of Arbitration and Conciliation Act 1996 for enforcement of the said award which is being disposed of by a separate order.

7. On 28/4/2003, the respondent (M/s Orient Ships Agency) filed suit (2570/03) for a declaration and seeks money decree against the petitioner M/s Mitsui O.S.K. Ltd. Mr Zaiwala learned senior counsel appearing for the petitioner invited my attention to the order dated 24 th July 2003 passed by the Supreme Court of India in arbitration petition filed by the petitioner holding that "The parties have expressly agreed that the proper law prevailing in Japan governing the arbitration proceedings would be applicable to the arbitration proceeding and the arbitration proceedings shall be conducted at Tokyo (Japan)."

8. Mr Zaiwala learned senior counsel appearing for the petitioner invited my attention to the arbitration agreement recorded in Article 17 of Asmita 5/22 .. 6 .. ARBP-446/03 @ Suit No.2570/03 the agency agreement and also some paragraphs from the pleadings filed by the respondents and suit no.2750 of 2003 filed by the respondents and in reply to the petition No.7 of 2003 and would submit that respondents have admitted the existence and validity of the agency agreement and the arbitration clause therein.

9. Mr. Zaiwala learned senior counsel submits that on the basis of the pleadings filed by the respondents themselves it clearly indicates that the respondents have not disputed the existence of the arbitration agreement between the parties nor are able to dispute the fact that arbitration agreement was not altered or amended by virtue of alterations/amendment to the agency agreement. Learned senior counsel submits that the entire claim made by the respondents in the

suit is relating to payments of alleged commission, fees, expenses, damages all of which are claimed on the basis of the work done by the respondents for the petitioner as its agent for its business in India under the said agency agreement. Respondents have admitted that all through out the respondents had acted as agent of the petitioner in India for the purpose of carrying out the business of the petitioner in India. Respondents have not denied the fact that the agency agreement dated 1st April, 1964 is valid, subsisting and binding on the parties. Learned senior counsel submits that the disputes and differences in the suit filed by the respondents and what has been arisen between the parties are governed by arbitration agreement. Learned senior counsel submits that clause 17 of the agency agreements which records an arbitration agreement is very wide and any difference of opinion or any claim or dispute arising under the said agreement has to be decided by Asmita 6/22 .. 7 .. ARBP-446/03 @ Suit No.2570/03 arbitrators under the provisions of Code of Civil Procedure of Japan, 1890 regarding arbitration proceedings or any statutory modification or reenactment thereof. Learned senior counsel submits that prayer (a) of the suit ex facie indicates that the respondents have prayed for an order and declaration that the said agency agreement dated 1 st April, 1964 had come to an end by efflux of time and/or has been novated or substituted and the terms and conditions of the agreement are not binding upon the parties. It is submitted that even this issue has to be referred to arbitration and can be decided only in arbitration under Article 17 of the agency agreement. Mr. Zaiwala, learned senior counsel placed reliance on the judgment of the Supreme Court in the case of Chloro Controls (I) P. Ltd. Vs. Severn Trent Water Purification Inc and Ors. (2013) 1 SCC 641. Reliance is placed on paragraphs 129 to 134 which read thus :

> "129. We are not oblivious of the principle 'Kompetenz kompetenz'. It requires the arbitral tribunal to rule on its own jurisdiction and at the first instance. One school of thought propagates that it has duly the positive effect as it enables the arbitrator to rule on its own jurisdiction as it widely recognized international arbitration. However, the negative effect is equally important, that the Courts are deprived of their jurisdiction. The arbitrators are to be not the sole judge but first judge, of their jurisdiction.

In other words, it is to allow them to come to a decision on their own jurisdiction prior to any court or other judicial authority and thereby limit the jurisdiction of the national courts to review the award. The kompetenz kompetenz rule, thus, concerned not only is the positive but also the negative effect of the arbitration agreement. (refer Fouchard Gaillard Goldman on International Commercial Arbitration)

