* **HIGH COURT OF DELHI : NEW DELHI**

\+ **I.A. No. 5382/2009 and I.A. No. 6643/2009 in CS (OS) No. 519/2009**

Sara International Ltd. ...Plaintiff

Through : Mr. Sanjay Jain, Sr. Adv. with
Mr. Gyanendra Kumar and
Ms. Anuradha Mukherjee, Advs.

Versus

Golden Agri International PTE Ltd. & Anr. ...Defendants

Through : Mr. Ravi P. Mehrotra, Adv. for D-1.
Mr. C. Mukund and Mr. Avneesh Garg, Advs. for D-2.

Decided on: June 04, 2010

Coram:

HON'BLE MR. JUSTICE MANMOHAN SINGH

1. Whether the Reporters of local papers may be allowed to see the judgment? No

2. To be referred to Reporter or not? Yes

3. Whether the judgment should be reported in the Digest? Yes

MANMOHAN SINGH, J.

1. The present suit was filed by the plaintiff for declaration that no arbitration agreement exists between the plaintiff and the defendants and for damages worth Rs.25,08,365/-. The plaintiff is a duly incorporated company carrying on its business of manufacturing, selling importing, exporting and sourcing commodities, textiles etc. and is also involved in infrastructure development and sea ports.

2. Defendant no. 2, a duly incorporated company with its office

at Mumbai introduced the plaintiff to defendant no. 1 in its capacity as a commodity broker. Defendant no. 1 is a company incorporated in Indonesia and engaged in the business of crude palm oil, i.e. in refining, trading and exporting the same.

3. Defendant no. 2 made certain representations to the plaintiff, including issuing a seller confirmation note dated 17.07.2008 for trading oil between the plaintiff and an identified buyer 'Jayesh Oil Trade Pvt. Ltd.', on the basis of which a Sales Contract was executed between the parties on 24.07.2008.

4. As per the contract, defendant no. 1 was to sell 500 MT Crude Palm oil to the plaintiff at a unit price of US$ 1040 per MT for which a marine insurance policy covering all risks was obtained by the plaintiff for a sum of Rs. 2,57,00,000/-. Payment was to be made through a Letter of Credit through the Issuing bank to the defendant's nominated bank, i.e. the Negotiating bank.

5. After loading the consignment, defendant no. 1 was to obtain a bill of lading from the carrier and forward the same to the Negotiating bank, which would send the same to the Issuing bank from which the plaintiff would obtain it. After producing the bill of lading with other documents, the plaintiff was to get possession of the consignment.

6. The consignment was supposed to reach its destination on 07.09.2008. An irrevocable letter of credit was procured by the plaintiff as per the contract and in order to honour to same by the Issuing bank, certain conditions were to be complied with by defendant no. 1. Without

compliance of these conditions, the plaintiff would not be able to get possession of the consignment. As it turned out, defendant no. 1 did not comply with some of the requirements and the plaintiff was consequently unable to obtain the consignment.

7. In the meantime, prices of crude palm oil fell thereby leading to cancelling of orders by buyers, causing loss to the plaintiff. The Negotiating bank itself pointed out errors in the documents due to which the same were never sent to the Issuing bank and hence, not received by the plaintiff. Though the vessel of consignment reached the port on time, as the plaintiff did not have the bill of lading he could not take delivery of the consignment without the original documents and absence of authorization from defendant no. 1.

8. Instead of rectifying the defects in the documents, defendant no. 1 asked the plaintiff to provide a letter of indemnity to the vessel owner to take delivery of the consignment. The needful was not done till the expiry of the letter of credit when the plaintiff conveyed to its banker on 08.12.2008 that it would not raise any dispute under the letter of credit.

9. The plaintiff received a notice on 21.01.2009 from the advocates of defendant no. 1 stating that arbitration proceedings had been initiated in PORAM. The plaintiff has stated that there is no arbitration agreement between the parties and the invocation of arbitration is void. Hence the present suit.

10. Along with the suit, the plaintiff filed the application for

interim injunction wherein an ex-parte interim order was passed directing the defendant No.1 to get adjournment before the Arbitral Tribunal.

11. It is pertinent to mention that after the conclusion of the argument in the application, it was pointed out by the plaintiff that the goods in question which were lying at Kandla Port have been received by the defendant No.1 and the same have been sold to a third party. In this regard, an affidavit dated 23.10.2009 on behalf of defendant no. 1 has been filed by Mr. Lim Chin Guan, Senior Trader in defendant no.1 company who has, among stating other things, admitted that following the directive of the High Court of Gujrat defendant no. 1 sold the consignment at Kandla Port to Adani Wilmar Ltd. on 01.06.2009 @ US $ 660 per metric tonne.

12. Upon service of the plaint, defendant nos. 1 and 2 filed the following applications being I.A. No. 5382/2009 and I.A. No. 6643/2009 under Order VII Rule 11 (d) read with Section 151 and under Order VII Rule 11 (a) and (d) read with Order 1 Rule 10 (2) of the Code of Civil Procedure, 1908 (hereinafter referred to as the 'CPC') respectively.

