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

NOTICE OF MOTION NO. 58 OF 2012
IN
SUMMARY SUIT NO. 2086 OF 2011

Wockhardt Ltd. .. Plaintiff
Vs.
T.A.I. Pharma Ltd. .. Defendant

Mr.Rohaan Cama i/b T.N.Tripathi & Co. for plaintiff.

Mr.Simil Purohit i/b Girish B. Kedia for defendant.

CORAM : K.R.SHRIRAM, J.
RERERVED ON : 10TH AUGUST, 2015
PRONOUNCED ON : 20TH AUGUST, 2015

P.C.

1 The plaintiff and the defendant entered into an agreement dated 1.01.2007 (the said agreement) whereby the defendant was appointed by the plaintiff as a clearing and forwarding (C & F) agent for the purpose of importing/stocking the products and selling the pharmaceutical products of the plaintiff. According to the plaintiff, the defendant was responsible for payment of the value of the products supplied by the plaintiff whereas the stand of the defendant is that they were not so liable.

2 The plaintiff supplied diverse quantity of pharmaceutical products to the defendant. In respect of the supplies made by the plaintiff, the plaintiff

drew 14 bills of exchange which were duly accepted by the defendant for payments. The dues under the bills of exchange were payable through the bankers of the plaintiff or to their orders. The defendant having accepted the bills of exchange, the plaintiff has paid and discharged dues of the bankers under the bills of exchange and it is the case of the plaintiff that they are entitled to recover amounts under the bills of exchange from the defendant as per the statutory provisions contained in Section 145 of the Indian Contract Act. The plaintiff is claiming a sum of Rs.28,23,83,193.4 from the defendant and has based their claim in the suit as stated in paragraph 9 of the plaint as under :

> *"9 The plaintiff's claim is arising out of bills of exchanges and statutory provisions contained in Section 145 of the Indian Contract Act. …........................."*

3 The suit was lodged after the Court granted leave under Clause 12 of the Letters Patent. The plaintiff has taken out summons for judgment being summons for judgment no.335 of 2011 which came to be registered on 3.11.2011. The defendant took out a notice of motion bearing No.58 of 2012 that came to be lodged on 9.01.2012 and also took out chamber summons no.45 of 2012 lodged on 10.01.2012 praying for revocation of the leave accorded under clause 12 of the Letters Patent to the plaintiff.

4 The notice of motion taken out by the defendant is seeking an order to refer the dispute in the present suit to arbitration in accordance with the rules of arbitration of the International Chambers of Commerce to be held at Berlin and decided as per German Law in terms of the said agreement. The counsel for the plaintiff and the defendant stated that the notice of motion be heard first and if the Court decides the notice of motion in favour of the applicant, nothing will survive in the suit. Therefore, the notice of motion is taken up for hearing.

5 It is the case of the defendant that clause 12.1 and 12.2 of the said agreement provide that the dispute between the parties to be referred to arbitration and the agreement is governed by German Law. Clauses 12.1 and 12.2 read as under :

> *12.1 Any dispute between the parties, whether resulting from a provision in this agreement or from the applicable statuary law, which may arise in connection with this agreement, or the interpretation, application, implementation, validity or termination of this Agreement or of any provision thereof shall exclusively be referred to and finally settled by arbitration in accordance with the rules of Arbitration of the International Chamber of Commerce as valid at the date of proceedings, excluding ordinary proceedings. The place of arbitration proceedings shall Berlin.*
>
> *12.2 The validity, construction and performance of this Agreement shall be governed by German Law. The contractual language is English. The parties further agree that English shall be the language applicable for*

arbitration proceedings.

6 According to the counsel for the applicant, this Court has no jurisdiction because the bills of exchange based on which the suit is filed, have been issued and accepted under the said agreement and as the said agreement provides for arbitration and that German Law to be applied as substantiative law, this Court shall not exercise jurisdiction.