130. This policy has found a favourable mention with reference to the New York Convention in some of the countries. This is one aspect. The more important aspect as far as Chapter I of Part II of the 1996 Act is concerned, is the absence of any provision like Section 16 appearing in Part I of the same Act. Section 16 contemplates that the arbitrator may determine its own jurisdiction. Absence of such a provision in Part II, Chapter I is suggestive of the requirement for the Court to determine the Asmita 7/22 .. 8 .. ARBP-446/03 @ Suit No.2570/03 ingredients of Section 45, at the threshold itself. It is expected of the Court to answer the question of validity of the arbitration agreement, if a plea is raised that the agreement containing the arbitration clause or the arbitration clause itself is null and void, inoperative or incapable of being performed. Such determination by the Court in

accordance with law would certainly attain finality and would not be open to question by the arbitral tribunal, even as per the principle of prudence. It will prevent multiplicity to litigation and re-agitating of same issues over and over again. The underlining principle of finality in Section 11(7) would be applicable with equal force while dealing with the interpretation of Sections 8 and 45. Further, it may be noted that even the judgment of this Court in SBP & Co. (supra) takes a view in favour of finality of determination by the Court despite the language of Section 16 in Part I of the 1996 Act. Thus, there could hardly be any possibility for the Court to take any other view in relation to an application under Section 45 of the 1996 Act. Since, the categorization referred to by this Court in the case of National Insurance Company Ltd. (supra) is founded on the decision by the larger Bench of the Court in the case of SBP & Co. (supra), we see no reason to express any different view. The categorization falling under para 22.1 of the National Insurance Company case (supra) would certainly be answered by the Court before it makes a reference while under para 22.2 of that case, the Court may exercise its discretion and decide the dispute itself or refer the dispute to the arbitral tribunal. Still, under the cases falling under para 22.3, the Court is expected to leave the determination of such dispute upon the arbitral tribunal itself. But wherever the Court decides in terms of categories mentioned in paras 22.1 and 22.2, the decision of the Court is unreviewable by the arbitral tribunal.

131. Another very significant aspect of adjudicating the matters initiated with reference to Section 45 of the 1996 Act, at the threshold of judicial proceedings, is that the finality of the decision in regard to the fundamental issues stated under Section 45 would further the cause of justice and interest of the parties as well. To illustratively demonstrate it, we may give an example. Where party 'A' is seeking reference to arbitration and party 'B' raises objections going to the very root of the matter that the arbitration agreement is null and void, inoperative and incapable of being performed, such objections, if left open and not decided finally at the threshold itself may result in not only parties being compelled to pursue arbitration proceedings by spending time, money and efforts but even the arbitral tribunal would have to spend valuable time in adjudicating the complex issues relating to the dispute between the parties, that may finally prove to be in vain and futile. Such adjudication by the arbitral tribunal may be rendered ineffective or even a nullity in the event the courts upon filing of an award and at execution stage held that agreement between the parties was null and void inoperative and incapable of being performed. The Court may also hold that the arbitral Asmita 8/22 .. 9 .. ARBP-446/03 @ Suit No.2570/03 tribunal had no jurisdiction to entertain and decide the issues between the parties. The issue of jurisdiction normally is a mixed question of law and facts. Occasionally, it may also be a question of law alone. It will be appropriate to decide such questions at the beginning of the proceedings itself and they should have finality. Even when the arbitration law in India contained the provision like Section 34 of the 1940 Act which was somewhat similar to Section of the English Arbitration Act, 1889, this Court in the case of Anderson Wright Ltd. (supra) took the view that while dealing with the question of grant or refusal of stay as contemplated under Section 34 of the 1940 Act, it would be incumbent upon the Court to decide first of all whether there is a binding agreement for arbitration between the parties to the suit or not. Applying the analogy thereof will fortify the view that determination of fundamental issues as contemplated under Section 45 of the 1996 Act at the very first instance by the judicial forum is not only appropriate but is also the legislative intent. Even, the language of Section 45 of the 1996 Act suggests that unless the Court finds that an agreement is null and void, inoperative and incapable of

being performed, it shall refer the parties to arbitration.

Correctness of Law stated in Sukanya

132. Though rival contentions have been raised before us on the correctness of the judgment of this Court in Sukanya Holdings Pvt. Ltd. (supra), Mr. Salve vehemently tried to persuade us to hold that this judgment does not state the correct exposition of law and to that effect it needs to be clarified by this Court in the present case. On the contrary, Mr. Nariman argued that this judgment states the correct law and, in fact, the principles stated should be applied to the present case.

