* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

Reserved on: 17th July, 2019
Pronounced on: 23rd September, 2019

\+ CS(COMM) 257/2019

JES & BEN GROUPO PVT. LTD. & ORS. ..... Plaintiffs

Through: Mr. Mohit Chaudhary, Ms. Garima Sharma, Mr. Balwinder Singh and Mr. Kunal Sachdeva, Advocates.

versus

HELL ENERGY MAGYARORZAG KFT. (HELL ENERGY HUNGRY LTD.) & ANR. ..... Defendants

Through: Mr. Sachin Datta, Senior Advocate with Ms. Bindra Rana, Mr. Nihit Nagpal and Mr. Anuj Jhawar, Advocates for D-1.
Mr. Samir Malik, Ms. Iti Agarwal and Mr. Paritosh Goel, Advocates for D-2.

CORAM: JUSTICE SANJEEV NARULA

JUDGMENT

SANJEEV NARULA, J.:

I.A. 8948/2019

1. Defendant No.1 has filed the present application under Section 45 of the Arbitration and Conciliation Act, 1996 (hereinafter 'the Act') for the dismissal of the suit on the ground that the subject matter of the suit is covered by the arbitration agreement between the parties.

2. Plaintiff No. 2- Mr. Harpreet Sachdeva is an entrepreneur and is the promoter, director and authorized representative of Plaintiff No.1 company.

The said company is headquartered at New Delhi and is engaged in the business of import, distribution, marketing and advertising of food and beverage products. Defendant No. 1 is a company incorporated under the laws of Hungary and is engaged in the business of production and sale of 'Hell Energy Drinks' and development of the brand. Defendant No. 2 is the agent of Defendant No. 1 and is the India National Sales Director of Defendant No.1. Plaintiff No. 3 is stated to be the sub-distributor of Plaintiff No.1 who is stated to be aggrieved by the actions of the Defendants and has joined as a party.

Brief Factual Background

3. Plaintiff No. 1 and Defendant No. 1 entered into an Exclusive Distribution Agreement (hereinafter referred to as 'the Agreement') dated 4th October 2017 granting Exclusive Distribution Rights to Plaintiff No. 1 in respect of the product *'Hell Energy'*(energy drink). In terms of Clause 9.2.5 of the Agreement, *inter alia* due to failure of Plaintiff No. 1 to fulfil 75% of Annual Order Volume, Defendant No. 1 terminated the Agreement on 25th March 2019.

4. On account of aforesaid termination, Plaintiffs filed the present suit for injunction, cancellation, declaration, reconciliation/rendition of accounts and damages. Defendant No.1 relying upon Clause 10.13 of the Agreement submits that the subject matter of the present suit is governed by a foreign-seated International Commercial Agreement and hence the same is not maintainable in terms of Section 45 of the Act. The aforesaid clause reads as under:

> *"10.13. The Contracting Party undertake to resolve the disputes arising in an amicable way, and if this is ineffective, the parties specify the exclusive competence of the Arbitration Court attached to the Hungarian Chamber of Commerce and Industry, which proceeds according to its rules of procedure, to resolve the dispute. The Arbitration Court is composed of three Arbitrators, and the court is sitting in Budapest and the language of the procedure shall be Hungarian. The contracting parties accept the decision of the Arbitration Court as binding on them, and the costs of the procedure shall be borne by the losing party."*

5. Learned Counsel for Defendant No. 1 submits that both India and Hungary are contracting parties to the UNCITRAL Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention) and International Commercial Arbitration is to be treated in terms of Chapter I of Part-II of the Act and Part-I of the Act has no application. Since Plaintiff No. 1 has admitted the execution and validity of the agreement, it cannot on one hand seek to enforce the said agreement and on the other hand escape or avoid the arbitration clause. In support of his submissions, the counsel places reliance upon the judgment of the Supreme Court in ***Bharat Aluminium Company v. Kaiser Aluminium Technical Services Inc., (2012) 9 SCC 552***, the relevant portion whereof reads as under:

> ***"195.*** *With utmost respect, we are unable to agree with the conclusions recorded in the judgments of this Court in Bhatia International and Venture Global Engg. In our opinion, the provision contained in Section 2(2) of the Arbitration Act, 1996 is not in conflict with any of the provisions either in Part I or in Part II of the Arbitration Act, 1996. In a foreign-seated international commercial arbitration, no application for interim*

> *relief would be maintainable under Section 9 or any other provision, as applicability of Part I of the Arbitration Act, 1996 is limited to all arbitrations which take place in India**. Similarly, no suit for interim injunction simpliciter would be maintainable in India, on the basis of an international commercial arbitration with a seat outside India.**"*
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> *(emphasis supplied)*

6. Reliance is also placed on ***Shin-Etsu Chemical Co. Ltd. vs. Aksh Optifibre Ltd. and Anr., (2005) 7 SCC 234***, wherein the Supreme Court has held that the correct approach to be adopted by the trial court under Section 45 of the Act at the pre-reference stage, is to draw a *prima facie* finding as to the validity or otherwise of the arbitration agreement and refer the parties to arbitration. Affirming the aforenoted submissions, Learned Counsel on behalf of the Defendant No. 2, who is not a signatory to the Agreement, without prejudice to his rights and contentions submitted that disputes with a non-signatory to the arbitration agreement can also be referred to Arbitration, if the cause of action is arising out of the same agreement. In this regard, he also relied upon ***Chloro Controls India Private Limited vs. Severn Trent Water Purification Inc., (2013) 1 SCC 641***.