7 The counsel for the plaintiff stated that the plaintiff has lodged the claim on the subject matter of the present suit on the basis of bills of exchange accepted by the defendant which the defendant is entitled to maintain independently of the said agreement. As the suit filed is not under the said agreement but on the basis of the acceptance of the bills of exchange by the defendant, the said agreement itself need not be looked into to decide the present suit and therefore the arbitration clause or the applicable law clause can have no bearing. The counsel for the plaintiff relied on the judgment of this Court in the mater of ***M/s. Kishan Swaroop Ashokkumar & Ors. Vs. The Podar Mills Limited with other matters***[1]**.**

Per contra, the counsel for the defendant submitted that as the said agreement provided that the validity, construction and performance of the agreement shall be governed by German law, the onus is on the plaintiff to

1 1986(3) Bom.C.R.1

show that such an action only on the bills of exchange independent of the underlying contract is permissible for a party to maintain under German Law. In other words, he submitted that the plaintiff should prove that there was a provision akin to order 37 of Code of Civil Procedure under German Law. The counsel further submitted that the defendant has not accepted the bills of exchange, as the endorsement in the Bills of Exchange only says "Received original documents". According to the counsel Shri Purohit it only means that defendant has received the documents and does not mean they hve accepted or agreed to pay under the Bills of Exchange.

8 On the issue as to whether the Bills of Exchange has been accepted or not is something that is going into the merits of the case made out by the plaintiffs and will be considered at the time of hearing of the summons for judgment. Hence, I am also not making any observation on the same at this stage but proceeding purely on the basis of the averments in the plaint-Bills of Exchange have been accepted by the defendant.

9 Though the case in Kishan Swaroop (supra) was on an application made under Section 34 of the Arbitration Act, 1940, the principles laid down therein would equally apply even on an application filed under Section 45 of the Arbitration and Conciliation Act, 1996. The Court held that Section 34

for staying of suits would not be applicable to the suit in question when all the hundies in question were drawn in favour of the petitioner and when the suit claim is based on the hundies and not for the price of the goods. In that case also, the plaintiff had filed a summary suit under Order 37, Rule 2 of the Code of Civil Procedure, 1908 for recovering the amounts of dishonoured hundies. When the plaintiff took out summons for judgment, the defendant had taken out notice of motion for staying of the suits and reference of the disputes to arbitration. The Court observed that it was essential that the dispute which is sought to be referred to arbitration must relate to or arise out of the contract which is the subject matter of the suit sought to be stayed. Otherwise there was no need to stay.

The court in paragraphs 10, 11 and 12 of the judgment held as under :

> *10 The basic question, however is whether in a summary suit based on a hundi the defendant can invoke the arbitration clause contained in the contract, under which the goods for the p rice of which the hundies were drawn, were supplied. The Supreme Court accepting the test laid down in this behalf in (Heyman v. Darwins Ltd.), 1942 AC 356 laid down in (A.M. Mair & Co. Vs. Gordhandas Sagarmull), A.I.R.(38) 1951 S.C.9 that where a party has to have recourse to the contract to establish his case, it is a dispute under the contract. As mentioned above the suits out of which these appeals arise that are summary suits based on the negotiable instruments viz. the hundies. It is also pertinent to not in this context that the hundies were drawn in favour of ht State Bank of India and were endorsed in favour of the respondent who thus became the holders in due course of the hundies. It will also be seen from the hundies that the goods were received by the*

appellants before the hundies were drawn. There is also nothing to show that by a subsequent agreement the liability of the appellants to pay the amount of the hundies was conditional upon the appellants to pay the satisfying themselves of the quality and quantity of the goods supplied. The liability accepted by the appellants under the hundies was absolute and the discharge of th liability to pay for the goods was unconditional. Hence not only it was not open for the respondents to a fall back on the original contracts for the recovery of the price nor it was open for the appellants to raise any dispute in respect of th quality and quantity of the goods, or in respect in of any counter claim arising out of the terms of the contracts under which goods in question were supplied. <u>This position flows from Section 32 of the Negotiable Instruments Act which lays down that in the absence of a contract to the contrary, the maker of a promissory note and the acceptor before maturity of the bill of exchange are bound to pay the amount thereof at maturity according tot he apparent tenor to of the note of or acceptance respectively, and the acceptor of a bill of exchange at or after maturity is bound to pay the amount thereof the to holder on demand.</u>