133. The ambit and scope of Section 45 of the 1996 Act, we shall be discussing shortly but at this stage itself, we would make it clear that it is not necessary for us to examine the correctness or otherwise of the judgment in the case of Sukanya (supra). This we say for varied reasons. Firstly, Sukanya was a judgment of this Court in a case arising under Section 8 Part I of the 1996 Act while the present case relates to Section 45 Part II of the Act. As such that case may have no application to the present case. Secondly, in that case the Court was concerned with the disputes of a partnership concern. A suit had been filed for dissolution of partnership firm and accounts also challenging the conveyance deed executed by the partnership firm in favour of one of the parties to the suit. The Court noticing the facts of the case emphasized that where the subject matter of the suit includes subject matter for arbitration agreement as well as other disputes, the Court did not refer the matter to arbitration in terms of Section 8 of the Act. In the case in hand, there is a mother agreement and there are other ancillary agreements to the mother agreement. It is a case of composite transaction between the same parties or the parties claiming through or under them falling under Section 45 of Asmita 9/22 .. 10 .. ARBP-446/03 @ Suit No.2570/03 the Act. Thus, the dictum stated in para 13 of the judgment of Sukanya would not apply to the present case. Thirdly, on facts, the judgment in Sukanya's case, has no application to the case in hand.

134. Thus, we decline to examine the merit or otherwise of this contention."

10. Mr. Kamat, learned counsel appearing for the respondent on the other hand submits that under Article 17 of the agency agreement, that the dispute can be referred to arbitration only if any difference of opinion or any claim or dispute arises out of the said agency agreement and not otherwise.

It is submitted that none of the claims made by the respondents or dispute or differences arise under the said agency agreement and thus disputes which are subject matter of the suit cannot be referred to arbitration. Learned counsel invited my attention to paragraphs 3.5 to 3.8, 3.13, 3.14, 3.29, 3.36, 3.44, 5 and 10 of the plaint in support of his submission that the averments in the plaint would indicate that none of the claims and/or disputes arise under the agency agreement. Learned counsel submits that there were change of activities. Nature of the work carried out and what was contemplated under the agreement was different. The petitioners had given an assurance to the respondents of entering into joint venture. Respondents had accordingly invested about 15 Crores.

11. Mr. Kamat learned counsel submits that the agency agreement dated 1st April, 1964 stood novated and became null and void. None of the disputes arose under the said agreement. None of the claims made in the suit are made under the said agency agreement. Respondents have not made any claim for commission. It is submitted that on the basis of mutual Asmita 10/22 .. 11 .. ARBP-446/03 @ Suit No.2570/03 understanding and trust between the parties, petitioner continued its operation and business activities in India through respondents as its sole and exclusive agents though the activities carried out by the respondents were beyond the scope of the agreement. All such subsequent activities performed by the respondents as sole and exclusive agents of the petitioner in India were under a oral arrangement entered into between the parties and were outside the scope of agency agreement dated 1st April, 1964.

12. Mr. Kamat, learned counsel for the respondent submits that the respondents have carried out activities for handling Samudera containers which admittedly did not belong to the petitioners and thus claim arising out of such activities could never be within the scope of agency agreement. It is submitted by the learned counsel that the respondents have claimed damages also against the petitioner as the petitioner had committed breach of the promises to have a joint venture with the respondents. Respondents have also claimed the amount which the respondents have spent for the proposed joint venture. Learned counsel submits that the respondents will have to establish in the suit that the said agency agreement was novated by joint venture and such issue cannot be referred to arbitration. It is submitted that the plaint filed by the respondents as it stands on the face of it beyond the scope of arbitration agreement and beyond the scope of agency agreement. My attention is invited to letter dated 7 th October, 2002 from the advocates of the respondents to the petitioners in which it was contended by the respondents that the agency agreement dated 1st April, 1964 had become absolute and stood novated and thus the arbitration clause under the said agency agreement could not be invoked. Learned counsel submits that the Asmita 11/22 .. 12 .. ARBP-446/03 @ Suit No.2570/03 transactions which could be governed by agency agreement and transactions which are subject matter of suit are totally separate and distinct. Learned counsel submits that in view of the novation, arbitration agreement recorded in agency agreement has become null and void, inoperative and no action under the said agreement can be initiated under section 44 of the Arbitration and Conciliation Act, 1996. Learned counsel distinguished the judgment of the Supreme Court in case of Chloro Control (supra).