7. Per contra, Plaintiffs argued that the application is misconceived and suit is the most appropriate remedy, since Plaintiffs have challenged the validity of the arbitration agreement on the ground that it is contrary to the public policy of India. In view of Section 28 of the Indian Contract Act, 1872, the agreement is void and the arbitration agreement is wrongfully supportive in favour of the Defendants in terms of geography, language and laws and the same cannot be enforced. It would be financially and legally not viable for Plaintiffs to enforce the existing dispute resolution clause by approaching the

Arbitration tribunal envisaged under the agreement. During the course of arguments, Learned Counsel handed over a copy of written submissions praying that the same be considered as a reply to the Application. The request was allowed and the same was taken on record. The grounds urged therein are dealt in detail hereinafter.

Analysis and Findings

Scope and Power of the Court under Section 45 of the Act

8. The controversy in the present case revolves around the scope and power of the Court under Section 45 of the Act. The aforesaid provision confers powers on a Judicial Authority to refer parties to arbitration, at the request of one of the parties, unless it is found that the agreement is null and void, inoperative or incapable of being performed. Thus, Section 45 incorporates the salutary principle that the Court should not refer the parties to arbitration, when it finds that the agreement is null and void, inoperative and incapable of being performed. This is in line with the New York Convention. When a Court is approached with a request by one of the parties under the aforesaid provision, what would be the nature and scope of exercise of its power, has been clarified in the authoritative decision of the Supreme Court in ***Shin-Etsu Chemical Co. Ltd***. (supra). In the said judgment, there are two concurring views and one minority view. The relevant portion of the concurring view is as under:

> *"47. For all these reasons, I respectfully differ from the judgment of my esteemed Brother Sabharwal. I am of the view that the present matter needs to be remitted to the trial court, but not for a full trial as directed by the impugned judgment of the High Court.*

The application under Section 45 would have to be determined by the trial court after arriving at the prima facie satisfaction that there exists an arbitral agreement, which is "not null and void, inoperative or incapable of being performed". If the trial court finds thus, the parties shall be referred to arbitration.

* * *

51. With utmost respect to both of them, I am inclined to agree with the view expressed by learned Brother Srikrishna J. but only with a rider and a partly different reason which may I state below:-

> *The main issue is regarding the scope of power of any judicial authority including a regular civil court under Section 45 of the Act in making or refusing a reference of dispute arising from an international arbitration agreement governed by the provisions contained in Part III Chapter-I of the Act of 1996.* ***I respectfully Agree with learned Brother Srikrishna J. only to the extent that if on prima facie examination of the documents and material on record including the arbitration agreement on which request for reference is made by one of the parties, the judicial authority or the court decides to make a reference. It may merely mention the submissions and contentions of the parties and summarily decide the objection if any raised on the alleged nullity, voidness, inoperativeness or incapability of the arbitration agreement. In case, however, on a prima facie view of the matter which is required to be objectively taken on the basis of material and evidence produced by the parties on the record of the case, the judicial authority including a regular civil court, is inclined to reject the request for reference on the ground that the agreement is 'null and void' or 'inoperative' or 'incapable of being performed' within the meaning of Section 45 of the Act, the judicial authority or the court must afford full opportunities to the parties to lead whatever documentary or oral evidence they want to lead and then decide the question like trial of a preliminary issue on jurisdiction or limitation in regular civil suit and***

> ***pass an elaborate reasoned order. Where a judicial authority or the court refuses to make a reference on the grounds available under Section 45 of the Act, it is necessary for the judicial authority or the court which is seized of the matter to pass a reasoned order as the same is subject to appeal to the appellate court under Section 50(1)(a) of the Act and further appeal to this Court under Sub-section (2) of the said section."***
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> *(emphasis supplied)*

9. The minority view is as under:

> *"100. I am of the view that Indian Legislature has consciously adopted a conventional approach so as to save the huge expense involved in international commercial arbitration as compared to domestic arbitration.*
>
> *In view of the aforesaid discussion, I am of the view that under Section 45 of the Act, the determination has to be on merits, final and binding and not prima facie."*

10. A reading of the concurring views leaves no room for doubt that the scope of the power requires the Court to take a *prima facie* view of the matter objectively on the basis of the material and evidence produced by the parties on the record of the case. Hon'ble Mr. Justice D.M. Dharmadhikari, while concurring with Hon'ble Mr. Justice B.N. Srikrishnan, has further held that in case the Judicial Authority including a regular Civil Court is inclined to reject the request for reference on the ground that the agreement is null and void, inoperative or capable of being performed within the meaning of Section 45 of the Act, it must afford full opportunities to the parties to lead whatever documentary or oral evidence they want to and then decide questions like a trial of a preliminary issue on jurisdiction or limitation in regular civil suit and

subsequently pass an elaborate and reasoned order. In ***Sasan Power Ltd. v. North American Coal Corpn. (India) (P) Ltd., (2016) 10 SCC 813***, the Supreme Court held that the scope of inquiry under Section 45 of the Act in the following words:

> *"49. In our opinion, the scope of enquiry (even) under Section 45 is confined only to the question whether the arbitration agreement is "null and void, inoperative or incapable of being performed" but not the legality and validity of the substantive contract."*

Whether the Contract is Inoperative and Null and void?