13. The grounds which defendant no. 1 has submitted in its IA No. 5382/2009 seeking that the plaint be rejected are as follows :

i) The subject-matter of the present suit, i.e. the issues and disputes between the parties are being governed by arbitration proceedings that have already commenced before the designated arbitral tribunal. Section 9 of the CPC bars the

courts from trying civil suits of which their cognizance is either expressly or impliedly barred. Therefore, the plaint ought to be rejected as the instant suit is barred under law by the provisions of the Arbitration and Conciliation Act, 1996.

ii) It has been submitted that in paragraphs 33 to 36 of the plaint, the plaintiff has made statements as regards raising of disputes by defendant no. 1 at the arbitral forum of PORAM (Palm Oil Refineries Association of Malaysia). As per Section 21 of the Arbitration and Conciliation Act, arbitral proceedings in respect of a particular dispute are deemed to commence on the date on which a request to refer that dispute to arbitration is received by the respondent. In this case, a request or arbitration was sent to PORAM by defendant no. 1 vide letter dated 09.01.2009 and was communicated to the plaintiff vide letter dated 21.01.2009 along with a copy of the request to PORAM. By two letters dated 30.01.2009 and 11.01.2009 PORAM requested the plaintiff to nominate an arbitrator.

iii) The plaintiff vide its letter dated 16.02.2009 to PORAM disputed the existence and validity of the arbitration agreement and by its letter dated 18.02.2009 PORAM informed the plaintiff that these issues would be raised at PORAM and decided by the arbitral tribunal itself. Due to the failure of the plaintiff to nominate anyone, PORAM

appointed one Mr. Julian Lim as one arbitrator, the said appointment being requested to be cancelled by the plaintiff vide its letter dated 07.03.2009. The statement of claim has been filed with the arbitral tribunal by defendant no. 1.

iv) As such, Section 16 of the Arbitration and Conciliation Act, 1996 provides that the arbitral tribunal shall adjudicate upon the question of its jurisdiction. Section 18 of the Malaysian Arbitration Act, 2005, modeled on the UNCITRAL Model Law like the Indian Arbitration Act, also provides likewise as regards the tribunal's competence to decide its own jurisdiction. The statements in the plaint reflect the existence of the arbitration proceedings which have already commenced, satisfying the requirement of Order VII Rule 11 (d) as they are statements that indicate that the suit is barred by the Arbitration and Conciliation Act.

v) Further, though the validity and existence of the arbitration clause has been disputed by the plaintiff, a claim for damages constituting a counter claim has been filed by way of the present suit. The present proceedings are virtually a counter blast to the initiation of the arbitration proceedings and the former have been commenced only with a view to sabotage the arbitral process which has already started. The present case was filed by the plaintiff on 17.03.2009 i.e. four months after refutation of any allegations of default on its part and

after apparently treating the entire matter as closed as can be seen from its e-mail dated 01.11.2008 sent to defendant no. 2. All the issues agitated by the plaintiff in the present civil suit can well be agitated by it in front of the arbitral tribunal as otherwise, there would be parallel adjudication leading to several judicial pronouncements on the same issue.

vi) The present suit is expressly barred under Section 5 of the Arbitration and Conciliation Act which begins with a non-obstante clause and states that in case of matters under Part I of the Act, no judicial authority shall intervene except where the same is specifically provided for.

14. In its reply to the application of defendant no. 1, the plaintiff has submitted that on the hearing on 06.04.2009 defendant no. 1 submitted that it did not want to file any written statement but that it would file an application under Order VII Rule 11. This statement has been recorded in the Order dated 06.04.2009. It is the plaintiff's contention that as the defendant no. 1 forfeited his right to file the written statement, he also forfeited his right of defence and therefore the application for rejection of plaint is not maintainable.

15. It is also submitted by the plaintiff that defendant no. 1 has not intimated the Arbitral Tribunal of the ongoing suit proceedings and instead of taking adjournment as directed by this Court has gone ahead and filed its statement of claim thereat. Further, the present application of defendant no. 1 is only with regard to prayer (b) of the plaint, which is

as follows :

> "(b) pass a decree of declaration to that there is no arbitration agreement between the Plaintiff and Defendants for resolution of disputes;"

16. The plaintiff has submitted that defendant no. 1's reliance on Section 5 of the Arbitration and Conciliation Act while contending that the said section bars the present suit is misplaced as Section 5 of the Arbitration Act is only applicable to Part I of the Act. Arbitration in the present matter is taking place in Malaysia and would only be covered under Part II of the Arbitration Act.

17. As per the plaintiff, this court is empowered with the jurisdiction to determine whether there is any valid arbitration agreement between the parties as it is the plaintiff's case that not only does the alleged agreement not have the plaintiff's signatures but the said agreement does not even contain an arbitration clause. The plaintiff has sought to challenge the arbitration clause contained in the sales contract. Further, having forfeited its right to defend itself, defendant no. 1 should not be permitted to plead any case on the merits of the suit, neither in the guise of the application under Order VII Rule 11 nor in any other way.