13. Mr. Kamat learned counsel for the respondent placed reliance on the judgment of the Supreme Court in case of Sukanya Holdings Private Limited Vs. Jayesh H. Pandya (2003) 5 SCC 531 in support of his submission that even if part of the claims are within the scope of arbitration agreement and part of the claims are out side the arbitration agreement, no part of the claim can be referred to arbitration and entire dispute has to be tried by a Civil Court. It is submitted that the judgment of Supreme Court in Sukanya Holding would apply to the facts of this case and not the case of Chloro Control (supra).

14. Mr. Kamat learned counsel then submits that the application of the petitioner under section 45 of the Act is not a bona fide application. On 10th June, 2002, the petitioners had invoked arbitration agreement. On 11 th June, 2002, respondents had denied arbitration. On 28 th April, 2003, respondents filed a suit in this court. On 24 th July, 2003 Supreme Court passed an order in

arbitration application filed by the petitioner holding that Indian Law would not apply and law of Japan would apply. On 2 nd October, 2003 petitioner filed this petition under section 45 and did not pursue this Asmita 12/22 .. 13 .. ARBP-446/03 @ Suit No.2570/03 petition for ten years. Learned counsel placed reliance on minutes of the arbitration meeting held on 16 th December, 2006 which records that arbitration petition filed by the petitioner in this court was pending. Petitioner did not take any steps to pursue the said petition. Only after award is rendered by the arbitral tribunal in respect of the claims made by the petitioner, petitioner has now pursued this petition deliberately. It is submitted that in any event since the arbitral tribunal has already rendered an award, arbitration agreement does not survive. Arbitration tribunal has become functus officio.

15. Mr. Zaiwala learned senior counsel in rejoinder submits that under the said agency agreement, the respondents were appointed as general agents and were required to provide necessary agency services for all vessels owned, operated, chartered or managed by the petitioners in the area as shall from time to time be required by the petitioner without prejudice to the generality of the specific services recorded in article 2 of the agreement. Learned senior counsel submits that the vessel Samudera was one of such vessel which was operated and or chartered or managed by the petitioner in respect of which various services were provided by the respondents and in respect thereof claims are made by the respondents in the suit. The said services were also provided under the same agency agreement and in particular under article 2. Learned senior counsel submits that even if there is difference of opinion or claim or dispute arising out of this agreement, it is mandatory that the same shall be referred to arbitration. Suit is not maintainable for adjudication of such claims. Reliance is placed on article 14 of the agency agreement in support of the submission that the said Asmita 13/22 .. 14 .. ARBP-446/03 @ Suit No.2570/03 agreement shall continue in force indefinitely subject to cancellation by mutual consent of parties. The said agreement was thus valid as the same is not terminated. Under Article 6 of the agency agreement, the respondents were permitted to appoint some agents. Learned senior counsel submits that whether respondent could claim extra or any amount for additional work if done or not such disputes and differences shall be decided by the arbitrator in arbitration agreement and cannot be decided by the civil court. Learned senior counsel submits that the suit filed by the respondent and this petition filed by the petitioner, are pending in this court. Even respondents did not take any steps to pursue the suit nor applied for dismissal of the petition filed by the petitioner. Learned senior counsel distinguished the judgment of the Supreme Court in case of Sukanya Holdings (supra). Learned senior counsel submits that the petitioner has satisfied the conditions laid down under section 45 of the Arbitration & Conciliation Act, 1996 and it is thus mandatory to refer the disputes which are subject matter of the suit to arbitration in accordance with article 17 of the agency agreement. It is mandatory that the parties to the suit be referred to arbitration under article 17 of the agency agreement and the suit filed by the respondent be disposed of.

REASONS AND CONCLUSIONS :

16. It is not in dispute that the respondents were appointed as general agents for area mentioned in the agency agreement by the petitioner for providing services to all the vessels whether owned, operated, chartered or managed by the petitioner from time to time. Services were to Asmita 14/22 .. 15 .. ARBP-446/03 @ Suit No.2570/03 be provided by the respondents without prejudice to the