11. Keeping the aforesaid principles in mind, I now proceed to examine, whether on the basis of the material placed on record, a *prima facie* view can be taken to allow the request of the applicant. This necessarily invites evaluation of the grounds urged by the Plaintiffs in opposition to the application. Plaintiffs' counsel referring to Section 28 of the Indian Contract Act, 1872 contended that the law does not allow parties to make contracts whereby they bargain in advance, the right not to resort to the Courts for the protection of their rights and determination of their liabilities. Such agreements take away rights of the parties to approach the Civil Courts even on issues pertaining to fraud and the same would not only be hit by the aforementioned provision but would also be contrary to the public policy. It has been further contended that there are allegations of fraud and serious malpractices and such contentions can only be settled in Court through furtherance of judicial evidence and cannot be gone into by the Arbitrator.

12. The contention of Plaintiffs is contrary to the settled principles of law laid

down by the Apex Court. When the parties have expressly entered into an agreement referring any dispute to arbitration, the same cannot be held to be contrary to public policy. In this regard the Judgment of the Supreme Court in ***World Sport Group (Mauritius) Ltd. v. MSM Satellite (Singapore) Pte. Ltd., (2014) 11 SCC 639*** is relevant where the Court has held as under:

> *"**38.** The Division Bench of the High Court has further held that Clause 9 of the Facilitation Deed insofar as it restricted the right of the parties to move the courts for appropriate relief and also barred the right to trial by a jury was void for being opposed to public policy as provided in Section 23 of the Indian Contract Act, 1872 and was also void for being an agreement in restraint of the legal proceedings in view of Section 28 of the said Act. Parliament has made the Arbitration and Conciliation Act, 1996 providing domestic arbitration and international arbitration as a mode of resolution of disputes between the parties and Exception 1 to Section 28 of the Indian Contract Act, 1872 clearly states that Section 28:*
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> > *"shall not render illegal a contract, by which two or more persons agree that any dispute which may arise between them in respect of any subject or class of subjects shall be referred to arbitration, and that only the amount awarded in such arbitration shall be recoverable in respect of the dispute so referred".*
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> *Clause 9 of the Facilitation Deed is consistent with this policy of the legislature as reflected in the Arbitration and Conciliation Act, 1996 and is saved by Exception 1 to Section 28 of the Indian Contract Act, 1872. The right to jury trial is not available under Indian laws. The finding of the Division Bench of the High Court, therefore, that Clause 9 of the Facilitation Deed is opposed to public policy and is void under Sections 23 and 28 of the Indian Contract Act, 1872 is clearly erroneous."*

13. The Plaintiffs have laid much emphasis on the allegations of fraud and

serious malpractices on the part of Defendants and have argued that such a situation can only be reconciled before a Civil Court. Before venturing to decide the aforesaid objection, it is first essential to understand the case set up by the Plaintiffs on the plea of fraud. The suit filed by the Plaintiffs is for cancellation, declaration, reconciliation/rendition of accounts. The plaint narrates that Plaintiff No. 2 [Harpreet Sachdeva @ Harry Sachdeva] is the promoter of Plaintiff No. 1 company and has been working for more than a decade in the field of manufacturing/distribution of drinks/food beverages. Plaintiff No.1 holds exclusive distribution contract for the product Hell Energy, for Indian Territory. Based on the understanding of exclusivity, Plaintiff No.1 invested about Rs. 8 crores and also put efforts by using personal connections in the trade and by holding seminars/meetings/ conferences for brand promotion. Plaintiff No. 1 made the unknown and new product into a well recognised brand in the Indian Territory. Due to efforts of Plaintiff No. 1, the product became the second most sold drink in the category in less than a year and is earning a revenue of about Rs. 14 crores for the year ending 31st March 2019. The contract has been illegally terminated and as a result, Plaintiffs are out of market which was created and developed by them from scratch. The sequence of events has been recounted, explaining as to how the distribution agreement came to be executed and thereafter Defendants defaulted in fulfilling their obligations under the said agreement. Plaintiffs have also elaborately articulated the efforts put in by them to build brand image of the product in the market for generating demand. The details of year wise expenses incurred by the Plaintiffs have also been set out in the plaint. The Plaintiffs have alleged that the Defendants were non responsive and there was procedural delay on their part in supply of the goods which

obstructed the distribution targets of the Plaintiff No.1. Credit notes raised by the Plaintiff No.1 were delayed and ignored and there was a non responsive approach on production planning, purchase order and other aspects. The termination dated 29th March 2019 is wrongful and arbitrary, based upon unfair and unreasonable clauses in the contract. The agreement contains one sided, unfair and unreasonable clauses which are liable to be struck down.