11 Somewhat identical question fell for consideration of the Division Bench of Lahore High Court in (Radha Bihari Diwan Singh V. Jaffe & sons.) AIR 1922, Lahore 353 in an appeal from an order refusing to stay the proceedings a in a suit under Rule 18 of the second schedule of the Code of Civil Procedure (which is analogous to section 34 of the Arbitration Act). In that case that the appellant-firm placed indent for purchase of 10 bales of white shirting of certain specified qualified with the respondent-firm. After the shipment of goods the appellants drew two bills of exchange against the buyer at 60 day' sight. These bills we presented by the National Bank of India, Limited, Delhi, to the appellants who accepted them but subsequently refused to pay them upon maturity. The respondent firm accordingly sued them and their claim was based in the first instance, upon the accepted but unpaid bills, and in the alternative they sued for the price for the goods and for certain expenses. Clause 15 of the indent form provided that if any claim or dispute *arose in connection with the contract, unless amicable settlement could be arrived at, it must be referred to arbitration in Delhi, in accordance with the Survey and Arbitration Rules of the Delhi Hindustani Mercantile Rules of the Delhi Hindustani Mercantile Association. Relying upon this clause the appellants sought reference of the dispute of toe arbitration and stay of the suit. The trial court rejected the prayer and in appeal the Division Bench confirmed that order holding as follows:*

> *"It is not denied that the bills of exchange were accepted by the defendant firm. Section 32 of the Negotiable Instruments Act lays down that in the absences of a contract to the contrary to the acceptor before maturity of the a bill of exchange is bound to pay the amount thereof at maturity, according to the apparent tenor of the acceptance. The suit as brought upon the accepted, but unpaid, bills of exchange is therefore, a suit governed by this section and is not a suit for damages or for the price of the goods at all".*

In that case that the appellant invoked Section 43 of the Negotiable Instruments Act to urge that either the bills of exchange were accepted without consideration or for a consideration which subsequently failed, and that, therefore, the appellants were not liable. The leaned Judges accepted the position that it was open for the appellants to show that the bills of exchange were accepted without consideration or to raise any other defence which they maybe advised to; do, but prima facie the respondent firm had a good case under Section 32 of the Negotiable Instrument Act, and , hence there a was no justification for interfering with the order refusing to stay the suit. No doubt in that case int eh indent itself the appellant had bound themselves to accept the bills presentation and pay at maturity notwithstanding any objections they may have regarding any objection they may have regarding or on account of any variation whatever from the terms of the indent, such objection to be settled by arbitration as provided for. The learned Judges held that even if such *objection was taken it must be settled by arbitration in the way subsequently provided but the accepted drafts must be paid at maturity whether there a be any objection or not.*

12 The decision of the Allahabad High Court in Diraj Lal v Sir Jacob Behrenes & sons, AIR 1933 All 74 is more to the point. In that case the parties had entered into an agreement known as 'C.I.F. contract in terms of which the defendant appellants purchased cloth from the plaintiff. Several orders were placed by the defendant appellants with the respondent and the respondents dispatched goods after the bills of exchange drawn by the respondents directing the appellants to pay to the Chartered Bank of Cawnpore a sum representing the cost to of goods, freight and insurance etc. were accepted by the appellants but when the time came for honouring the accepted bills and taking delivery of the goods the appellants refused to do so and hence the respondents instituted a suit for recovery of the amount due on bills of exchange accepted by the appellants. The appellants relying on a clause in the agreement applied under Section 19 of the Arbitration Act for stay of the suit. The trial Judge rejected the application on various grounds, one of which was that the suit was based on accepted of goods delivered, under the contract which contained the arbitration clause. Upholding the order of the trial Court the learned Judges of the Allahabad High Court held as follows:

> *"The defendants accepted the bills before maturity. The effect of such a transaction ordinarily is that the defendant liability to the plaintiff for the invoice value of the goods is discharged, and a liability tot he Bank under the bills is substituted therefor. The defendant could not be liable to both, that is to the plaintiff for the price of goods and to the bank for acceptance for the bills under S.32, Negotiable Instrument Act, which clearly provides that the acceptor before maturity of a bill of exchange is bound to pay the amount thereof at maturity according to the apparent tenor of acceptance".*

In that case by virtue of Clause 3 of the agreement the respondents were empowered to claim the invoice value in spite of the acceptance of the bills. Discussing the effect of this clause the learned Judges observed further as follows:

> *"It is, of course, implied that if the sellers elect to sue for the invoice value on the basis of the original contract they would secure for the buyers immunity against any claim on the basis on the of bill and, conversely, if the buyers' acceptance of the bill is enforced, they are absolved of their liability under the original contract. But for cl (c) the legal position would have been only this: after acceptance followed by maturity of the bill the buyers would have been liable only to the bank which alone would be liable to the sellers according to the terms of the agreement between them, under which the sellers drew the bill the of exchange in favour of the bank. The sellers have however reserved to themselves an alternative remedy to themselves an alternative remedy of falling back on the original consideration. It is only if they avail themselves of this remedy and their claim is contested that a dispute will arise 'out of a contract' entered into in connection with this agreement', within the meaning of the arbitration clause quoted above marked (d).*
>
> *If on the other hand, the suit is based on the bill and a dispute arises in such suit it cannot be said to arise out of any contract between the parties "in connection with the agreement" but it arises between one of the parties to it and a third person in connection with the acceptance of the bill, a transaction collateral to but not arising out of the agreement".*

In the ultimate analysis the learned Judges spelt out their view of the case as follows:

> *"The draft was drawn in favour of the Chartered Bank, and it a was the Chartered Bank who has*

> *in the first instances a right to recover the sum due on the draft from the acceptor. Had the Bank sued on the acceptance, clearly the acceptors could not have pleaded that under an agreement between themselves and a third party, namely, the sellers of the goods, they had a right to refer the matter to arbitration. No question as to the nature a of the goods arose between the present appellants and the Chartered Bank, and there was no agreement between them containing any cause authority a reference to arbitration. The Chartered Bank endorsed the bills of exchange to the plaintiffs, and the plaintiff in bringing this suit on the basis of the bills of exchange are in the position of the Chartered Bank and therefore entitled to frame the suit accordingly. There position in this respect is the same as that of a total stranger to whom the Bank might endorse the bills. A suit brought by them for the price of the goods will bring into operation the arbitration clauses of the agreement between themselves as sellers and the defendant as buyers. But there is no agreement and no arbitration clause which can come into force as between the plaintiff as holder and the defendant as acceptors of the bills of exchange".*

As mentioned above all the hundies in question in these suits were drawn in favour of the State Bank of India and were endorsed tot he respondent by the bank. Moreover the respondents have based there claims on the hundies and have not alternatively claimed the price of the goods, which obviously they could not have done as in the original contracts was not have done as in the present cases, the option to fall back on the original contracts was not reserved. The ratio of the decision in Dhiraj lal v. Sir Jacob Behrns & Sons, is therefore, clearly applicable to he facts to the present case.

(emphasis supplied)

10 Therefore, the basic question is whether in a summary suit based on a bills of exchange, the defendant can invoke the arbitration clause contained in the contract, under which the goods for the price for which the Bills of Exchange were drawn, were supplied. The answer is 'no'.

11 As mentioned in the quotation above, it is quite clear that if the suit is based on the bills of exchange and a dispute arises in such suit, it cannot be said to arise out of any contract between the parties "in connection with the agreement", but arises in connection with the acceptance of the bill, a transaction collateral to but not arising out of the agreement. If the suit had been brought by the plaintiff for recovering the price of goods, then the arbitration clause will be brought for the operation because of the agreement between themselves, the plaintiff as seller and the defendant as buyer. But there is no arbitration clause which can come into force as between the plaintiff as holder and the defendant as acceptor of the bills of exchange.

12 The Calcutta High Court in the matter of ***The State Trading Corpn. Of India Vs/ K.K. Designs (P) Limited*** [2] at paragraph 21 has held as under :

> *21 The learned Advocate appearing on behalf of the*

2 (1999) 1 CALLT 413 HC

appellant/petitioner has submitted that the Bank Guarantee being an independent contract, notwithstanding the other clauses of the contract, shall be enforceable as soon as there has been a breach of contract. Therefore, in this case since the Defence Authorities have already taken steps to enforce the Bank Guarantee furnished by the appellant/petitioner, there was no other alternative left to the appellant/petitioner but to enforce the Bank Guarantee which has been furnished by the respondent in favour of the appellant/petitioner. The fact remains that the respondent did not supply the entire 1,700 M.T. of tea as agreed before to the appellant/petitioner. in this context this Bench has already taken a view in the case of Star Wire (India) Ltd. V. ITC Global Holdings Pvt. Ltd. which is as follows :--

