THE HIGH COURT OF DELHI AT NEW DELHI

% Judgment delivered on: 20.08.2010

IA Nos. 7826-7827/2010 in CS(OS) 702/2010

FOCUS BRANDS TRADING (INDIA) PVT LTD & ANR. ..... PLAINTIFFS

Vs

CAMPARI INTERNATIONAL S.A.M & ANR. ..... DEFENDANTS

Advocates who appeared in this case:

For the Plaintiff : Mr P V Kapur, Sr Advocate with Ms Ritu Bhalla, Mr Dhruv Dewan, Mr Aman, Ms Ananya Ghosh for the plaintiff.

For the Defendant: Mr Neeraj K Kaul, Sr Advocate with Mr Darpan Wadhwa, Mr Kamal Shankar, Mr Sandeep Das & Mr Aditya Mehra for the defendants.

CORAM :-
HON'BLE MR JUSTICE RAJIV SHAKDHER

1. Whether the Reporters of local papers may be allowed to see the judgment ? Yes
2. To be referred to Reporters or not ? Yes
3. Whether the judgment should be reported in the Digest ? Yes

RAJIV SHAKDHER, J

IA Nos. 7826-7827/2010 (under Section 45 of Arbitration & Conciliation Act by deft.nos.1 & 2)

1. By this common order, I propose to dispose of the captioned applications which have been filed by defendant nos 1 and 2 under Section 45 of the Arbitration & Conciliation Act, 1996 (hereinafter referred to as '1996 Act'). Before I proceed further, it may perhaps be relevant as well as convenient to broadly allude to the contours of the case.

2. In the action filed by the plaintiffs there are four parties impleaded. The four parties are: plaintiff no.1 i.e., Focus Brands Trading (India) Private Limited (hereinafter referred to as 'Focus'); plaintiff no.2 i.e., Jubilant Enpro Private Limited (hereinafter referred to as 'Jubilant'); defendant no.1 i.e., Campari International S.A.M. (hereinafter

referred to as 'Campari'); and defendant no.2 i.e., Di Ci.E. Holding B.V. (hereinafter referred to as 'Di Ci'.). Focus is a company incorporated under the Indian Companies Act, having its registered office in New Delhi. Jubilant is also a company, which is incorporated under the Indian Companies Act, having its registered office situate in India in the State of Uttar Pradesh. Campari is a company incorporated in the principality of Monaco having its registered office in Monaco, while Di Ci. is a company incorporated under the laws of Netherland, having its registered office at Amsterdam.

3. It is averred in the plaint that Focus was initially promoted by two gentlemen by the name of Anthony Brian Senior and Siddhanta Sharma. It appears that in and around 27.11.2007, the aforementioned gentlemen sold their shares to Jubilant. On 27.03.2008 Campari entered into a distribution agreement with Focus. Suffice it to say, for the present, that the distribution agreement contains an arbitration clause i.e., Clause 17 which envisages that in case disputes were to arise between the parties to the agreement, with respect to any matter, in relation to the said distribution agreement, parties shall mutually agree to enter into negotiations for an amicable settlement. In case parties are unable to reach a written agreement within a period of 30 days from the date the claim is presented, each party will be entitled to submit the dispute to a panel of three Arbitrators. Each party is authorized to nominate their Arbitrator, while the two Arbitrators in turn nominate a third Arbitrator. The third Arbitrator, so nominated will act as the president of the Arbitration Panel. In case of a dispute, the third Arbitrator would be appointed by the Arbitration Council of the ***National and International Arbitration Chamber of Milan***. The said clause provides for arbitration to be held in Milan. The rules governing the arbitration are by the International Arbitration Rules of the National and International Chamber of Arbitration of Milan.

4. There is a sequel to the aforesaid events; which is, soon after the execution of the distribution agreement (i.e., after a gap of approximately seven months) a Shareholders' Agreement dated 24.10.2008 was executed between Focus and three other entities. These being: Jubilant (i.e., plaintiff no.2), Jubilant Reality Private Limited (hereinafter referred

to as 'Jubilant Reality') (the said entity is not a party to the present dispute) and Di Ci. (i.e., the defendant no.2). Focus (i.e. the plaintiff no.1) as indicated was the fourth signatory to the shareholder's agreement. By this agreement i.e., the Shareholders' Agreement Jubilant Reality which held 0.01% of the equity capital of Focus (i.e., 100 equity shares) and Jubilant the other 99.9% of the equity capital (i.e., 1599725 equity shares) agreed to sell their shares to Di Ci. It may be important to note that at some stage Di Ci purchased additional shares in Focus. Resultantly, Di Ci. came to own 26% of the equity capital of Focus. It is not disputed that the balance 74% of the equity capital of Focus is held by Jubilant. Therefore, in sum and substance the equity share capital of Focus is divided between Di Ci. and Jubilant each holding 26% and 74% of the equity capital in Focus. This agreement also contains an arbitration Clause, which is Clause 18. The arbitration clause in the Shareholders' Agreement provides that in case of any dispute, controversy, claim or disagreement of any kind whatsoever among the parties or Focus on account of breach, ***termination*** or invalidity, it shall be resolved by arbitration. Curiously, even while the clause (see clause 18.2) provides that the seat of arbitration shall be Singapore or such other place, as parties may agree, it goes on to stipulate that the arbitration proceedings shall be held at Singapore International Arbitration Centre (in short 'SIAC'). The clause (i.e. clause 18.2) further provides that the arbitration proceedings shall be conducted in accordance with Clause 18, and the UNCITRAL Arbitration Rules, 1976. The clause, however, specifically excludes the applicability of Part I of the 1996 Act save and except Section 9. There is a provision for appointment of a panel of three Arbitrators. Each party is authorized to appoint its nominee, while the third Arbitrator is required to be appointed jointly, by the two nominees. In the event of a party failing to appoint an Arbitrator or the two Arbitrators failing to appoint a third Arbitrator, the gap is required to be fulfilled by the SIAC in accordance with the UNCITRAL Arbitration Rules, 1976. It is provided that the language for conducting arbitration shall be English.

4.1 In so far as the governing law and jurisdiction is concerned, a provision is made in Clause 17.13 of the Shareholders' Agreement. The said clause provides that the applicable law will be that of the Republic of India without regard to the principle of conflict of laws. It further stipulates that subject to the provision of Clause 18 (which is the Arbitration Clause) the Courts at New Delhi shall have exclusive jurisdiction over disputes arising out of or in relation to the Shareholders' Agreement.