18. In its rejoinder, defendant no. 1 has stated that the plaintiff's reply to its application is misconceived and lacks substance. It has submitted that by filing an application for rejection of a plaint which appears to be barred by law or by making a request to this effect at the first hearing itself, the right to file a written statement or the right of defence is not forfeited.

19. As regards the allegation that the court's order directing defendant no. 1 to get adjournment at the arbitration proceedings has been violated, defendant no. 1 has denied the same and submitted that no proceedings are currently on-going at the Arbitral Tribunal in Malaysia, i.e. no hearing is being effected. The allegation of violation of this court's order is completely without basis as no proceedings are under way yet at the Arbitral Tribunal.

20. In the second application I.A. No. 6643/2009, the grounds submitted by defendant no. 2 for rejection of plaint and/or deletion of its name from the array of parties are as follows :

> i) It is submitted by defendant no. 2 that it has no role to play in the present proceedings as the dispute is entirely between the plaintiff and defendant no. 1. Defendant no. 2 was only the broker in the entire transaction who introduced the plaintiff to defendant no. 1 and thus, is not involved in the dispute at all. There is no cause of action against defendant no. 2 in the plaint and the plaintiff has failed to state anywhere as to why and how the said defendant has been impleaded. The plaint therefore, ought to be rejected under clause (a) of Order VII Rule 11. On the same grounds, defendant no. 2 ought to be deleted from the array of parties. It has also been submitted that defendant no. 2 is situated in Mumbai and has to incur heavy expenditure due to the ongoing proceedings in Delhi.

ii) Defendant no. 1 has already initiated arbitration proceedings in Malaysia and this court is not vested with the jurisdiction to declare the same as not maintainable, implying that this court's jurisdiction to try the present case is ousted as it is barred under the Arbitration and Conciliation Act.

21. In reply to the application filed by defendant no. 2 under Order VII Rule 11 (a) and Order 1 Rule 10 being IA No. 6463/2009, the plaintiff has contended that the said application ought to be dismissed in limine as a valid cause of action exists against the said defendant due to the fact that it is a signatory to the Sales Contract GA/8/0908/CPO01774 dated 24.07.2008 and this fact has been admitted by defendant no. 2 in its written statement. Because the said defendant is a signatory, it is liable for ensuring performance of the other signatories. Further, defendant no. 2 is a signatory to the seller's confirmation note dated 24.07.2008 confirming the terms of the transaction.

22. It has been denied by the plaintiff that the only part that defendant no. 2 played in the entire transaction was that of a broker's. In fact, it is submitted that mere brokers do not execute sale contracts usually, nor are they signatories/confirming parties to the same. Defendant no. 2 was aware that the parties, i.e. defendant no. 1 and the plaintiff were entering into a contract on the basis of the representations made by defendant no. 2.

23. In so far as the dismissal of plaint is sought due to lack of territorial jurisdiction of this court, it is averred by the plaintiff in the

plaint that the execution of the Sales Contract was negotiated in Delhi, the bank issuing the letter of credit is situated in Delhi, the marine insurance was obtained at New Delhi and therefore, the cause of action can be validly said to have arisen in Delhi.

24. I have perused the submissions of all the parties. First of all, I shall take up I.A. No. 6643/2009 filed by defendant no. 2 for rejection of plaint and for its deletion from the array of parties.

25. As far as the question of territorial jurisdiction is concerned, the same shall be governed by the provisions of the CPC. Section 20 of the CPC provides that a suit may be instituted in the Court within the local limits of whose jurisdiction the cause of action, wholly or in part, arises. The plaintiff's averment in the plaint is that since the sales contract was negotiated in Delhi, the letter of credit was issued in Delhi and the insurance was obtained by the plaintiff in Delhi therefore, the cause of action has arisen in part in Delhi.

26. In the cause of action paragraph (paragraph 37) as well, the plaintiff has submitted that *"the cause of action for the present suit arose when the plaintiff opened the L/C with its banker Punjab National Bank, New Delhi branch. The cause of action further arose when the payment was to be made by the banker of the plaintiff i.e. at New Delhi……"*. As per settled law, in order to reject the plaint under Order VII Rule 11 CPC the averments made in the plaint have to be considered. Since specific averments are made in the plaint in order to invoke the territorial jurisdiction as referred above and are not disputed

by the defendants, therefore, the objection of the defendant no. 2 regarding territorial jurisdiction cannot be accepted in the present matter.

27. As regards the next submission of the defendant No. 2 that no cause of action is disclosed against the defendant no. 2 in the plaint, it is argued by him that in paragraph 37 of the plaint, the cause of action against the defendant No.2 as per plaintiff has arisen on the plaintiff's entering into contract with defendant no. 1 and defendant no. 2. On the contrary it has been argued that the defendant No.2 is merely a broker and therefore, is not a proper and necessary party to the suit. The plaintiff's counsel has countered this argument by stating that defendant no. 2's status is not only of a broker's as the same is a signatory to the sales contract signed between the plaintiff and defendant no. 1.