14. The plaint runs into more than 60 pages. However for the purpose of deciding the present application, the relevant portion which deals with the alleged cause of action for approaching the Court reads as under:

> *"10. Being harassed by the actions of the Defendants and being exposed to huge amounts in terms of money /energy/ resources, the Plaintiffs have approached this court so as to seek the prayers of injunction, cancellation, reconciliation, rendition of accounts and for damages etc. Due to the knee jerk reaction of sending frivolous termination, Plaintiffs are suffering damages to the extent of Rs. 2 Crores on monthly basis, which is due to the expenses on the maintaining the entire supply chain which has come to a standstill alongwith on job workforce of about direct 102employees. The cost of such persons/vehicles/office/godown/ professionals/computers/software etc. is running on daily basis. There are about 400 indirect persons working through dealership network amount towards these indirect persons are not being taken in account for the time being.*
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> *11. Being harassed by the actions of the Defendants, who are wanting to illegally encash on the efforts/money spent/works done by the Plaintiffs and being exposed to huge amounts in terms of money /energy/ resources, the Plaintiffs have approached this court so as to seek the prayers of injunction, cancellation and damages etc."*

15. A bare reading of the entire plaint does not disclose any allegation of fraud, much less serious fraud. The entire plaint is premised on the fact that Defendant No.1 has unlawfully terminated the contract based on the contractual provisions which according to the Plaintiffs are onerous, unreasonable and one sided. Thus, the allegations of fraud have only been raised to circumvent the Arbitration Clause, without any real substance. It is also important to note that the Supreme Court in several judgments has held the parties cannot be permitted to raise defence of fraud as a matter of convenience to avoid arbitration. In the present case, the bogey of fraud is set-forth with the sole intention that the dispute cannot be arbitrated upon. The suit actually is entirely based on Plaintiffs' allegations relating to the violations of the contractual terms and the resultant damages. Plaintiffs cannot be allowed to nullify the effect of the Arbitration Agreement only on the basis of an allegation of fraud simpliciter, without any corroborative material to justify such allegations.

16. In ***A. Ayyasamy v. A. Paramasivam, (2016) 10 SCC 386***, the Court while dealing with the plea of fraud raised as an objection to the application under Section 8 of the Act, has elaborately dealt with the question of fraud. Although the judgment deals with Section 8 of the Act, however the ratio is squarely applicable. The relevant portion reads as under:

> ***"25. In view of our aforesaid discussions, we are of the opinion that mere allegation of fraud simpliciter may not be a ground to nullify the effect of arbitration agreement between the parties. It is only in those cases where the court, while dealing with Section 8 of the Act, finds that there are very serious allegations of fraud which make a virtual case of criminal***

offence or where allegations of fraud are so complicated that it becomes absolutely essential that such complex issues can be decided only by the civil court on the appreciation of the voluminous evidence that needs to be produced, the court can sidetrack the agreement by dismissing the application under Section 8 and proceed with the suit on merits. *It can be so done also in those cases where there are serious allegations of forgery/fabrication of documents in support of the plea of fraud or where fraud is alleged against the arbitration provision itself or is of such a nature that permeates the entire contract, including the agreement to arbitrate, meaning thereby in those cases where fraud goes to the validity of the contract itself of the entire contract which contains the arbitration clause or the validity of the arbitration clause itself. Reverse position thereof would be that where there are simple allegations of fraud touching upon the internal affairs of the party inter se and it has no implication in the public domain, the arbitration clause need not be avoided and the parties can be relegated to arbitration. While dealing with such an issue in an application under Section 8 of the Act, the focus of the court has to be on the question as to whether jurisdiction of the court has been ousted instead of focusing on the issue as to whether the court has jurisdiction or not. It has to be kept in mind that insofar as the statutory scheme of the Act is concerned, it does not specifically exclude any category of cases as non-arbitrable. Such categories of non-arbitrable subjects are carved out by the courts, keeping in mind the principle of common law that certain disputes which are of public nature, etc. are not capable of adjudication and settlement by arbitration and for resolution of such disputes, courts i.e. public fora, are better suited than a private forum of arbitration. Therefore, the inquiry of the Court, while dealing with an application under Section 8 of the Act, should be on the aforesaid aspect viz. whether the nature of dispute is such that it cannot be referred to arbitration, even if there is an arbitration agreement between the parties. When the case of fraud is set up by one of the parties and on that basis that party wants to wriggle out of that arbitration agreement, a strict and meticulous inquiry into the allegations of fraud is needed and only when the Court is*

satisfied that the allegations are of serious and complicated nature that it would be more appropriate for the Court to deal with the subject-matter rather than relegating the parties to arbitration, then alone such an application under Section 8 should be rejected."