4.2 While I am on the shareholder's agreement, I may also refer to one more clause which is a subject matter of much consternation in so far as the plaintiffs' are concerned. This being: Clause 10.3, which provides for a "Put Option". Briefly, the clause vests a right in Di Ci. to require Jubilant, at its sole discretion , on issuance of a written notice to purchase its equity shares including those held by its affiliates, in Focus, on occurrence of any of the events stipulated therein. The two events stipulated therein are: (i) termination of licence and/or distribution agreement, or; (ii) the occurrence of an insolvency event. As to what would constitute an "insolvency event" is defined in clause 1.1 of the shareholder's agreement. I will come back to this aspect a little later. For the moment we are concerned with Clause (a) of Clause 10.3.1, which is termination of the licence and/or the distribution agreement. Clause (a) further provides that "***termination could be for any reason whatsoever***".

5. This brings me to the third sequence to the saga, which is the execution of the licence agreement dated 10.12.2008 (hereinafter referred to as the 'Licence Agreement') executed between Campari and Focus. As in the case of the distribution and the shareholder's agreement there is an arbitration clause provided in the licence agreement, which is Clause 20. The said arbitration clause briefly provides that the agreement will be governed and construed in accordance with the "laws of Italy". The clause further provides that in case parties are unable to resolve their disputes amicably, and in good faith within a period of 30 days from the date of the claim, parties are free to refer their disputes to an Arbitration panel of three Arbitrators, as in the other arbitration agreements mentioned hereinabove. Each party is free to nominate their own Arbitrators, who in turn

shall appoint a third Arbitrator. The third Arbitrator would be required to act as a president of the Arbitration Panel. In the event of any dispute regarding the third Arbitrator his appointment shall be made by the ***Arbitration Council of the National and International Arbitration Chamber of Milan***. The arbitration is required to be held in Milan, and is mandated to be governed by the International Arbitration Rules of the National and International Chamber of Arbitration of Milan.

6. A brief overview of three agreements (to the extent necessary for the purpose of disposal of the applications) bring to fore the fact that while the distribution agreement and the Licence Agreement is entered between the same parties i.e., Campari and Focus and has more or less similar arbitration clauses, the Shareholders' Agreement is entered among Jubilant, Jubilant Reality Private Limited, Di Ci. and Focus. Though in the plaint it is stated that Di Ci. is a subsidiary of Campari, there seems to be some uncertainty about this fact, as the counsel for the defendants has stated that it is the other way round, which is, that Campari is a 100% subsidiary of Di Ci. The counsel for the plaintiffs has not clarified this position.

6.1 To complete the narrative, it is the case of the plaintiffs that under the distribution agreement, Focus was appointed as a sole and exclusive distributor for India, Sri Lanka, Nepal, Bhutan, Bangladesh and Maldives in respect of various products referred to in the agreement. The distribution agreement pertains to the business described as Bottled in Origin (in short 'BIO'). The distribution agreement is, in the normal course, valid till 31.12.2012 with a provision of renewal for a further period of five years, provided the parties commence their re-negotiations of the terms of renewal at least nine months before its expiry, and come to a conclusion in respect of the same at least six months prior to its expiry. In the absence of renewal, the agreement would automatically stand terminated at the end of the stipulated period of validity.

6.2 Admittedly, the agreement was terminated by Campari vide its notice dated 11.03.2010.

6.3 Similarly, the licence agreement which obtained between Focus and Campari, by virtue of which Focus was given the rights by Campari to use its trade mark relating to various products such as Old Smuggler Scotch Whisky, Old Smuggler Rum and Old Smuggler Gin for the purposes of production, marketing and distribution of its product, I was informed, during the course of hearing, has also been terminated. In the plaint there is no reference to the termination of the licence agreement, as according to the learned counsel for the plaintiff, this event happened after the institution of the suit. Though I must add after I reserved judgment an application for amendment has been filed, on which I have issued notice. It may be pertinent to note that the licence agreement, which came into effect on 01.04.2008; had it not been terminated, would have remained in force till 31.03.2014.

6.4 The shareholders agreement, which provided for participation by both shareholders, i.e., Di Ci and Jubilant on the board of directors' of Focus was according to the plaintiffs, put into jeopardy by issuance of put option notice dated 11.03.2010 by Di Ci calling upon Jubilant to purchase the 'Put Shares' in terms of clause 10.3 of shareholders agreement from Di Ci at the "exit consideration" which includes the consideration of any other amounts paid by Di Ci for acquiring additional equity shares. Further, as per this notice, the sale of put shares is to be completed within 30 business days commencing from the date of receipt of the put notice. The put notice also requires Jubilant to inform Di Ci as regards the details of the third party. Interestingly, as per the terms of the shareholder's agreement the third party is to be a person resident outside India. The said third party would be the person who would acquire the put shares. The notice requires Jubilant to fix a date on which the sale of the put shares would be consummated keeping in mind the 30 day period indicated hereinabove.

6.5 I may also point out at this stage, that in the plaint there is a reference to the fact that the Campari has terminated the distribution agreement on the ground of alleged breach of clause 4 of the distribution agreement, which deals with the price and payment. It is averred by the plaintiff that defendants are seeking payment of what the defendants

term as unpaid invoices amounting to nearly USD, 9,62,000/-. The plaintiffs, however, aver that according to them none is payable. The plaintiffs have also alluded to the fact that the Campari has manipulated the situation in a manner that the BIO business was given greater importance as against BII business as it enabled Campari to garner larger revenue in view of the provision in the distribution agreement which gave it unimpeded right to fix the export price of the product sold to Focus under the distribution agreement. The plaintiffs allege that consequently, the BII business of Focus was not adequately supported by the defendants. It is alleged, that resultantly, Focus could not take advantage of the BII liquor business even though the products, in that section of the business, moved faster, and brought better cash flow. The defendants, it is averred sought to promote BIO business, without realizing that the products, which were sold as part of BIO liquor business catered to niche consumers, which did not enjoy a wide popularity. Consequently, plaintiffs aver that Focus has suffered a loss of 8.87 crores in the financial year 2008-09, which only got worse in the financial year 2009-10. Plaintiffs have also averred that Jubilant has infused funds in Focus in the form of Inter Corporate Deposits (in short 'ICD') between October-December, 2009 to the tune of Rs 4.50 crores.

SUBMISSIONS OF COUNSELS

7. In the background of these broad facts Mr P.V. Kapur, learned senior counsel assisted by Ms Ritu Bhalla advanced arguments on behalf of the plaintiffs. He began with a preliminary objection to the maintainability of the captioned application, which ultimately turned into a full fledged argument, which necessarily meant he was given the right to rejoin.