28. A perusal of the said Sales Contract No. GA/8/0908/ CPO01774 dated 24.07.2008 shows that the seller/ beneficiary is defendant no. 1, the buyer is the plaintiff herein and the status in which the defendant no. 2 is party to the said contract is clearly marked 'Broker'. Further, the Confirmation Notes dated 24.07.2008 and 17.07.2008 also clearly mention the amount of brokerage to be received by defendant no. 2 in its capacity as broker.

29. In view of the afore-mentioned documents placed on record by the plaintiff itself, it appears that contrary to what the plaintiff has alleged defendant no. 2's involvement in the entire matter is limited to that of a broker. I am unable to agree with the contentions of learned counsel for the plaintiff that a mere broker would not be a signatory to a

Sales Contract etc. as what has to be focused upon is the designation/ position in which the said person/ broker is a signatory.

30. Therefore, I am of the considered opinion that there is no valid cause of action against the defendant No.2 in the suit, hence, the defendant No.2 is deleted from the array of the parties. The defendant no. 2's application I.A. No. 6643/2009 is allowed. Accordingly, the suit against the defendant No.2 is dismissed.

31. Now coming to the application under Order VII Rule 11 CPC filed by the defendant No.1 for rejection of the plaint, the crux of learned counsel for defendant no. 1's argument in IA No. 5382/2009 is that (i) arbitration proceedings have already been initiated at PORAM and the plaintiff has known the same from the very beginning as it was informed of the same, (ii) the plaintiff can raise its grievances at PORAM as the arbitral panel has the jurisdiction to preside over all questions including its own jurisdiction, validity of arbitration agreement/clause etc. and (iii) the present suit is barred by Section 5 of the Arbitration and Conciliation Act.

32. The first submission of Mr. Sanjay Jain, learned Senior Counsel for the plaintiff, is that there is no agreement between the plaintiff and defendant No.1 dated 24.7.2008 as the said contract reveals that it does not bear the plaintiff's signatures. According to him, it bears only the signature of the defendant No.1. Thus, the document dated 24.7.2008 does not satisfy the requirement of an arbitration agreement

signed between the parties as stipulated under Section 7 of the Arbitration and Conciliation Act.

33. The contention of Mr. Jain has been strongly disputed by the learned counsel for the defendant No.1 who has argued that after entering into the sale contract with the defendant No.1 according to which 500 Metric Tonnes of Crude Palm Oil was to be shipped between 1st and 30th September, 2008 to Kandla Port, Gujarat, the Letter of Credit required for payment was opened by the plaintiff and the defendant No.1 proceeded to ship the contracted cargo on board as per the nominated vessel against two Bills of Lading dated 13th September, 2008 between 23rd to 30th September, 2008. The plaintiff had rejected the presentation of the documents and declined payment by raising objection on the basis of several discrepancies in the documents and refused to take delivery of the cargo.

34. I have heard the submissions of the learned counsel for the parties on this aspect. Section 7 of the Arbitration and Conciliation Act provides as under :

> 7. Arbitration agreement.—(1) In this Part, "arbitration agreement" means an agreement by the parties to submit to arbitration all or certain disputes which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not.
> (2) An arbitration agreement may be in the form of an arbitration clause in a contract or in the form of a separate agreement.
> (3) An arbitration agreement shall be in writing.
> (4) An arbitration agreement is in writing if it is contained in —
> (a) a document signed by the parties;
> (b) an exchange of letters, telex, telegrams or other means of telecommunication which provide a record of

> the agreement; or
> (c) an exchange of statements of claim and defence in which the existence of the agreement is alleged by one party and not denied by the other.
> (5) The reference in a contract to a document containing an arbitration clause constitutes an arbitration agreement if the contract is in writing and the reference is such as to make that arbitration clause part of the contract.

35. It is settled law that where in consequence of an agreement between parties, any act is done to further the transaction or to abide by the terms of the agreement, the necessary inference is that the dispute in such a matter must be referred to arbitration and the party which has thus acted cannot resile from the same by saying that the agreement is not signed as there is a presumption of existence as regards the arbitration agreement in such a case [See ***Dr. S.Z. Jafrey Vs. Modern Industrial Enterprises, Indore,*** *2006 (3) Arb. LR 424 (MP)*]. Further, even if an agreement is not signed, the conduct of the parties is necessarily indicative of the same. In this regard, the judgment in ***Shakti Bhog Foods Ltd. v. Kola Shipping Ltd.,*** *(2009) 2 SCC 134* is relied upon :

> "17. The appellant contended that the respondent did not file the original charter party agreement in any of the proceedings before any of the lower courts. We would want to reiterate that as far as the provision of Section 7 of the Act is concerned, an arbitration agreement may be in the form of an arbitration clause in a contract or in the form of a separate agreement and furthermore an arbitration is considered to be in writing if it is contained in a document signed by the parties or in an exchange of letters, telex, telegrams or other means of telecommunication which provide a record of the agreement or an exchange of statement of claim and defence in which the existence of an agreement is alleged by one party and not denied by the other. So from the provisions of Section 7, it is clear that a charter party agreement need not be in writing signed by both parties and this could as well be made out from the acts

of the parties to the agreement by way of their exchange of letters and information through fax, e-mails, etc."