(emphasis supplied)

17. It is also pertinent to note that the exclusive distribution agreement is not standard form of contract executed between Plaintiff No. 1 and Defendant No.1. The said agreement is a well negotiated International Commercial Arbitration Agreement. Plaintiff No.1 admits the execution and validity of the agreement. Thus, as a matter of fact, on one hand, Plaintiff No. 1 is trying to enforce the said agreement, and on the other hand is trying to escape the Arbitration Clause alleging that the agreement is null and void, inoperative and incapable of being performed. The Plaintiffs' allegations relating to malpractices and any predatory practices, are all disputed questions of fact. Defendant No.1 has alleged that Plaintiff No. 1 has failed to fulfil 75 percent of the annual order volume in accordance with Clause 9.2.5 of the terms of the Agreement and that it was constrained to terminate the Agreement. The Plaintiffs' allegations regarding malpractices and predatory practices, are well within the scope of adjudication by the Arbitrator in accordance with the terms of Arbitration Agreement. These allegations do not *prima facie* render the agreement to be null and void, inoperative and incapable of being performed. The allegations of the Plaintiff regarding the terms and conditions of the contract being onerous and unreasonable are also questions which would have to be examined by the Arbitrator and cannot be a ground to avoid the Arbitration Clause.

Disputes with a Non Signatory to the Arbitration Agreement

18. The Plaintiffs have alleged that the disputes raised in the suit are not independent or isolated between Plaintiff No. 1 and Defendant No. 1 but are dependent and interconnected with material issues involving other parties who are not signatories to the Arbitration Agreement. The Arbitrator cannot arbitrate the disputes since Plaintiff No. 2 and Defendant No. 2, are not parties to the Arbitration Clause and they cannot be referred to Arbitration. Reliance in this behalf has been placed on the judgment of Supreme Court in ***Venture Global Engineering v. Satyam Computer Services Ltd. and Anr. (2006) 4 SCC 190.*** What is the case set up against the non signatory to the Arbitration Agreement? In paragraph 12 of the plaint, the parties have been introduced. Plaintiff No. 2 [Mr. Harpreet Sachdeva] is Director and authorised representative of Plaintiff No. 1 and Plaintiff No. 3 is stated to be sub-distributor of Hell Energy drinks operating in Central Delhi. Defendant No. 2 is arrayed as the agent of its Principal (Defendant No.1) sitting aboard and India National Sales Director of Defendant No. 1. The relief sought against Defendant No. 2 is for damages. He is not a signatory to the exclusive distribution agreement and is arrayed in the capacity of representative of Defendant No.1. It has also been alleged that he is liable for damages on account of actions done under/on instructions of Defendant No. 1 company. All the allegations are related to termination of the agreement and the damages arising therefrom. It is thus apparent that the plaint is an example of clever drafting, with the sole intent to wriggle out of the application of Section 45 of the Act. Plaintiffs cannot be permitted to escape the arbitration process merely by impleading non signatories as parties to the suit. There is no privity of contract with Defendant No.2 and he cannot be vicariously held

liable for the actions of Defendant No.1. The suit also does not demonstrate any such liability. Plaintiff No.2 also has no independent cause of action and is not a necessary party to the suit. The above noted parties are added in order to negate the arbitration clause, with the aim of avoiding referral of the suit to arbitration. Further, as contended by Defendant No. 2, without prejudice to the foregoing contention, even if he is not a signatory to the Arbitration Agreement, since the disputes raised in the suit relates to the actions of Defendant No. 2 in connection with the Arbitration Agreement, he can also be referred to arbitration. The Supreme Court has held that even a non signatory to the arbitration agreement can be referred to arbitration if the cause of action is arising out of one agreement and the disputes arise out of the same contract. A reference in this regard may be made to the following decisions of the Supreme Court in ***Chloro Controls India Private Limited vs. Severn Trent Water Purification Inc., (2013) 1 SCC 641.*** The relevant portion of the said judgment reads as under:

> *"70. Normally, arbitration takes place between the persons who have, from the outset, been parties to both the arbitration agreement as well as the substantive contract underlining (sic underlying) that agreement. But, it does occasionally happen that the claim is made against or by someone who is not originally named as a party. These may create some difficult situations, but certainly, they are not absolute obstructions to law/the arbitration agreement. Arbitration, thus, could be possible between a signatory to an arbitration agreement and a third party. Of course, heavy onus lies on that party to show that, in fact and in law, it is claiming "through" or "under" the signatory party as contemplated under Section 45 of the 1996 Act. Just to deal with such situations illustratively, reference can be made to the following examples in Law and Practice of Commercial Arbitration in England (2nd Edn.) by Sir Michael J. Mustill:*

"1. The claimant was in reality always a party to the contract, although not named in it.
2. The claimant has succeeded by operation of law to the rights of the named party.
3. The claimant has become a party to the contract in substitution for the named party by virtue of a statutory or consensual novation.
4. The original party has assigned to the claimant either the underlying contract, together with the agreement to arbitrate"

71. Though the scope of an arbitration agreement is limited to the parties who entered into it and those claiming under or through them, the courts under the English law have, in certain cases, also applied the "group of companies doctrine". This doctrine has developed in the international context, whereby an arbitration agreement entered into by a company, being one within a group of companies, can bind its non-signatory affiliates or sister or parent concerns, if the circumstances demonstrate that the mutual intention of all the parties was to bind both the signatories and the non-signatory affiliates. This theory has been applied in a number of arbitrations so as to justify a tribunal taking jurisdiction over a party who is not a signatory to the contract containing the arbitration agreement.[Russell on Arbitration (23rd Edn.)]