7.1 The submission of Mr kapur is briefly as follows: Section 45 of the 1996 Act has no applicability in the facts and circumstances of the instant case. This submission was elaborated by Mr Kapur by adverting to the fact that Section 45 would not apply in a situation where there were multiple agreements obtaining between the parties and having arbitration separate clauses provided in them. The reason, according to Mr Kapur, was that even though there were multiple agreements the transactions obtaining between the

parties was the same and, therefore, to relegate the parties to arbitration would lead to a chaotic situation in as much as each leg of the transaction so to say would be before a different fora altogether. In sum and substance the submission was that even though distribution agreement and the licence agreement was executed between Focus and Campri, the shareholders agreement, which was executed between four parties, i.e., Jubilant, Jubilant Reality, Di Ci and Focus, essentially pertained to the same transaction. Therefore, by virtue of termination of the distribution agreement and the licence agreement the put option in the shareholders agreement has got triggered. The consequent result of which, according to Mr Kapur, is that three different arbitral tribunals would adjudicate what according to him is essentially the same dispute. He elaborated by submitting that in so far as the distribution agreement and the licence agreement are concerned there would be a three-member arbitral tribunal set up in Milan, whereas in so far as the shareholder's agreement is concerned parties would have to subject themselves to an arbitral proceedings (held once again before a three-member tribunal) under the aegis of SIAC. Mr Kapur submitted that this would result in a situation where Jubulant would be disabled from impugning action of DI Ci in regard to issuance of put notice dated 11.03.2010, the trigger for which is the termination of the licence agreement and distribution agreement; a dispute which is subject matter of arbitration agreements contained in the said licence and distribution agreements, to be resolved by two separate arbitral tribunals. The parties to the licence agreement and the distribution agreement being Focus and Campari, Jubilant would have no say before arbitral tribunal constituted in consonance with the arbitration agreements contained in the licence agreement and the distribution agreement respectively.

7.2 In order to demonstrate that the underlying transaction was the same; in other words, the distribution and licence agreement had been dovetailed into the shareholders agreement, Mr Kapur referred to several clauses of the distribution agreement, starting with the definition clause. In the shareholder agreement recital B refers to the fact that business in which FOCUS is to be engaged in relates to the import, manufacture,

wholesale distribution, marketing and buying spirits and wine in India or consultancy in relation thereto. Reference was also made to the definition of "distribution agreement" in the shareholder agreement which, as is obvious refers to, distribution agreement dated 27.03.2008 obtaining between the Campari and Focus. In this regard reference was also made to the definition of "licence agreement" in the shareholder's agreement which, as noticed above, refers to the licence agreement obtaining between Campari and Focus. Stress was also laid on the definition of "material adverse effect", in particular, clause (2) to contend that any material impairment of the ability of Focus, Jubilant or Jubilant Reality in performance of their respective obligations contained in the shareholders agreement or in failing to consummate the transaction contemplated therein would be construed as a material adverse effect. Reference was also made to the definition of transaction documents, which brings within its ambit not only the shareholders agreement but also the licence and the distribution agreement. A specific stress was also laid on clause 2.1, to contend that Focus could not undertake activities except those agreed to by the parties in writing. In this regard reference was also made to clause 2.7, and clause 4.1(b). As regards clause 4.1(b) it was stated that the execution of the licence agreement was one of the condition precedent for Capmari to purchase the shares from Jubilant and Jubilant Reality. My attention was also drawn to clause 8.9 sub clause (c) to demonstrate that no business other than the business contemplated and defined in the shareholders agreement could be undertaken without the affirmative vote of the nominee of the Campari in the meeting of the Board of Directors' or general body meeting of the shareholders or the committee meeting or even in a circular resolution.

7.3 It was thus contended that since the cause of action in respect of the disputes which had arisen under the three agreements, that is, the distribution agreement, licence agreement and the shareholders agreement being common the same could not be split. It was contended that the instant remedy by way of a civil suit undertaken by the plaintiffs was the only appropriate remedy, as otherwise parties to the instant action would have to agitate their respective disputes, in effect, before three different tribunals leading to

multiplicity of proceedings, and conflicting judgments. It was further contended that the purpose of relegating parties to arbitration is best served when there is speedy resolution of disputes at optimum cost. In the scenario, which obtained in the present case, there would neither be speedy nor effective resolution of disputes, and in addition the plaintiffs would be mulcted with exorbitant cost. In support of his submissions Mr Kapur relied upon the following judgments: ***Sukanya Holdings (P) Ltd. vs Jayesh H. Pandya & Anr. (2003) 5 SCC 531*** and ***Indian Organic Chemicals Ltd vs Chemtex Fibres Inc. & Ors. AIR 1978 Bom. 106***.

7.4 Apart from the above, Mr Kapur contended that it is not as if the civil court has no power to decline an application under Section 45 of the 1996 Act . For good reason the court can decline to entertain an application even where their subsists an arbitration agreement between the parties. In that regard, it was submitted that the provisions of Section 8 and 45 of the 1996 Act are pari materia. In support of this submission reliance was placed on the judgment of the Supreme Court in ***N. Radhakrishnan vs Maestro Engineeers & Ors. (2010) 1 SCC 72.***

8. The stand taken by the plaintiffs was rebutted by the applicant/defendant before me. In their rebuttal, they were led by Mr Neeraj Kishan Kaul, learned senior counsel assisted by Mr Darpan Wadhwa. Mr Kaul's submission in support of the defendant nos. 1 and 2 application under Section 45 of the 1996 Act were briefly as follows: The court has no discretion in not relegating parties to arbitration once it comes to the conclusion that parties to the dispute before it are also parties to an arbitration agreement. The only exception, according to Mr Kaul, was that provided in Section 45 of the 1996 Act itself. The exceptions being where the court comes to the conclusion that the arbitration agreement is null and void or is inoperative or incapable or performance. It was contended that merely because the agreement became unworkable or inconvenient on account of cost or for reasons which were connected with logistics of carrying witnesses to the arbitral forum was not good enough for disallowing their applications. For this purpose reliance was also placed on ***Modi Entertainment Network & Anr. vs W.S.G.***

Cricket PTE Ltd. (2003) 4 SCC 341 paragraphs 9, 23 & 26. As a matter of fact, it was submitted that even the possibility of conflicting judgments ought not to come in the way of court in exercising its power under Section 45 of the 1996 Act . This argument was further elaborated by Mr kaul; it was his submission that once an application under Section 45 has been moved, and it meets the pre-requisite of the Section the grounds for refusal can only be those which are referred to in the Section, that is, arbitration agreement is either null and void, inoperative or incapable of performance. In so far as the submission of the plaintiffs' counsel with regard to splitting of cause of action was concerned it was Mr Kaul's submission that situation does not obtain in the instant case. The reason, according to him, was that the three agreements related to three separate transactions, therefore, the ratio of the judgment of the Supreme Court in the case of ***Sukanya Holdings*** *(supra)* was not applicable. In so far as the judgment of the Bombay High Court in the case of ***Indian Organic Chemicals*** (*supra*) is concerned it was Mr Kauls' submission that the observations made therein were not good law. To support this submission he relied upon the judgment of the Supreme Court in the case of ***Svenska Handelsbanken & Ors. vs M/s Indian Charge Chrome Ltd. & Ors. (1994) 2 SCC 155***. The contention being that Section 3 of the Foreign Awards (Recognition) Act Enforcement Act, 1961 (hereinafter referred to as 'Foreign Awards Act') which was substantially similar to Section 45 of the 1996 Act mandated that the court would stay the proceedings unless it was satisfied that the arbitration agreement was null and void, inoperative or incapable of being performed; or there was no dispute with regard to matter on which parties had agreed to a referral. He submitted that except for the last condition the other three conditions, that is, that the agreement was null and void, inoperative and incapable of being performed also find a mention in Section 45 of 1996 Act. Therefore, on an analogous principle this court ought to allow the applications. He emphasized that in the context of the provisions of Section 3 of Foreign Awards Act, the Supreme Court in ***Svenska Handelsbanken*** (*supra*) case had held that once conditions stipulated were fulfilled court was obliged to stay the action. This right, according to the learned counsel,