36. Reliance can also be placed in this regard on this Court's decision in ***Sharad Dogra Vs. Sahara Airlines Ltd. & Ors***, *2007 VIII AD (DELHI) 20,* the relevant extract from which can be read as under :

> "8. It is the submission of the plaintiff that surety bond is a unilateral agreement and not bilateral one. The defendant is only a beneficiary of this surety bond. Therefore, the aforesaid clause cannot be treated as arbitration agreement between the parties as arbitration agreement has to be bilateral and thus, it does not satisfy the requirement of Section 7 of the Arbitration and Conciliation Act 1996 (in short "the Act"). This submission was dilated by the learned counsel by quoting from Black"s Law Dictionary, 6 edn., which defines surety bond to mean:-
>
> > "A contractual agreement between the surety, the principal and the obligee whereby the surety agrees to protect the obligee if the principal defaults in performing the principal"s obligations. The bond is the instrument which binds the surety."
>
> 9. It was submitted that the purported arbitration clause, which was contained in a bond, i.e. unilateral guarantee, would be null and void inasmuch as (i) there has to be an agreement in writing between the parties to have an arbitration clause in an agreement; (ii) a bond is a document executed by a single party unilaterally confirming that he shall pay a certain amount in the event of principal defaulting-there is no agreement between two parties since a bond only has one person who is confirming and accepting that he shall clear off the liability in the event of principal defaulting, therefore there can be no arbitration clause in a surety bond; (iii) the employer is not a party to the surety bond and therefore there can be no arbitration clause in the first instance; (iv) Section 2(h) of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as the said Act) defines "party" to mean a party to arbitration agreement and in the present case the employer is admittedly not a party to the surety bond; (v) Section 7(i) of the Act defines "arbitration agreement" to be an agreement by the parties to submit to arbitration all or certain disputes .... while Section 7(iii) mandates that an arbitration agreement shall be in writing and Section 7(iv) (a) explains

that arbitration agreement is in writing if it is contained in a document signed by the parties; (vi) the surety bond sought to be relied upon by the defendant company does not have the employer, i.e. the defendant company as a party nor is it signed by the defendant company as mandated under the provisions of the Arbitration and Conciliation Act, 1996 and therefore there is a clear bar for any arbitration proceedings to be held between the parties.

10. It was also argued that in any case, the said bond is arbitrary, unconscionable and violative of Section 23 of the Contract Act since the same is opposed to public policy. The alternate submission was that the terms of surety bond as per which the plaintiff had indemnified the employer, i.e. the defendant No.1 was against all or any kind of loss, damage, injury or liability that may be caused directly or indirectly by the conduct of the employee due to negligence, dereliction of duty, default, misconduct, dishonesty, non-performance, error in judgment, breach of duty, mismanagement and/or embezzlement by him "during the course of his employment with the employer." Submission was that resignation of the plaintiff and recovery of money as a result thereof was clearly outside the scope of the surety bond and, therefore, it could not be the subject-matter of arbitration proceedings and was not arbitrable.

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20. Once it is held that the Bond is question is a contract between the parties and it is obviously in writing as well, arbitration clause contained in the said contract would constitute arbitration agreement between the parties. In such a case, it would not be necessary that it has to be signed by the defendant No.1 as well. To take care of such situations, clause (b) of sub-section (4) of Section 7 provides that there can be an arbitration agreement by exchange of letters, telex etc., which provided a record of the agreement."

37. From the above settled law, it is clear that consequent to the sale contract between the plaintiff and defendant No.1, the plaintiff had taken various actions indicating acceptance of the said contract. It is immaterial that the said sale contract is not signed by the plaintiff. The

contention of the plaintiff in this regard therefore cannot be accepted and the same is without any force.

38. The next submission of Mr. Jain is that an arbitration clause is independent of the underlying contract and the plaintiff's acceptance of the contract cannot be treated as its acceptance/acquiescence of the vague arbitration clause in view of the separate identity of both. He states that the plaintiff is not attempting to forestall the arbitration proceedings and in fact the said proceedings have been initiated by the defendant No.1 wrongly as the arbitration clause on the basis of which the proceedings have been initiated is unenforceable.

39. The contention of the plaintiff is that the arbitration clause is vague and unenforceable and the suit cannot be held as barred unless this Court, under Section 45 which falls within Part II of the Act, adjudicates upon the validity and existence of the arbitration agreement. The vagueness in the clause has been attributed to the use of the words "Arbitration, if any" in the clause of the sale contract dated 24.7.2008.