72. This evolves the principle that a non-signatory party could be subjected to arbitration provided these transactions were with group of companies and there was a clear intention of the parties to bind both, the signatory as well as the non-signatory parties. In other words, "intention of the parties" is a very significant feature which must be established before the scope of arbitration can be said to include the signatory as well as the non-signatory parties.

73. A non-signatory or third party could be subjected to arbitration without their prior consent, but this would only be in exceptional cases. The court will examine these exceptions from

the touchstone of direct relationship to the party signatory to the arbitration agreement, direct commonality of the subject-matter and the agreement between the parties being a composite transaction. The transaction should be of a composite nature where performance of the mother agreement may not be feasible without aid, execution and performance of the supplementary or ancillary agreements, for achieving the common object and collectively having bearing on the dispute. Besides all this, the court would have to examine whether a composite reference of such parties would serve the ends of justice. Once this exercise is completed and the court answers the same in the affirmative, the reference of even non-signatory parties would fall within the exception afore-discussed.

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102. Joinder of non-signatory parties to arbitration is not unknown to the arbitration jurisprudence. Even the ICCA's Guide to the Interpretation of the 1958 New York Convention also provides for such situation, stating that when the question arises as to whether binding a non-signatory to an arbitration agreement could be read as being in conflict with the requirement of written agreement under Article I of the Convention, the most compelling answer is "no" and the same is supported by a number of reasons.

103. Various legal bases may be applied to bind a non-signatory to an arbitration agreement:

103.1. The first theory is that of implied consent, third-party beneficiaries, guarantors, assignment and other transfer mechanisms of contractual rights. This theory relies on the discernible intentions of the parties and, to a large extent, on good faith principle. They apply to private as well as public legal entities.

103.2. The second theory includes the legal doctrines of agent-principal relations, apparent authority, piercing of veil (also called "the alter ego"), joint venture relations, succession and estoppel. They do not rely on the parties' intention but rather on

the force of the applicable law."

Similar view has been taken by the Supreme Court in ***Cheran Properties Limited vs. Kasturi and Sons Limited and Ors., (2018) 16 SCC 413***.

19. In view of the aforesaid judgments of the Supreme Court and the facts noted above, I hold that the disputes raised by the Plaintiff No.1 can be referred to Arbitration and the Tribunal can further adjudicate whether Defendant No. 2 can be arrayed as a party to the same proceedings.

Court of Natural Jurisdiction

20. Plaintiffs have contended that there is no other Court which can be construed as court of "natural jurisdiction" since no part of cause of action in connection with the present suit has arisen outside India. The Plaintiffs further contends that Hungarian Chambers of Commerce is not the appropriate or convenient forum to resolve the disputes between the Plaintiffs and Defendants. Plaintiff No.1 does not dispute that it voluntarily entered into the Exclusive Distribution Agreement with Defendant No. 1. The agreement is valid and binding. The Hungarian Chambers of Commerce at Budapest was agreed by the parties as the only appropriate forum to resolve the present disputes. *Forum Non Conveniens* alleged by the parties cannot make a subject matter non-arbitrable or incapable of being performed. In this regard, reference may be made to the decision of the Supreme Court in ***Harmony Innovation Shipping Ltd. Gupta Coal Indian Ltd and Ors., AIR 2015 SC 1504***. The relevant portion reads as under:

"41. In Dozco [(2011) 6 SCC 179 : (2011) 3 SCC (Civ) 276] , the Court referred to Article 22 and Article 23 of the agreement,

which dealt with the governing laws and arbitration. Article 22.1 in the said case provided that the agreement shall be governed by and construed in accordance with the laws of the Republic of Korea. Article 23.1, which dealt with arbitration, stipulated that all disputes arising in connection with the agreement, shall be finally settled by arbitration in Seoul, Korea or such other place as the parties may agree in writing, pursuant to the rules of agreement then in force of the ICC. The Court referred to the decisions in Bhatia International [(2002) 4 SCC 105] , Indtel Technical Services [(2008) 10 SCC 308] , Citation Infowares Ltd. [(2009) 7 SCC 220] , NTPC v. Singer Co. [(1992) 3 SCC 551] and while analysing the import of Clause 23.1, the Court placed heavy reliance on Naviera Amazonica Peruana S.A. [(1988) 1 Lloyd's Rep 116 (CA)] and held thus: (Dozco case [(2011) 6 SCC 179 : (2011) 3 SCC (Civ) 276] , SCC pp. 188-89, paras 19-20)

"19. In respect of the bracketed portion in Article 23.1, however, it is to be seen that it was observed in Naviera case [(1988) 1 Lloyd's Rep 116 (CA)] :