generality of the services mentioned in article 2. Some of the clauses of the said agreement have been amended admittedly. Article 17 of the agency agreement which provides for referring the difference of opinion or any claim or dispute arising out of the said agency agreement to arbitration is admittedly not amended. The said agency agreement has not been terminated. Article 14 provides that the said agreement shall continue in force indefinitely subject to cancellation at any time after 90 days notice or by mutual consent of parties. When disputes in respect of the claims made by the petitioner were sought to be referred to arbitration, respondent refused to appoint an arbitrator. In para 3.3 of the plaint filed by the respondents herein it is averred that the said agency agreement remained unamended save and except for the addendum issued from time to time which pertained only to the changes in the agency commission from time to time. It is alleged in the plaint that on mutual understanding and trust the respondents carried out activities which were beyond the scope of agreement and those activities performed by the respondents as the sole and exclusive agents of the petitioner in India were under fresh arrangement entered into between the parties. It is the case of the respondents that the petitioner had offered and proposed joint venture to the respondents and simultaneously requested for reduction in the schedule of agency commission.

17. On perusal of the order passed by he Supreme Court in Arbitration Petition filed by the petitioner for appointment of arbitrator, it is clear that the Supreme Court had held that the parties had expressly agreed that the proper law prevailing in Japan governing the arbitration proceedings would Asmita 15/22 .. 16 .. ARBP-446/03 @ Suit No.2570/03 be applicable to he arbitration proceedings and the arbitration proceedings shall be conducted at Tokyo. Respondents never disputed the existence of arbitration agreement before the Supreme Court. Pursuant to the said order passed by Supreme Court, petitioner had filed proceedings before District Court of Tokyo for appointment of arbitrator. The said proceedings were opposed by the respondents. In the said proceedings the District Court of Tokyo rendered a finding that the parties continued the transaction based on agency agreement inspite of the change of practice. The District Court also considered the submissions made by the respondent that since 1981 the respondents had been doing agency business of transportation of container which the respondents had not done till then. The District Court rendered a finding that there was no evidence that the parties rescinded the agreement or concluded a new agreement which differed from the agency agreement. Parties had agreed at the time of concluding addendum that all the terms and conditions of the agency agreement remained unchanged in almost all the addendum. The arbitration agreement thus remained in force. The said order of District Court Tokyo was challenged by respondents in High Court of Tokyo and thereafter before Supreme Court of Japan and was unsuccessful.

Findings rendered by the District court on the issues including the issue whether arbitration agreement survived or not, has become final and conclusive. Reliance placed by Mr. Zaiwala learned senior counsel on those findings is proper in support of his submission that the same are binding on the parties.

18. A perusal of prayer (a) of the plaint clearly indicates that the respondents themselves seek an order and declaration that the agency Asmita 16/22 .. 17 .. ARBP-446/03 @ Suit No.2570/03 agreement dated 1st April, 1964 had come to an end by efflux of time and/or had been novated/substituted and the terms and conditions of the said agreement were not binding upon the

parties. A perusal of article 17 clearly indicates that the said clause is very wide and would cover such issue as to whether the said agreement has come to an end or not by virtue of efflux of time or had been novated and/or substituted.

19. A perusal of the reply of the respondent quoted in paragraph 11 of the petition, which is not disputed by the respondents clearly indicates that the respondents did not deny the existence and validity of agency agreement. In my view whether there was any novation or substitution of any agency agreement other than what was admitted by the parties has to be decided by the arbitrators under article 17 of the agency agreement and can not be decided by the Civil Court. Whether there was any assurance made to execute joint venture by the petitioner or not would also be an issue which arises under the agency agreement and has to be decided by the arbitral tribunal. In my view Mr. Zaiwala learned senior counsel is right in his submission by referring to article 2 in support of his submission that even the claims arising out of the activities carried out if any in respect of the vessel Samudera which was chartered or managed by the petitioner would fall under article 2 of the agency agreement. All claims for damages made by the respondents also has to be decided by the arbitral tribunal under article 17 of the agency agreement. Supreme Court in case of Chloro Control India Pvt. Ltd. (supra) has dealt with judgment of the Supreme Court in the case of Sukanya Holdings (supra) and has held that unless the court finds that the agreement is null and void, inoperative and incapable of being Asmita 17/22 .. 18 .. ARBP-446/03 @ Suit No.2570/03 performed, under section 45 of the Arbitration & Conciliation Act, 1996 it shall refer the parties to arbitration. Supreme Court has held that the judgment of Supreme Court in the case of Sukanya Holdings was arising under section 8 under Part I of the Arbitration Act whereas the proceedings before the Supreme Court were relating to section 45 under Part II of the Act and thus the judgment of the Supreme Court in the case of Sukanya Holdings may have no application to the proceedings under section 45 which fall in Part II of the Arbitration Act. I am respectfully bound by the judgment of the Supreme Court in case of Chloro Controls which squarely applies to he facts of this case. In my view, judgment of Supreme Court in case of Sukanya Holdings (supra) would not apply to the facts of this case.