40. Mr. Jain's contention was that Section 5 cannot be construed by the defendants' counsel in such a way that Section 45 is rendered otiose. Further, he submitted that if the two provisions are read in a harmonious manner, it would be evident that the defendant's application is actually an application under Section 45 of the Act and not under Order VII Rule 11 and in fact, the said application should have been filed under Section 45 of the Arbitration Act. Section 45 overrides the provisions of Part I, starting with a non-obstante clause, giving the civil

courts jurisdiction to refer the parties to arbitration when it is approached by one of the parties, unless it find the arbitration agreement null and void, inoperative or incapable of being performed. With regard to the construction of the two sections, learned senior counsel for the plaintiff has referred to the judgment in ***Sultana Begum Vs. Prem Chand Jain,*** *(1997) 1 SCC 373.*

41. The contention of the learned counsel for the plaintiff has been denied by the learned counsel for the defendant No.1. It is argued by the defendant No.1 that the subject matter of the suit between the parties is governed by arbitration proceedings. Therefore, Section 9 of the CPC would apply which bars the Court from trying the civil suit. The suit is also barred under Section 5 of the Arbitration and Conciliation Act. In support of his contention, learned counsel for the defendant No.1 has referred following decisions:

1. ***C. Natarajan vs. Ashim Bai & Another***, AIR 2008 SC 363.
2. ***Gas Authority of India Ltd. & Anr. vs. Keti Construction (I) Ltd. & Ors.,*** (2007) 5 SCC 38.
3. ***Aurohill Global Commodities Ltd. vs. Maharashtra STC Ltd.,*** (2007) 7 SCC 120 (123).
4. ***Secur Industries Ltd. vs. Godrej & Boyce Mfg. Co. Ltd. & Anr.,*** (2004) 3 SCC 447.
5. ***Bharat Sewa Sansthan vs. U.P. Electronics Corpn. Ltd.***, (2007) 7 SCC 737.
6. ***P. Anand Gajapathi Raju & others vs. P.V.G. Raju (Dead) & Others***, (2000) 4 SCC 539.
7. ***National Agricultural Coop. Marketing Federation India Ltd. vs. Gains Trading Ltd.***, (2007) 5 SCC 692.
8. ***Adhunik Steels Ltd. vs. Orissa Manganese & Minerals (P) Ltd.***, (2007) 7 SCC 125.
9. ***The Empire Jute Co. Ltd. & Ors. vs. The Jute Corporation of India Ltd. & Anr.***, (2007) (12) Scale 514.

42. Coming to the discussion on Section 45, under this section

learned Senior Counsel for the plaintiff has contended that this court has the jurisdiction to adjudicate upon the validity and existence of the arbitration agreement. Relying on this logic, learned Senior counsel Mr. Sanjay Jain has referred to the following judgments in the following cases, all of which are pertaining to Section 45 of the Arbitration Act :

I. ***Shivnath Rai Har Narain Vs. Italgranispa,*** *2001(3) Arb. LR 246 (Delhi)*

> "12. First and foremost condition rather one most, condition for invoking section 45 is existence of "agreement in writing" between the parties. However, if any of the parties feels or deems that such an agreement is null and void or inoperative or, incapable of being performed that party has right of approach the judicial authority which may entertain the matter.
>
> 13. Since the factum of existence of the agreement and that too in writing has been disputed by the plaintiff, this would be one of the issues, may be a preliminary issue, to be decided by this court as under Part II, the arbitrator has not been bestowed with the power of ruling on its own jurisdiction or ruling on objections with respect to existence or validity of the arbitration agreement. Under Part II, such power vests in the court and not with the arbitrator."

II. ***Global Marketing Direct Ltd. Vs. GTL Ltd. & Anr.,*** *2004(3) Arb. LR 56 (Bombay)*

> "An analysis, therefore, of the law would be that in a proceeding pending before a judicial authority, Section 45 can be resorted to if there are disputes between the parties as to the validity of the arbitration agreement. Unlike Section 8 which provides that the application shall be moved not later than when submitting the first statement of the substance of the dispute under Section 45 there is no such limitation. All that Section 45 says is that when a judicial authority is seized of an action in a matter in respect of which parties had made an agreement for arbitration the judicial authority at the request of one of the parties or any person claiming through them or under him refer the parties to arbitration, unless it finds that the said agreement is null and void, inoperative or incapable of being performed. Prima facie, therefore, there seems to be no time limit within which such an application can be made. A further aspect of the matter is

that even if Section 45 is invoked, the Civil Court would continue to nave jurisdiction until it decides whether the arbitration agreement is void, inoperative or unlawful. It is only after recording such a finding with the issue of jurisdiction be answered."