to have their disputes referred to an arbitral tribunal was an indefeasible right over which the court would not dilute. When looked form this view point Mr Kaul submitted that the judgment of the Bombay High Court in the case of ***Indian Organic Chemicals*** (*supra*) was contrary to the law laid down by the Supreme Court in ***Svenska Handelsbanken*** (*supra*) as also an earlier judgment of the Supreme Court in the case of ***State of Orissa vs Klockner & Co. & Ors. AIR 1996 SC 2140***.

8.1 It was Mr Kaul's submission that in the ***Indian Organic Chemicals*** (*supra*) the learned Judge had himself observed that mere possibility of conflicting judgments could not be construed as making the arbitration agreements incapable of performance so as to bring it within the exception. Furthermore, it was Mr Kaul's submission that the learned Judge had ultimately rejected the prayer of staying the action by resorting to the "discretion" vested in court under Section 34 of the Arbitration Act, 1940. This, according to learned counsel, was not permissible as it was in the teeth of Section 3 of Foreign Awards Act.

8.2 In so far as the judgment of the Supreme Court in ***N. Radhakrishnan*** (*supra*) was concerned, Mr Kaul relied upon the judgment of this court in the case of ***M/s Maruti Clean Coal & Power Ltd. vs Kolahai Infotech Pvt. Ltd. & Ors. IA No. 1659/2010 in CS(OS) 2241/2009 dated 03.03.2010*** wherein the said judgment was distinguished. Specific emphasis was laid on that portion of the judgment wherein the Supreme Court observed that it is the party against whom a charge of fraud is made, is the party which could approach the court, and seek trial in an open court; which perhaps would be a sufficient cause for the court not to make a reference in terms of the arbitration agreement. It was submitted that in this case the defendants had made no such plea; on the contrary the defendants were seeking a reference to the arbitral tribunal. Apart from the above, Mr Kaul also relied very heavily upon a judgment of this Court in the case of ***W.P.I.L. vs NTPC Ltd. & Ors. 2009 (1) Arb. LR 378 (Delhi)***. Particular reference was made to observations made in paragraphs 27 to 30 at pages 392 to 394 of the judgment.

REASONS

9. Having heard the learned counsel for parties, and noticed facts and submissions which are germane to the disposal of the captioned applications; the issue which arises for consideration is: would this court refer the parties to arbitration, in a situation as in the present case, where there are multiple arbitration agreements obtaining between parties with equal number of arbitral tribunals. Not to speak of the difference in laws by which they will be governed. There is the distribution and licence agreement obtaining between Focus and Campari and a shareholder's agreement amongst Focus, Jubilant, Jubilant Reality and Di Chi. All three agreements provide for a panel of three arbitrators. While the arbitral panel in respect of the distribution and licence agreement will function under the aegis of National and International Chamber of Arbitration of Milan; the arbitral panel which would adjudicate upon the disputes under the Shareholder's agreement would work under the aegis of SIAC. The laws governing the distributor and licence agreement is the Italian law while the laws which would govern the shareholder's agreement are laws of this country, i.e, India.

9.1 This is a scenario which is typical of a multi party contract. A multi-party contract can give rise to various kinds of situations. It could be a situation where party A has contracted for project with more than one party say party B and C. Each entity, i.e., A, B and C could have an arbitration agreement with A having therein a right to choose their own arbitrator, and a provision for appointment of a third arbitrator by the other two. The nature of A's claim could be such that B's liability would arise only if C is liable. The difficulty faced would be how do you constitute a Panel of arbitrators with three warring parties, each having the right to choose their own arbitrator.

9.2 Take the example of the present case, which is yet another instance of a Multi-party dispute. There are three separate contracts; parties in at least one out three agreements are different; Focus being the only common entity.

9.3 In the first example the problem is less complex, parties can perhaps be persuaded to agree to a common arbitral tribunal. While party A could have its nominee, party B and C would agree to a common nominee. Where parties cannot agree to common arbitrators,

the Arbitration Institution could step in, where of course such provisions are in existence. Most Arbitration Institutions have provided for such a situation (***see clause 10 of the ICC Rules of Arbitration and Clause 9 of SIAC***). The problem, however, becomes intractable where municipal laws by which parties are governed provide against enforcement of those award, where the right of a party to nominate an arbitrator is superseded. The municipal laws of such countries provide that, where parties are disabled from choosing their arbitrators, such awards are to be set aside on the ground of breach of public policy. (See French case ***BKMI and Siemens vs Dutco referred to in year book of Commercial Arbitration Volume XVIII-1993 pages 140-142***). In this regard reference may be had to Article v(d) of New York Convention extracted in Schedule I to the 1996 Act. The relevant extract reads as follows:

> *"Article V*
>
> *1. Recognition and enforcement of the award may be refused, at the request of the party against whom it is invoked, only if that party furnishes to the competent authority where the recognition and enforcement is sought, proof that –*
>
> *(a) xxxx*
>
> *(b) xxxx*
>
> *(c) xxxx*
>
> ***(d) the composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties, or, failing such agreement, was not in accordance with the law of the country where the arbitration took place; or***
>
> *(e) xxxx"*

9.4 The resolution of the problem in the 2nd example – which is akin to the situation obtaining in the present case, is far more complex. The courts have no power of consolidation of disputes unless parties agree nor is there the power to stay one arbitration till the other proceeds. There is no power vested in the court to add parties unless parties agree. In the case entitled ***Abu Dhabi Gas Liquefaction Co. Ltd. vs Eastern Bechtel Corporation and Chiyoda Chemical Engineering & Construction Co. Ltd. (1982) 2 Lloyd's Law Reports 425*** the House of Lords did exercise its power to appoint a common

arbitrator in a dispute arising between the employer, main contractor, and sub-contractor which were governed by two separate agreement. This power was exercised, however, in an application moved before the court for appointment of an arbitrator. The argument raised in ***Abu Dhabi*** (*supra*) against appointment of a common arbitrator was equally weighty, (an argument which was accepted by the court below). The argument was that if arbitrator is common then, if in the adjudication of the 1st dispute between the employer and the main-contractor the arbitrator forms a certain opinion he could carry a bias, which could impact the main contractor in the resolution of his dispute with the sub-contractor. This argument, based on an apprehension of the main contractor, was sought to be allayed by the House of Lords by alluding to the following: firstly, the standard and quality of arbitrator they intended to appoint; secondly, at the appropriate time, perhaps, the arbitrator may himself, if he felt the need, could disengage from the proceedings; and lastly by giving liberty to the party to approach the court.