*'... It seems clear that the submissions advanced below confused the legal "seat", etc. of an arbitration with the geographically convenient place or places for holding hearings. This distinction is nowadays a common feature of international arbitrations and is helpfully explained in Redfern and Hunter [**Ed.**: Redfern and Hunter on International Arbitration.] in the following passage under the heading "The Place of Arbitration":*

"The preceding discussion has been on the basis that there is only one 'place' of arbitration. This will be the place chosen by or on behalf of the parties; and it will be designated in the arbitration agreement or the terms of reference or the minutes of proceedings or in some other way as the place or 'seat' of the arbitration. This does not mean, however, that the Arbitral Tribunal must hold all its meetings or hearings at the place of arbitration. International commercial arbitration often involves people of many different nationalities, from many different countries. In these circumstances, it is by no means unusual for an Arbitral Tribunal to hold meetings — or even hearings — in a

place other than the designated place of arbitration, either for its own convenience or for the convenience of the parties or their witnesses….

It may be more convenient for an Arbitral Tribunal sitting in one country to conduct a hearing in another country — for instance, for the purpose of taking evidence…. In such circumstances, each move of the Arbitral Tribunal does not of itself mean that the seat of the arbitration changes. The seat of the arbitration remains the place initially agreed by or on behalf of the parties."

These aspects need to be borne in mind when one comes to the Judge's construction of this policy.'

It would be clear from this that the bracketed portion in the article was not for deciding upon the seat of the arbitration, but for the convenience of the parties in case they find to hold the arbitration proceedings somewhere else than Seoul, Korea. The part which has been quoted above from Naviera Amazonica Peruana S.A. v. Compania International de Seguros Del Peru [(1988) 1 Lloyd's Rep 116 (CA)] supports this inference.

20. In that view, my inferences are that:

(i) The clear language of Articles 22 and 23 of the distributorship agreement between the parties in this case spells out a clear agreement between the parties excluding Part I of the Act.

(ii) The law laid down in Bhatia International v. Bulk Trading S.A. [(2002) 4 SCC 105] and Indtel Technical Services (P) Ltd. v. W.S. Atkins Rail Ltd. [(2008) 10 SCC 308] , as also in Citation Infowares Ltd. v. Equinox Corpn. [(2009) 7 SCC 220] is not applicable to the present case.

(iii) Since the interpretation of Article 23.1 suggests that the law governing the arbitration will be Korean Law and the seat of arbitration will be Seoul in Korea, there will be no question of applicability of Section 11(6) of the Act and the appointment of arbitrator in terms of that provision."

* * *

48. In the present case, the agreement stipulates that the contract is to be governed and construed according to the English law.

This occurs in the arbitration clause. Mr Viswanathan, learned Senior Counsel, would submit that this part has to be interpreted as a part of "curial law" and not as a "proper law" or "substantive law". It is his submission that it cannot be equated with the seat of arbitration. As we perceive, it forms as a part of the arbitration clause. There is ample indication through various phrases like "arbitration in London to apply", arbitrators are to be the members of the "London Arbitration Association" and the contract "to be governed and construed according to the English law". It is worth noting that there is no other stipulation relating to the applicability of any law to the agreement. There is no other clause anywhere in the contract. That apart, it is also postulated that if the dispute is for an amount less than US $50,000 then, the arbitration should be conducted in accordance with small claims procedure of the London Maritime Arbitration Association. When the aforesaid stipulations are read and appreciated in the contextual perspective, "the presumed intention" of the parties is clear as crystal that the juridical seat of arbitration would be London. In this context, a passage from Mitsubishi Heavy Industries Ltd. v. Gulf Bank K.S.C. [(1997) 1 Lloyd's Rep 343 (CA)] is worth reproducing:

> *"It is of course both useful and frequently necessary when construing a clause in a contract to have regard to the overall commercial purpose of the contract in the broad sense of the type and general content, the relationship of the parties and such common commercial purpose as may clearly emerge from such an exercise. However, it does not seem to me to be a proper approach to the construction of a default clause in a commercial contract to seek or purport to elicit some self-contained 'commercial purpose' underlying the clause which is or may be wider than the ordinary or usual construction of the words of each sub-clause will yield."*

* * *

50. Thus, interpreting the clause in question on the bedrock of the aforesaid principles it is vivid that the intended effect is to have the seat of arbitration at London. The commercial

background, the context of the contract and the circumstances of the parties and in the background in which the contract was entered into, irresistibly lead in that direction. We are not impressed by the submission that by such interpretation it will put the respondent in an advantageous position. Therefore, we think it would be appropriate to interpret the clause that it is a proper clause or substantial clause and not a curial or a procedural one by which the arbitration proceedings are to be conducted and hence, we are disposed to think that the seat of arbitration will be at London."