III. ***Bharti Televentures Ltd. Vs. D.S.S. Enterprises Pvt. Ltd. & Ors.,*** *2001 (3) RAJ 433 (Del)*

"Out of all this, the following conclusions emerge :-

(i) The first and foremost condition to invoke Section 45 of the Act is the existence of written agreement which should neither be denied nor be disputed by any of the parties as according to Clause 2 of Article II of the First Schedule the definition of the 'agreement in writing' is of inclusive nature and is in substance at par with that of Section 7 of the Act.

(ii) Unless the contending parties accept each other as parties to the agreement, none of the parties or any person claiming through or under that party can request for referring the dispute to arbitration under Section 45 of the Act.

(iii) The exclusion of provisions of Sections 5, 9 & 16 in the Act in Part II of Chapter I does not mean that Part II of Chapter I confers power upon the judicial authority to adjudicate upon the jurisdiction of the Arbitrator. Section 45 of the Act has an overriding effect and prevails over anything contrary thereto either contained in Part-I of 1996 Act or in Code of Civil Procedure, 1908.

(iv) Section 45 is a complete code in itself so far as the power of the judicial authority to entertain an action in a matter in respect of which the parties made an agreement referred to in Section 44 of the Act is concerned. Section 45 makes it mandatory for the judicial authority when seized of an action in a matter in respect of which an arbitration agreement exists to refer parties to arbitration unless it finds that the agreement is null and void, inoperative or incapable of being performed. It imposes a mandatory duty on the Courts of Contracting State to recognize and enforce agreement to arbitrate.

(v) The question whether arbitration clause is null and void or inoperative or incapable of being performed as envisaged in Section 45 of the Act would arise only if both the parties

have such an agreement in writing. The onus to prove these elements lies upon the party opposing the reference.

(vi) Once the parties have chosen a foreign arbitration forum to decide their disputes, it is no more open to them to subvert or stultify the arbitration agreement by approaching the judicial authority for any interim protection before or during the arbitral proceedings as it would render the agreement nugatory and tautologous.

(vii) The main basis for determining whether the remedy sought for by the plaintiff can be considered by way of the suit or not is the series of events as set out in the plaint that culminated in sale of the sharers by the CGL to Bharti as the defendants have refused to accept the plaintiff as one of their partners by way of questioning the validity of the sale of sharers of CGL.

(viii) The claims and counter-claims of the parties can be adjudicated only by way of an independent suit as for the defendants the plaintiff is a stranger and is forcing its entry into their domain as a trespasser whereas the plaintiff claims that it is his legal right to have the same place as was once occupied by CGL.

(ix) The application under Section 9 of the Act though filed on erroneous presumption that the parties were governed by domestic arbitration and the suit for injunction filed by DSS do not operate waiver nor do they amount to abandonment of the arbitration clause in the agreement."

IV. ***Shin-Etsu Chemical Co. Ltd. Vs. Aksh Optifibre Ltd***.,*(2005) 7 SCC 234*

"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."

43. No doubt Section 45 of the Act provides that the judicial authority concerned has to refer the parties to arbitration if it is satisfied that the arbitration agreement is valid and enforceable.

44. The question which arises for consideration is whether Section 45 of Part II pertaining to Enforcement of Certain Foreign Awards New York Convention Awards bars the suit filed by the plaintiff or not. Section 44 of Part II provides as under:

> "44. Definition—In this Chapter, unless the context otherwise requires, "foreign award" means an arbitral award on differences between persons arising out of legal relationships, whether contractual or not, considered as commercial under the law in force in India, made on or after the 11th days of October, 1960—
>
> (a) in pursuance of an agreement in writing for arbitration to which the Convention set forth in the First Schedule applies, and
>
> (b) in one of such territories as the Central Government, being satisfied that reciprocal provisions have been made may, by Notification in the Official Gazette, declare to be territories to which the said Convention applied."

45. Section 44 relating to Convention on the Recognition and Enforcement of Foreign Arbitral Awards defines the "agreement" as under:

> "the term "agreement in writing" shall include an arbitral clause in a contract or an arbitration agreement, signed by the parties or contained in an exchange of letters or telegrams."

46. It is evident from a plain reading of Section 44 and the aforesaid Article II of First Schedule that until and unless there is an undisputed agreement – that too in writing – between the parties for arbitration, the provisions of Section 45 cannot be invoked. In the present case, this condition is fulfilled as it has been found that there is an undisputed agreement in writing between the plaintiff and defendant No.1.

47. In the present case, the arbitration agreement between the plaintiff and defendant No.1 is in the nature of an International Commercial Arbitration as defined under Section 2(f) of the Arbitration and Conciliation Act, 1996. The present suit is admittedly filed before a domestic forum in this country in respect of an arbitration clause in a matter of International Commercial Arbitration. When a suit is pending in respect of which the parties have made an agreement referred to in Section 44, at the request of one of the parties the Court can refer the parties to arbitration, unless it finds that the said agreement is null and void, inoperative or incapable of performance. In the present suit, the plaintiff seeks a relief that the agreement including the arbitration clause is null and void. It is settled law that if Section 45 is invoked, the Civil

Court would have jurisdiction unless it decides whether the arbitration agreement is void or inoperative.