9.5 In the instant case, however, I am dealing with a situation where the defendants request the court to refer the parties to arbitration and for appointment of arbitrators.

10. The submission of Mr Kapur is that I should interdict this process.

10.1 In order to do so the court should be able to come to the conclusion that Section 45 of the 1996 Act is not triggered. For the sake of convenience let me cull out the provisions of Section 45 of 1996 Act .

> *"45. Power of judicial authority to refer parties to arbitration, - Notwithstanding anything contained in Part I or in the Code of Civil Procedure, 1908 (5 of 1908), a judicial authority, when seized of an action in a matter in respect of which the parties have made an agreement referred to in section 44, shall, at the request of one of the parties or any person claiming through 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."*

10.2 A bare perusal of the aforementioned provision would show that Section 45 of the 1996 Act has four ingredients.

(1) Parties must have entered into an agreement referred to in Section 44 of 1996 Act . Such an agreement is required to be in writing (whether contained in a contract or executed separately) and should be signed by parties. The agreement however could also be culled out from contents of letters, faxes etc.

(ii) The judicial authority should be seized of an action in a matter in respect of which parties have an agreement referred to in clause (i0 above.

(iii) There is a request by the parties to the agreement for reference to an arbitration

(iv) The judicial authority comes to the conclusion that the arbitration agreement does not fall in the ***excepted part*** of Section 45, which is, that the arbitration agreement is neither null or void or, inoperative or, incapable of being performed.

10.3 It has neither argued nor pleaded that the agreements are not those, to which the New York convention applies. The court is seized of an action. There is an arbitral clause contained in an agreement signed by parties. Parties to the arbitration agreement have made a request for being referred to arbitration. The ingredients being fulfilled the court is obliged to refer the parties to arbitration unless it comes to the conclusion that it is null or void, inoperative or incapable of being performed.

10.4 In this context the observations of the author Alan Redfern and Martin Hunter in their book Law and Practice of International Commercial Arbitration at page 173 are instructive and hence are extracted hereinbelow:

> *"The reference to the agreement being "null and void" refers to the arbitration agreement itself since, as seen in the discussion of the principle of separability, in most countries the nullity of the main contract does not necessarily affect the validity of the arbitration agreement. At first sight it is difficult to see a distinction between the terms "inoperative" and "incapable of being performed". However, an arbitration clause is inoperative where it has ceased to have effect as a result, for example, of a failure by the parties to comply with a time-limit, or where the parties have by their conduct impliedly revoked the arbitration agreement. By contrast, the expression "incapable of being performed" appears to refer to more practical aspects of the prospective arbitration proceedings. It applies, for example, if for some reason it is impossible to establish the arbitral tribunal.*

Lack of the ability to make payment of an award should not mean that an arbitration clause is incapable of being performed. However, in India it has been held that a stay of court proceedings should be refused on the grounds that exchange control regulations would prevent payments in foreign currency to the arbitrators and other overseas expenses of those participating in a foreign arbitration."

10.5 There may be situation where there is an allegation of fraud in the execution of, the parent agreement in which the arbitration clause finds a mention, or in the arbitration agreement which is separately executed. Since fraud vitiates all solemn acts, the court is not bound in such situation to refer parties to arbitration on a request made to it under Section 45 of the 1996 Act is made. See ***India Household and Healthcare Ltd. vs L.G. Household and Healthcare Ltd. 2007 (5) SCC 510***. The agreement could be null or void for various reasons, including that it is in breach of the public policy of our country. What has to be borne in mind is that the expression "inoperative" or "incapable of being performed" does not and cannot relate to inconvenience or unworkability. It cannot be construed in a manner that it would defeat "***indefeasible rights***" of parties to have recourse of arbitral proceedings [See ***W.I.P.L.*** (*supra*)].

10.6 At this Point let me briefly advert to the facts obtaining in ***Svenska Handelsbanken*** (*supra*). The borrower who was the original plaintiff had entered into two separate agreements with suppliers of equipment and the lenders of finance. Both agreements contained arbitration clause to enable reference of disputes to arbitration. The borrower contrary to the terms of the arbitration agreements, obtaining in the two agreements, filed a suit in a civil court. The subordinate court granted an ad-interim ex-parte injunction. The lenders engaged a lawyer to seek vacation of the interim order and stay of the suit. The lender filed an application under Section 3 of the Foreign Awards Act seeking a stay of the suit. A similar application was filed by the suppliers, though no application was filed by them to seek vacation of the order of injunction. The lawyer, who was engaged by the lender specifically for the aforesaid purposes; it appears exceeded its mandate. The subordinate court confirmed the order of injunction and dismissed the

application under Section 3 of the Foreign Awards Act by observing that pre-requisites stipulated in ***Renusagar Company*** *(supra)* were not fulfilled. The matter was carried by the lenders to the High Court by way of a revision petition. The High Court disagreed with the view of the subordinate court except to the extent that condition (v) stipulated in ***Renusagar Company*** *(supra)* was not fulfilled. The High Court, accordingly concluded that the lender's application would have to be dismissed. At this stage it would be pertinent to make a note of the condition which was stipulated in ***Renusagar Company*** *(supra)* which, the High Court felt was not fulfilled, and what were its observation in that regard. The same being relevant are extracted hereinbelow:

Condition (V)

"(v) The court has to be satisfied that the agreement ***is valid, operative and capable of being performed****; this relates to the satisfaction about the 'existence and validity' of the arbitration agreement." (emphasis is mine)*
(**See paragraph 23 at page 166**)

"36. *It will be noticed that the only other finding of the High Court against defendant 4 for declining stay of the suit is common with other defendants appellants before us, namely that they have not satisfied condition (v) as spelt out in the aforesaid case of Renusagar.*

37. *The High Court at the end of paragraph 8 of its judgment gave the following findings:*

"Thus, factually, I am satisfied that Article II of the convention set forth in the schedule to the Foreign Awards Act applies to each of the agreements with the three sets of applicants. Suit out of which these civil revisions arise as legal proceedings initiated by plaintiff which is a party to each of the agreements with the applicants. Such suit relates broadly to defects in the equipments supplied, erection and commission of the power plant by defendants 1 to 3 and non-satisfaction of terms for payment to defendants 1 to 3 by defendant 4. ***These are all in respect of matters agreed to be referred to arbitration as per the clauses to that effect in the various agreements****. By alleging fraudulent misrepresentations in the plaint against the applicants, plaintiff cannot avoid the arbitration clauses in view of the broad language of the different clauses, where question of fraudulent representation can also be effectively answered in the award to be binding*

on the parties to the agreement. Therefore, conditions (i), (ii), (iii) and (vi) as laid down by the Supreme Court for application of Section 3 are satisfied in this case in respect of all the applicants."