> "A Bill of Exchange like other negotiable instruments, furnishes a right to payment under section 32 of the Negotiable instruments Act 1881 independent of the original contract pursuant to which the bill may have been executed. Where it not so it would also its character of negotiability. The Bills of Exchange in this case contain no arbitration clause. Any dispute regarding the enforceabillty of the Bills of Exchange cannot, therefore, be referred to arbitration."
>
> It does not matter that the Bills of Exchange were executed in terms of the contract. Once the Bill of Exchange is accepted it remains separate from the original contract much like a situation where in terms of the condition of the contract a Bank Guarantee may be provided by a Bank in favour of one of the parties to the original contract. The Bank Guarantee itself is a contract separate from the original contract pursuant to which the Bank Guarantee is furnished [See Hindusthan Paper Corporation Ltd. v. Kenellhouse Angaml : CAL. LT. 1990(1)HC 2001.
>
> We find support for this view from the

> observations of Mudholkar, J. in Ramlal Onkarmal Firm & Anr. v. Mohanlal Jogant Rice & Atta Mills : . The document in question in that case was a demand draft. It was said :
>
> "the respondents by accepting the demand draft must be deemed to have accepted that draft as a legal tender or as absolute payment of the amount payable under the cheque endorsed in their favour by the appellant. Their rights thereafter would rest only upon the demand draft and not upon the original debt which the appellant owed to them."
>
> (emphasis supplied)

13 This confirms the position that a bill of exchange like other negotiable instruments, furnishes a right to payment under Section 32 of the Negotiable Instruments Act, 1881 independent of the original contract pursuant to which the bill may have been executed. The bills of exchange in this case also does not contain any arbitration clause and any dispute regarding the enforceability of the bills of exchange cannot, therefore, be referred to arbitration. This would be the position even if the bills of exchange were executed in terms of contract. Once the bills of exchange is accepted, it remains separate from the original contract. Here, the plaintiff could have either sued under the contract or sued under the bills of exchange, independent of the original contract. The plaintiff has chosen the later. The cause of action of the plaintiff as laid down in the suit is based on the bills of exchange and is *prima-facie* independent of the said contract. A suit

under Order 37 Rule 1(2)(a) is applicable for suits upon bills of exchange alone. What we have to look for is the claim made by the plaintiff in the present suit. Here the plaintiff has sought relief only on the basis of the bills of exchange. The Apex Court in the matter of ***Milkhiram (India) Private Limited & Ors. Vs. Chamanlal Bros.***[3] has held that even assuming that a party is entitled to two reliefs, it was certainly open for a party to relinquish their claim for other reliefs and the mere fact that they did so to avail themselves of the summary procedure provided in Order 37 could not affect their suit adversely.

14 The counsel for the defendant relied on the judgment of the Delhi High Court in the matter of ***Mr.Akshay Kapur & Ors. Vs. Mr.Rishav Kapur & Ors.***[4] and the judgment of the Andhra Pradesh High Court in the matter of ***Nicholas Piramal India Limited Vs. Cultor Food Science Inc. & Ors.***[5] to submit that a Court has to interfere under Section 45 of the Arbitration and Conciliation Act, 1996 unless the Court finds that the said agreement is null and void, inoperative or incapable of being performed.

15 I am in agreement with the preposition. But in this case, the plaintiff

3 AIR 1965 SC 1698
4 IA NO.1441/2003 in Suit No.77/2003 dt.30.05.2003
5 Rev.CMP No.1347/2002 in CMA No.1285 & CRP No.3497/2001 DT.1.11.2002

has, as mentioned above, maintained the suit only on the bills of exchange which is permissible and not under the said agreement. In such a situation, the arbitration clause itself does not come into picture and consequently the exception carved out in Section 45 also does not come into operation.

16 The counsel for the defendant also relied on an unreported order passed by the Delhi High Court (Single Judge) and of the Division Bench in the matter of ***M/s. Ultra Tech Cement Ltd. Vs. M/s. Sportina Payce Infrastructure Pvt. Ltd.***[6] to submit that the parties should be directed to go for arbitration. Both are unreasoned orders and hence cannot have any binding or even persuasive effect.

17 As stated above, the plaintiff having filed a suit purely on the bills of exchange and not under the said contract, like the arbitration clause even the applicable law clause viz. Clause 12.2 of the said agreement cannot come into force. Therefore, the submissions of the counsel for the defendant that the Court has to see whether the plaintiff could have maintained an action purely on the bills of exchange under the German Law also cannot be accepted.

6 CS(OS) 124 of 2012 dt. 03.05.2013 & FAO (OS) 336/2013 dt.26.07.2013.

18 In the circumstances, the notice of motion is rejected.

(K.R. SHRIRAM, J.)