21. In view of the aforegoing decision, this objection of the Plaintiff is devoid of merit and is rejected.

Incapable of Being Performed

22. In the plaint, the Plaintiffs have made averments challenging the validity of the arbitration agreement. Plaintiffs allege that allowing arbitration in accordance with Hungarian Chamber of Commerce is a gross abuse of the judicial process and is an attempt to harass the Plaintiffs by engaging them in a protracted and expensive legal battle at Hungary. Plaintiffs have also alleged that the clause was a standard format, dotted line contract and there would have been no occasion for the Plaintiffs to bargain or to assume to have equal bargaining power. The contentions are grossly misconceived. The parties of their own volition have agreed to subject the arbitration under Hungarian law. After having performed the contract for some time, when the disputes have arisen, Plaintiffs cannot be permitted to allege that the terms and conditions were executed under coercion. It is well settled that where both the parties are people having expertise in the field, and the contract is a commercial transaction, the plea of unequal bargaining power cannot be raised to avoid arbitration. In this regard, it would be apposite to the judgment of the

Supreme Court in ***Central Inland Water Transport Corporation Limited* v. *Brojanath Ganguly, (1986) 3 SCC 156***. The relevant portion reads as under:

> *"89. Should then our courts not advance with the times? Should they still continue to cling to outmoded concepts and outworn ideologies? Should we not adjust our thinking caps to match the fashion of the day? Should all jurisprudential development pass us by, leaving us floundering in the sloughs of 19th century theories? Should the strong be permitted to push the weak to the wall? Should they be allowed to ride roughshod over the weak? Should the courts sit back and watch supinely while the strong trample underfoot the rights of the weak? We have a Constitution for our country. Our judges are bound by their oath to "uphold the Constitution and the laws". The Constitution was enacted to secure to all the citizens of this country social and economic justice. Article 14 of the Constitution guarantees to all persons equality before the law and the equal protection of the laws. The principle deducible from the above discussions on this part of the case is in consonance with right and reason, intended to secure social and economic justice and conforms to the mandate of the great equality clause in Article 14.* ***This principle is that the courts will not enforce and will, when called upon to do so, strike down an unfair and unreasonable contract, or an unfair and unreasonable clause in a contract, entered into between parties who are not equal in bargaining power. It is difficult to give an exhaustive list of all bargains of this type. No court can visualize the different situations which can arise in the affairs of men. One can only attempt to give some illustrations. For instance, the above principle will apply where the inequality of bargaining power is the result of the great disparity in the economic strength of the contracting parties. It will apply where the inequality is the result of circumstances, whether of the creation of the parties or not. It will apply to situations in which the weaker party is in a position in which he can obtain goods or services or means of livelihood only upon the terms imposed by the stronger party or go without them. It will also apply where a man has no choice, or rather no meaningful***

choice, but to give his assent to a contract or to sign on the dotted line in a prescribed or standard form or to accept a set of rules as part of the contract, however unfair, unreasonable and unconscionable a clause in that contract or form or rules may be. This principle, however, will not apply where the bargaining power of the contracting parties is equal or almost equal. This principle may not apply where both parties are businessmen and the contract is a commercial transaction. In today's complex world of giant corporations with their vast infrastructural organizations and with the State through its instrumentalities and agencies entering into almost every branch of industry and commerce, there can be myriad situations which result in unfair and unreasonable bargains between parties possessing wholly disproportionate and unequal bargaining power. These cases can neither be enumerated nor fully illustrated. The court must judge each case on its own facts and circumstances."

(emphasis supplied)

Pertinently, the plea of unequal bargaining power cannot be a ground to disallow the application under Section 45 of the Act. Since the parties have entered into an agreement of their own volition, the sanctity of the contract has to be preserved. The plea of *Forum Non Conveniens* being claimed on account of financial burden and legal non viability is not a question that can be entertained while deciding the application under Section 45 of the Act. Plaintiff No.1 cannot absolve itself from performing its part of the contract merely on account of the fact that the performance became onerous.

23. Plaintiff No.2 and 3 have not disclosed any cause of action for the present suit. Plaintiff No.2 was not a party to the agreement and was only the Director and promoter of Plaintiff No.1 company. He does not have any independent cause of action. Likewise, Plaintiff No.3 is the sub-distributor of Plaintiff

No.1 and has no independent cause of action for the reliefs sought in the suit.

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24. For the foregoing reasons, since Plaintiff No. 2 and 3 have failed to disclose any cause of action, the Plaint is rejected qua them. In respect of Defendant No.1, suit of Plaintiff No.1 is not maintainable before this Court. Accordingly, the application filed by Defendant No. 1 is allowed and Plaintiff No. 1 and Defendant No.1 are referred to Arbitration in terms of the Arbitration Clause No. 10.3 contained in Exclusive Distribution Agreement. The suit of Plaintiff No.1 qua Defendant No. 2 also does not disclose any cause of action and accordingly the Plaint of Plaintiff No.1 qua Defendant No.2 is also rejected. It would be open for Plaintiff No.1 to take appropriate action qua the said Defendant before the Arbitral Tribunal. Plaintiffs are also held liable to pay costs of the present suit to Defendant No. 1, which is assessed as Rupees Two Lakhs. The cost shall be paid within four weeks from today.

25. Application is disposed of.

SANJEEV NARULA, J

SEPTEMBER 23, 2019/*nk*