Again in paragraph 16 of the judgment it was observed thus:

***"It is next to be examined whether condition (v) is satisfied in respect of these three applications. There can be no doubt that each of the agreements standing by itself is valid, operative and capable of being performed**. Thus the condition relating to existence and validity of each of the agreements are satisfied.* But when all the agreements are put together, a different situation arises*." (emphasis is mine)*

(**See paragraph 36 & 37 at page 171**)

10.7 To continue with the narrative, against the decision of the High Court, matter was carried in appeal to the Supreme Court. The Supreme Court in its judgment dealt with two aspects. First, whether the advocate had acted beyond its mandate, and whether his acts would constitute a step in proceedings. The Supreme Court found in favour of the lenders (who were appellants before it). Since we are not concerned with this aspect, I need not dialate on it. The second, which is relevant for the present case are the observations of the Supreme Court on non fulfillment of condition (v). The same being apposite are extracted hereinbelow:

***"38.** We are concerned with the validity, operativeness and capability of being performed of the arbitration agreements — (1) between the borrower and the suppliers and (2) between the borrower and the lenders. The finding of the High Court is that they are valid, operative and capable of being performed if left with themselves between the borrower and the suppliers on the one hand and between the borrower and the lenders on the other. The High Court, however, took the view that they have become inoperative as the agreement with the lenders is before one set of arbitrators in proceedings to be held at Stockholm i.e. against the lenders and before other set of arbitrators in proceedings to be held at Paris i.e. against the suppliers, though, the body, which is to conduct the arbitration proceedings is the same. This makes the agreements either invalid, inoperative or incapable of being performed.*

39. *The above extracts and reasoning of the judgment of the High Court show that each of the three defendants 1 to 3 had satisfied all the requirements of Section 3 of the Foreign Awards Act and each was entitled to have the suit proceedings stayed against them so that the disputes could be resolved only by the foreign arbitration proceedings stipulated by them with the plaintiff in their respective arbitration agreements.*

40. *The only ground given by the High Court for refusing the stay of the suit against defendants 1 to 3 is as mentioned earlier. The High Court has also pointed out that since the plaint does not make severable allegations against different defendants who are parties to different contracts, with different arbitration agreements* ***and the allegations made by the plaintiff against different defendants are such that they cannot be separated from each other and since the arbitrations between the plaintiff and different defendants may have to go to different arbitrators, all the arbitration clauses must be treated as having become inoperative. It has further been observed by the High Court that if all the agreements containing arbitration clauses with different defendants had envisaged only one arbitrator for adjudicating all the disputes, the fact that there were several agreements with the different defendants would not have affected the matter and the award given by common arbitrators could have bound all the parties in the suit****.*

41. It appears to us that the aforesaid reasoning of the High Court is strained and totally erroneous*. It also amounts to disregarding the mandatory provision of Section 3 of the Foreign Awards Act."*

(emphasis is mine)

(**See para 38 to 41 at page 172**)

10.8 A perusal of the observations extracted above make it clear that the Supreme Court found the reasoning of the High Court ***'strained'***, in as much as it labeled the arbitration agreement "inoperative" or "incapable of being performed" because disputes had to resolved before two different arbitral forums. On a parity of reasoning; a somewhat similar argument of Mr Kapur will have to be rejected.

10.9 Therefore, before the court refers the parties to arbitration it is required to ascertain whether any of ***three excepted situations*** obtain in the matter. If not, the court has no jurisdiction to continue with the seized action.

10.10 Mr Kapur's argument is not that the situation obtaining in the present case falls in any of the three exceptions, but that Section 45 of the 1996 Act is not applicable. His submission put simplistically is that Section 45 of the 1996 Act speaks of "a matter" "an agreement" – is suggestive of the legislative intent that it would have no applicability where there are multiple agreements which are inextricably interlinked. In my view such an interpretation seeks to take advantage, though erroneously, of what is decidedly a case of bad drafting of the contract which failed to take into account a situation where multifarious disputes having common linkage could arise simultaneously. All that draftsman had to do was to provide for a clause for common panel of arbitrators and perhaps a suitable clause for consolidation of claims or even for impleadment of third (but interlinked) parties to the claim. The draftsman's mess in forging a contract of the kind, they have cobbled up, cannot be laid at the door the legislature. Having said that, in the instant case in so far the applicants, i.e., defendant nos. 1 and 2 are concerned they seek reference of parties to an arbitration arising of out one single arbitration agreement (i.e. a matter). There is no plurality in that sense, the plurality arises if at all because of number agreements which deal with different facets of the same business. Mr Kapur likened this situation to splitting of "cause of action". This he said was not permissible. In support of this argument he relied heavily upon the judgment of the Supreme Court in the case of ***Sukanya Holdings*** (*supra*). In order to deal with this submission one would have to examine the ratio of ***Sukanya Holdings*** (*supra*).

10.11 The facts of ***Sukanya Holding*** (*supra*) were as follows: the respondents before the Supreme Court were partners in a construction firm which was carried out in the name and style of M/s Hetali Construction Company (in short 'firm'). The land on which construction was to be carried out, had been brought into the firm by one partner, in the form of a capital contribution. The said partner, who had brought the land, pursuant to an

award stood retired from the firm. In accordance with the award the said partner was paid an appropriate compensation. Thereafter, it appears the firm entered into an agreement with a construction company. Some flats constructed were sold to creditors, while others were sold by the construction company, which the firm had engaged. The construction company in turn sold those flats to various purchasers (hereinafter referred to as the 'disputed flats'). It appears that the firm executed conveyance deed in favour of another company by the name of West End Gymkhana Ltd. in respect of flats which had been sold subject to rights of parties. It is in this context that respondent no. 1 before the Supreme Court filed a suit for dissolution of the firm, and also challenged the conveyance deed executed in favour of West End Gymkhana Ltd. In the said suit, the other partner, that is, the appellant, filed an application under Section 8 of the 1996 Act. The respondent no. 1 withdrew this suit, and filed a fresh suit in which apart from seeking dissolution of the firm, rendition of accounts, and other reliefs, relief; was also sought for setting aside of transfers made in disputed flats in favour of various purchasers. These purchasers were also made parties to the suit.