20. Division Bench of this court in case of Mulheim Pipe Coatings Gmbh Vs. Wellspun Limited in the judgment delivered on 16th August, 2013 in Appeal (L) No. 206 of 2013 has adverted to the judgment of Supreme Court in case of Chloro Control India Pvt. Ltd. (supra) and various other judgments of the Supreme Court. Relevant paragraphs of the said judgment of the Division Bench are paragraphs 28, 29, 31, 35 which read thus :

> "28. Section 45 requires the Court to focus upon whether the arbitration agreement is null and void, inoperative or incapable of being performed. Parliament has carefully, in selecting the language of the statutory provision, required the Court to apply its mind to the subsistence and validity of the arbitration agreement and not to whether the main contract of which the arbitration agreement is but a collateral part is valid or continues to subsist. This must, with the evolution of the law on the subject, necessarily be so because an arbitration agreement is capable of surviving the invalidation or termination of the main contract between the parties.

Undoubtedly, there may be cases where the arbitration agreement may perish with the main contract itself. For instance, where the main contract between the parties is held not to have been executed at all as for instance Asmita 18/22 .. 19 .. ARBP-446/03 @ Suit No.2570/03 when a party to the agreement asserts that its signature on the contract is forged, it is but evident that the arbitration agreement would not exist, if the signature of the executant on the contract itself is found to be forged.

But even in such a case, the reason why the arbitration agreement perishes is because, in the finding of the Court, the arbitration agreement itself is found not to have been executed by both the parties.

29. The doctrine of separability which now is an established part of Indian law has statutorily been codified in Section 7 of the Arbitration Act of 1996 in the U.K. Section 7 provides that "unless otherwise agreed by the parties, an arbitration agreement which forms or was intended to form part of another agreement (whether or not in writing) shall not be regarded as invalid, non-existent or ineffective because that other agreement is invalid or did not come into existence or has become ineffective and it shall for that purpose be treated as a distinct agreement". The consequence of the doctrine of separability has been explained in Russell on Arbitration as follows:

"Consequences of separability. The doctrine of separability underlines the potential width of an arbitration agreement because it establishes that an arbitration agreement has a separate life from the matrix contract for which it provides the means of resolving disputes. This enables the arbitration agreement to survive breach or termination of the matrix contract of which it forms part. The consequence of this separate existence is that even if the matrix contract has been brought to an end, for example by accepted repudiation or frustration, the arbitration agreement continues in being in order to deal with any disputes in respect of liabilities under the matrix contract arising before or after termination."

Russell on Arbitration restates the position that Section 7 of the Arbitration Act, 1996 in the U.K. enables the arbitration agreement to survive not just the termination or breach of the matrix contract but even if the contract in which it is contained is regarded as invalid, non-existent or ineffective. Moreover, even where the matrix contract is held to be void, the arbitration agreement may still be upheld as a valid and independent agreement so that any dispute must be referred to arbitration.

31. We now formulate the essential features of the doctrine of separability. These are :

(i) The arbitration agreement constitutes a collateral term in the contract which relates to the resolution of disputes and not to the performance of the contract. Whereas the substantive terms of a contract define the rights and obligations of the parties, an arbitration agreement provides for modalities agreed upon by parties for the resolution of their disputes. Parties agree thereby to have their disputes resolved before an Asmita 19/22 .. 20 .. ARBP-446/03 @ Suit No.2570/03 arbitral tribunal as distinct from the ordinary courts of law in the jurisdiction;

(ii) Upon the termination of the main contract, the arbitration agreement does not ipso facto or necessarily come to an end;

(iii) The issue as to whether the arbitration agreement survives or perishes along with the main contract would depend upon the nature of the controversy and its effect upon the existence or survival of the contract itself;

(iv) If the nature of the controversy is such that the main contract would itself be treated as non est in the sense that it never came into existence or was void , the arbitration clause cannot operate, for along with the original contract, the arbitration agreement is also void. Similarly, though the contract was validly executed, parties may put an end to it as if it had never existed and substitute a new contract solely governing their rights and liabilities thereunder. Even in such a case, since the original contract is extinguished or annihilated by another, the arbitration clause forming a part of the contract would perish with it;