48. The relevant clause referred in sale contract dated 24.7.2008 reads as under :

> "All other terms and conditions in accordance with FOSFA B1 ruling currently in force with the exception of Arbitration. Arbitration, if any, shall be in accordance to the PORAM rules of Arbitration and Appeal currently in force at the date of contract."

49. A perusal of the above quoted clause shows that the parties to the agreement were not sure or determined at the time of the sale contract about reference of the dispute to arbitration. While reading the words "Arbitration if any" in the clause it appears that the parties were yet to decide whether the future disputes between them were to be referred or not. Where there is merely a possibility of the parties agreeing to arbitration in future as contrasted with an obligation to refer disputes to arbitration, there would be no valid and binding arbitration agreement as per settled law. The words used in a said clause should disclose a determination and obligation to go to arbitration and not merely the contemplation of the possibility of going to arbitration. It appears that the said clause of arbitration is vague and uncertain and cannot be the basis for arbitration or binding on the parties as is clear from the language in which the clause is couched. The wording of the said clause does not leave room for any ambiguity inasmuch as it uses the words "Arbitration, if any".

50. In a case with similar circumstances titled ***Jagatjit Jaiswal and Anr. Vs. Karamjit Singh Jaiswal and Anr.*** reported as *146 (2008) DLT 404* it was held in paragraphs 39 and 40 as under :

> "39. In ***M/s. Garg Builders and Engineers*** v. ***U.P. Rajkiya Nirman Nigam Ltd. and Others,*** AIR 1995 Del. 111, this Court was concerned with the interpretation of the following Clause:
>
> > "In the event of any dispute arising out of any of the conditions of this agreement, the matter shall be referred to the then Unit. In-charge, whose decision shall be final and binding on both the parties."
>
> 40. Even though the clause used the expression 'any dispute arising out of any of the conditions of this agreement', the Court held that the clause was only calculated to prevent disputes from arising and was akin to a 'finality clause' making provision for decisions by an expert. No judicial determination of disputes was called for. The Court held that mere agreement between the parties to be bound by the decision of a person does not constitute him as an Arbitrator."

51. Yet in another case being ***Gajulapalli Chenchu Reddy Vs. Koyyana Jaya Lakshmi,*** *2009 (4) Arb. LR 119*, the Andhra Pradesh High Court held in paragraph 11 that clauses like "if they so desire, refer their disputes to arbitration", "should consider settlement by arbitration" do not constitute agreements of arbitration but merely expect/ require the parties to secure fresh consent or consensus at a later time for reference of disputes to arbitration. The meaning of these phrases is the same as of the doubtful phrase in the present case i.e. "arbitration, if any" as the same does not indicate that reference to arbitration is to be made by parties but if, at any point the need for arbitration arises, the parties after further discussion may refer their dispute(s) to arbitration.

52. It is a settled proposition of law that merely because an agreement speaks of reference of dispute, it does not automatically become an Arbitration Agreement and the same must be determined according to the circumstances and intention of the parties in each particular instance. Further, in ***State of U.P. Vs. Tipper Chand,*** *(1980) 2 SCC 341* the Court held that the clause in the said matter was not an arbitration clause as it contained no mention of any dispute, much less of a reference thereof. In the case at hand also, nowhere has any present or future dispute or reference thereof been mentioned. In view of the aforesaid observation, prima facie, it appears that there is no binding or enforceable agreement between the parties and the same is inoperative. This Court is of the view that the validity of the clause as referred may be decided on framing of preliminary issue(s).

53. As far as Section 5 if concerned, it has been settled in ***Bhatia International Vs. Bulk Trading S.A.,*** *(2002) 4 SCC 105* and confirmed in ***Venture Global Engineering Vs. Satyam Computer Services Ltd.,*** *(2008) 4 SCC 190* that Part I of the Arbitration Act is applicable to international arbitrations being held outside the territory of India subject to one rider i.e. the same must not be expressly or impliedly excluded by the arbitration agreement/clause. However, as it appears in the matter at hand as there is no binding arbitration agreement between the parties, the question of the applicability or otherwise depending upon the exclusion of Section 5 of Part I of the Arbitration Act does not arise. Thus, the application filed by the defendant No.1 is rejected. However, the

objection raised by the defendant No.1 in the application about the maintainability of the suit will be decided by framing of preliminary objection.

54. The findings arrived at by this Court in regard to arbitration clause are tentative and shall have no bearing when the preliminary issue so framed is decided.

55. In view of the finding that the impugned clause in the sales contract is inoperative and the agreement is not binding upon the parties, it is not necessary to discuss the other pleas and decisions referred by the parties.

CS (OS) No. 519/2009

List the matter before the Roster Bench on 10th August, 2010.

MANMOHAN SINGH, J.

JUNE 04, 2010
Jk/sa