10.12 It is in this context that the High Court had dismissed the application filed under Section 8 of the 1996 Act by the appellant, on the ground, that the defendants/purchasers, who are parties to the suit, were not a party who were not parties to the arbitration agreement. According to the High Court it did not have the power to add parties who were not parties to the arbitration agreement. The High Court also declined to accept the prayer that a part of the subject matter be referred to arbitration. The High Court, proceeded to hold that the purpose of the 1996 Act being to avoid multiplicity of proceedings, it could not allow two forums to simultaneously adjudicate upon the matter. The Supreme Court concurred with the view of the High Court, and held that there was no provision in the 1996 Act to split the cause of action. In this regard Mr Kapur had placed reliance on paragraph 15 to 17 of the judgment, for the sake of convenience the same are extracted hereinbelow:

"15. The relevant language used in Section 8 is "in a matter which is the subject matter of an arbitration agreement". Court is required to refer the parties to arbitration. Therefore, the suit should be in respect of 'a matter' which the parties have agreed to refer and which comes within the ambit of arbitration agreement. Where, however, a suit is commenced - "as to a matter" which lies outside the arbitration agreement and is also between some of the parties who are not parties to the arbitration agreement, there is no question of application of Section 8. The word 'a matter' indicates entire subject matter of the suit should be subject to arbitration agreement.

16. The next question which requires consideration is--even if there is no provision for partly referring the dispute to arbitration, whether such a course is possible under Section 8 of the Act. In our view, it would be difficult to give an interpretation to Section 8 under which bifurcation of the cause of action, that is to say, the subject matter of the suit or in some cases bifurcation of the suit between parties who are parties to the arbitration agreement and others is possible. This would be laying down a totally new procedure not contemplated under the Act. If bifurcation of the subject matter of a suit was contemplated, the legislature would have used appropriate language to permit such a course. Since there is no such indication in the language, it follows that bifurcation of the subject matter of an action brought before a judicial authority is not allowed.

17. Secondly, such bifurcation of suit in two parts, one to be decided by the arbitral tribunal and other to be decided by the civil court would inevitably delay the proceedings. The whole purpose of speedy disposal of dispute and decreasing the cost of litigation would be frustrated by such procedure. It would also increase the cost of litigation and harassment to the parties and on occasions there is possibility of conflicting judgments and orders by two different forums."

10.13 In my view, the ratio of the judgment of the Supreme Court in ***Sukanya Holdings*** (*supra*) has no applicability to the instant case. Firstly, the judgment construed the provisions of Section 8 and not Section 45 of the 1996 Act. While there may be some similarity of purpose in the legislature incorporating Section 8 in part I of the 1996 Act, the provisions are not pari materia. Secondly, as is deducible from the facts obtaining in that case the suit, which was filed by one of the partners, not only sought a relief of dissolution of the firm and rendition of accounts but also sought cancellation of sale deed

in respect of "disputed flats" transferred to certain purchasers who had been made defendants in the suit. In this context both the High Court and the Supreme Court came to the conclusion that the dispute between the partners wherein the relief sought for was for dissolution of the firm and rendition of accounts, could not be split. In the present case, there is no such difficulty obtaining. Each facet of the business is governed by a separate agreement. The applicants herein are seeking reference to arbitration, only qua those parties who are parties to the respective arbitration agreements. In this context the observations of the Supreme Court in the case of ***Rashtriya Ispat Nigam Ltd vs Verma Transport Corp. (2006) 7 SCC 275*** at page 291 and 292 in paragraph 45 & 47 being apposite are also extracted hereinbelow:

> *"45. Reliance placed by the learned counsel on* ***Sukanya Holdings (P) Ltd. vs Jayesh H. Pandya is misplaced****. Therein, not only a suit for dissolution of the firm was filed, but* ***a different cause of action had arisen in relation whereto apart from the parties to the arbitration agreement, other parties had also been impleaded****. In the aforementioned fact situation, this Court held:*
>
> *Quotation of para 13, of Sukanya Holdings (supra)*
>
> *46. xxxx*
>
> *Quotation of para 16 & 17 of Sukanya Holdings (supra).*
>
> *47. Such a question does not arise herein as the parties herein are parties to the arbitration agreement and the question in regard to the jurisdiction of the arbitrator, if any, can be determined by the arbitrator himself in terms of Section 16 of the 1996 Act."* (underlining is mine)

10.14 A close scrutiny of the facts would show it dealt with a case where a part of dispute was covered by the arbitration agreement while the other part was not. Such a situation does not obtain in the present case. The disputes are decidedly covered by the agreements in issue. Therefore, reference to arbitration will not result in splitting of cause of action.

11. On the aspect of plurality Mr Kapur placed reliance on the judgment of the Bombay High Court in the case of ***Indian Organics Chemicals*** (*supra*). The said judgment was passed in the context of Sections 2 and 3 of Foreign Awards Act. While

there are similarities there are also differences in the Foreign Awards Act and the 1996 Act.

11.1 In ***Indian Organics Chemicals*** (*supra*) the learned Judge rejected the application for stay filed under Section 3 of the Foreign Awards Act on two grounds. First, that the legal disputes had to arise out of agreements which were declared as commercial agreements "***under the law in force in India***". According to the learned Judge this expression which obtained in Section 2 of the Foreign Awards Act required enactment of a specific law in that regard. The learned Judge went on to hold: "***the agreements though commercial do not fall within the coverage of Section 3 of 1961 Act***". This is evident on reading of paragraphs 42 and 43 of the judgment. The second ground for rejection was the inapplicability of Section 3 of the Foreign Awards Act to multiple agreements.

11.2 In so far as the first ground was concerned a Division Bench of the Bombay High Court in the case of ***European Grain & Shipping Ltd vs Bombay Extractions Private Ltd & Ors. AIR 1983 Bom. 36*** specifically disagreed with the view taken by Mridul, J. in ***Indian Organic Chemicals*** (*supra*).

11.3 As regards the second aspect it is distinguishable for the reasons given hereinafter. But let me first advert to the facts obtaining in the case. In ***Indian Organics Chemicals*** (*supra*) the facts to the extent they could be gathered were as follows: (This is because the report skips setting out detailed facts – see paragraph 1 of the judgment) There were three arbitration agreements, provided for in three separate agreements, which required parties to appear before three different arbitral forums governed by different laws. The Bombay High Court in this context was called upon to adjudicate as to whether an application made under Section 3 of the Foreign Awards Act seeking a stay of the suit ought to be allowed. The court came to the conclusion that the contours of the dispute as noticed, took it outside the purview of Sections 2 and 3 of the Foreign Awards Act. The core of the court's reasoning is reflected in the following observations of the court:

"Section 3 of the Foreign Awards Act does not contemplate plurality of agreements impinge upon a dispute or a set of disputes. The Section has no application to a situation where plurality of agreements converge on disputes and differences which arise out of a single transaction or a series of transactions which are inextricably linked with each other".