(v) There may, however, be cases where it is the future performance of the contract that has come to an end. Such an eventuality may arise due to a number of circumstances, in which one or both the parties may be discharged from further performance. Termination of the contract by one party, repudiation of the contract by one party and its acceptance by the other and frustration of the contract are some of the circumstances. The controversy in such matters arises upon or in relation to or in connection with the contract. In all such cases, the contract is not put an end to for all purposes because there may be rights and obligations which had arisen earlier when it had not come to an end. The contract subsists for those purposes and the arbitration clause would operate for those purposes;

(vi) The doctrine of separability requires, for the arbitration agreement to be null and void, inoperative or incapable of performance, a direct impeachment of the arbitration agreement and not simply a parasitical impeachment based on a challenge to the validity or enforceability of the main agreement. In other words, arguments for impeaching the arbitration agreement must be based on facts which are specific to the arbitration agreement. There may, of course, be facts which are specific to both the main agreement and the arbitration agreement, but there may well be facts which are specific to the main agreement, but not to the arbitration agreement. In the former case, the arbitration clause would perish with the main contract while in the latter case, it would not. Another way of considering the matter is whether it is the further performance of the contract that is brought to an end or it is the existence of the contract which is brought to an end. In the former case, where the further performance of the contract has been brought to an end, the arbitration clause would survive whereas when the existence of the contract is itself brought to an end, the arbitration clause would not survive.

Asmita

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35. The Learned Single Judge was, in our view, in error in coming to the conclusion that by agreeing to the MOU, parties had given a go by to the SPA "in toto" and that the SPA, on the date of the institution of the proceedings under Section 45, was null and void and inoperative. In holding that the arbitration clause had perished with the SPA in toto, the Learned Single Judge has, with respect, overlooked that under Section 45 what the Court was called upon to decide is not whether the main contract had been discharged, terminated or extinguished but whether the arbitration agreement has been rendered null and void, inoperative or incapable of performance. For that, the ground of challenge must be based on facts which are specific to the arbitration agreement. The arbitration agreement is distinct from the main contract of which it is an independent and separable part. Parties when they arrived at the MOU sought to settle the manner in which the pre-emptive rights under the SPA would be discharged by performance. When by their mutual agreement they purported to resolve the modalities for working out the performance of the clause on pre-emption, that did not render the arbitration agreement null and void, inoperative or incapable of performance."

21. The District Court of Tokyo and Supreme Court of India has already rendered a finding that arbitration agreement exists. In my view, since the suit filed by the respondent and the petition filed by the petitioner under section 45 of the Arbitration & Conciliation Act, 1996 remained pending all these years in this court when none of the parties took any steps, no prejudice would be caused to refer the parties to the arbitration in view of existence of arbitration agreement. In my view since the petitioner has satisfied all the conditions set out in section 45 of the Arbitration & Conciliation Act, Court has to refer the parties to arbitration and such disputes are governed by Arbitration agreement can not be decided by Civil Court. I am not inclined to accept the submission of Mr. Kamat learned counsel appearing for the respondents that the application of the petitioner under section 45 is not a bona fide application.

22. In my view there is no substance in the submission of Mr. Kamat, Asmita 21/22 .. 22 .. ARBP-446/03 @ Suit No.2570/03 learned counsel for the respondents that the arbitration agreement is exhausted on the arbitral tribunal rendering an award in respect of the claims made by the petitioner. Since the said agreement had not been terminated and the arbitration agreement was not deleted, even successive reference under the same arbitration agreement is permissible. In my view parties thus have to be referred to arbitration under the same arbitration agreement i.e. article 17 of the agency agreement which continued to exist all through out.

23. I, therefore, pass the following order :

(a) Arbitration Petition No. 446 of 2003 is made absolute in terms of prayer clause (a).

(b) In view of the order passed by this court directing the parties to refer to arbitration in terms of prayer clause (a) of the petition, Suit No. 2570 of 2003 filed by the respondents in this Court is disposed of. No order as to costs.

(R.D.DHANUKA) On the oral application of Mr.Kamat, learned counsel appearing for the respondent, operation of this order is stayed for a period of four weeks from today.

(R.D.DHANUKA)

Asmita