11.4 Based on the observations made in the judgment Mr Kapur has stressed that the provisions of Section 3 of the Foreign Awards Act being pari materia with the provisions of Section 45 of the 1996 Act the same test ought to be applied while dealing with application of defendant nos. 1 and 2

11.5 In my view such submission cannot be accepted for more than one reason. First, the Supreme Court in the case of ***Renusagar Company Ltd vs General Electric Company & Anr. (1984) 4 SCC 679*** while construing the provisions of Section 3 of the Foreign Awards Act in no uncertain terms observed, in paragraph 54, that in case the ingredients referred to in Section 3 of the Foreign Awards Act are fulfilled the court is mandatorily obliged to stay the proceedings in view of the expression "shall" obtaining in the said provision.

11.6 Secondly, a careful perusal of Section 3 of the Foreign Awards Act would show that while there are some similarities there are also some marked differences. For the sake of convenience Section 3 of the Foreign Awards Act, 1961 as amended by Act of 47 of 1973 is extracted hereinbelow:

"3. Stay of proceedings in respect of matters to be referred to arbitration,- Notwithstanding anything contained in the Arbitration Act, 1940, or in the CPC, 1908, if any party to an agreement to which Article II of the Convention set forth in the Schedule applies, commences any legal proceedings in any court against any other party to the agreement, in respect of any matter agreed to be referred to arbitration in such agreement, any party to such legal proceedings may, at any time after appearance and before filing a written statement or taking any other step in the proceedings, apply to the Court to stay the proceedings and the Court, unless satisfied that the agreement is null and void, inoperative or incapable of being performed or that there is not, in fact, any dispute between the parties with regard to the matter agreed to be referred, shall make an order staying the proceedings."

11.7 A careful reading of the Section would show that even though both Section 3 of the Foreign Awards Act and Section 45 of the 1996 Act begin with a non-obstante clause the power under Section 3 of the Foreign Awards Act is to stay the proceedings, which is not the case in Section 45 of the 1996 Act – with the vesting of power of stay comes into play a certain amount of discretion. [See observations in paragraphs 25 to 27 of ***Rashtriya Ispat*** (*supra*) where there is discussion on the provisions of Section 8 of the 1996 Act and Section 34 of the Arbitration Act, 1940 (in short '1940 Act').]. Furthermore, a closer perusal of Section 3 of the Foreign Awards Act would show that it operates if, the following ingredients are present which are: If a person, who is a party to an agreement to which New York Convention applies, takes recourse to a legal proceeding against another person who is a party to the said agreement in respect of any matter with regard to which parties have agreed for a reference to arbitration then, such an aggrieved party any time ***before*** filing a ***written statement*** or ***prior*** to taking any "***steps in the proceedings***" could approach the court for stay of proceedings. It is quite evident that legal proceedings in court, which are covered by Section 3 of the Foreign Award Act, are not ip-so-facto without jurisdiction. If the opposing party were to take a step in proceedings or were to file the written statement the right of the aggrieved party, to seek stay of proceedings, would get dissolved.

11.8 As against this under Section 45 of the 1996 Act the court typically does not stay the proceedings but refers the parties to arbitration. The practical impact may perhaps be the same but jurisprudentially, in my view, the legislature has consciously cast the section differently. The reason perhaps being that once it is brought to the notice of the court that there is an arbitration agreement of the nature referred to in Section 44 of the 1996 Act obtaining between the parties, the court is duty bound to refer the parties to arbitration. This, of course, comes with a caveat, and to this extent the court exercises a limited jurisdiction, which is, to ascertain as to whether the agreement under which reference is sought is not null and void or inoperative or incapable of being performed. Therefore, apart from these aspects there is a marked difference in the two provisions. As a matter of

fact, Section 3 of the Foreign Awards Act has a fourth dimension which is, added to the excepted part of the provision, which is, that the court need not stay proceedings where there is no subsisting dispute obtaining between the parties. This fourth ingredient (i.e., exception) is absent in Section 45 of the 1996 Act. Therefore, in my view, to place reliance on the judgment of the Bombay High Court would not be apposite. This apart, as noticed above, the Supreme Court in the case of ***Renusagar Company*** (*supra*) followed by ***Svenska Handelsbanken*** (*Supra*) has decidedly observed in the context of Section 3 of the Foreign Awards Act that, once the ingredients of the provision stand fulfilled the court was duty bound to stay the proceedings.

12. In view of the discussion above, Mr Kapur's submission that the application filed by the defendant nos. 1 and 2 under Section 45 of the 1996 Act, is not maintainable since the provision is not applicable; is untenable. Section 45 is applicable. As observed by me hereinabove, the case does not fall within the excepted categories, and therefore, the only option available is, to refer the parties to arbitration.

13. One of the main planks of Mr Kapur's submission was that the put option under shareholder's agreements gets triggered, to the detriment of Jubilant, by a simplicitor termination of the distribution agreement. It is the submission of the learned counsel that this prejudices the cause of Jubilant; since Jubilant is not a party to the distribution agreement it is not in a position to impugn the termination notice.

13.1 In my view, this argument, on first blush, seems attractive, however, on a closer scrutiny it is clear that it is without merit.

13.2 In every contract there are events of default which set in motion obligation of the party to the contract. The contract between parties is not vitiated merely because the concerned party is not in a position to impugn the event of default. This can be tested on a bare perusal of clause 10.3 of the shareholder's agreement. The put notice gets not only triggered on termination of licence and/or distribution agreement but also on occurrence of an insolvency event. Insolvency event, as defined amongst others, is an event where a creditor presents a petition or commences proceeding for liquidation against Focus. It is

quite possible in such a proceedings Jubilant is not a party; then, could it in such circumstances be said by Jubilant, that triggering of the put option notice is prejudicial to its interest. In my view, the answer has to be in the negative. As a matter of fact Clause 10.3 is worded in the widest terms. Parties have agreed to the put option being triggered irrespective of the reason for termination of the distribution and/or licence agreement. A court cannot re-write agreement for parties.

14. There is one last submission of Mr Kapur that requires to be dealt with. Mr Kapur had placed reliance on the judgment of the Supreme in the case of ***N. Radhakrishnan*** (*supra*) to contend that, it is not as if once an application under Section 45 of the 1996 Act is filed, the court is bound to refer the parties to arbitration. Since I have dealt with the scope of the provisions of Section 45 of the 1996 Act, I do not intend to repeat the same here. Suffice it to say that once ingredients of Section 45 are found to be present in a matter, and a request is made that parties be referred to arbitration, court is duty bound to do so save and except where the case falls within excepted category. In ***N. Radhakrishnan*** (*supra*) case the Supreme Court was dealing with the case of fraud. There are no pleadings, much less particulars with respect to fraud being employed by the defendants, in the plaint. Therefore, in my view, the ratio laid down by the Supreme Court in ***N. Radhakrishnan*** (*supra*) case would not be applicable.

15. For the reasons given hereinabove, prayer (a) in the captioned applications are allowed. The parties to the suit are referred to arbitration in terms of the agreements obtaining between them. Parties shall bear their own cost.

Dasti.

RAJIV SHAKDHER, J

AUGUST 20, 2010
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