

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 28 04.2015

<i>Date of Reserving the Order</i>	<i>Date of Pronouncing the Order</i>
13.04.2015	27.04.2015

Coram

The Hon'ble Mr. Justice **T.S. SIVAGNANAM****O.P. Nos.131 to 133 of 2013**

M/s.Gimpex Ltd.,
Rep. By its Authorised Signatory
Mr.S.Uma Shankar,
No.282, Linghi Chetty Street,
Chennai - 600 001. .. Petitioner in both O.Ps.

Vs

M/s.Aanchal Cement Limited,
Formerly know as
M/s.Kalika Cement Ltd.,
Rep., by its Managing Director,
Mr.Manoj Goel,
No.23-A, N.S.Road, Suit-5, 7th Floor,
Kolkatta 700 001 .. Respondent in both O.Ps.
(Amended as per order dated 26.04.2013 in A.Nos.1905, 1908
& 1909/2013)

Common Prayer :- Petitions filed under Section 11 (5) of the Arbitration and Conciliation Act, 1996 to appoint an Arbitrator(s) to decide the dispute and differences between the petitioner and respondent in terms of High Seas Sale Agreement dated 17.04.2012, 27.04.2012.

For petitioners .. Mr.Abdul Hameed for
M/s.Anand Abdul & Vinodh
Associates

For Respondents .. Mr.K.Ravi for
M/s.Ragan and Arya

COMMON ORDER

These Petitions have been filed under Section 11 (5) of the Arbitration and Conciliation Act, 1996, (hereinafter referred to as 'The Act') to appoint an Arbitrator to decide the disputes and differences between the petitioner and the respondent arising out of three High Seas Sale Agreements, dated 17.04.2012, 27.04.2012 and 27.04.2012.

2. The facts in all these petitions are identical and the nature of transaction said to have taken place under the three agreements are identical and the relevant facts necessary to consider the reliefs sought for are set down here under.

2.1 The petitioner is engaged in the business of mining, mineral processing for value added products, exports, imports and third country merchanting trade. During the course of their business, the respondent is stated to have approached the petitioner for purchase of 35,000 MTS of Portland Cement Clinker of Vietnam Origin. Pursuant to which the petitioner forwarded its Proforma Invoice, dated 09.03.2012 for a quantity of 15,000MTS for a total price of Rs.6,33,75,000/-. In terms of the Proforma Invoice, goods clearance will be on High Seas Sale basis and the price at Rs.4225PMT loaded on the trucks at Haldia/Kolkata includes Customs and Excise Duty, clearing

and forwarding charges at Haldia.

2.2 The payment to be effected by the respondent was in the following terms namely (i) 10% by RTGS by 12.03.2012 and (ii) balance 90% by letter of credit payable 90 days from date of bill of lading against presentation of documents namely, invoice and proof of despatch, (iii) letter of credit to be opened latest by 16.03.2012. The delivery to be effected between 1st to 15th April 2012. The respondent by letter dated 12.03.2012, addressed the petitioner while confirming the terms of Proforma Invoice stated that they have duly remitted a sum of Rs.16,00,000/- which is 10% of the Transaction/Proforma Invoice Value and the same was done via RTS.

2.3 By further letter dated 13.03.2012, the respondent informed the petitioner, they wish to confirm the order of further 15,000MTS of OPC Clinker on the same terms and conditions as per the Proforma Invoice, dated 09.03.2012 and assured the payment of Rs.40,00,000/- as advance via RTGS by 14.03.2012. There were further communications between the respondent and the petitioner with regard to the further quantity for which orders were placed. In terms of the Proforma Invoice dated 09.03.2012, the respondent had remitted Rs.60,00,000/- on 12.03.2012 by RTGS and further sum of Rs.40,00,000/- as against Rs.60,00,000/- advance payable on 14.03.2012 by RTGS. It

opening the letter of credit, which was agreed to by the petitioner, but failed to open the letter of credit for the balance value of the goods within the extended time and therefore, the petitioner did not effect shiftment of 30,000MTS, for which the respondent had paid only part of the advance and failed to open the letter of credit in terms of the Proforma Invoice.

2.4 While the petitioner was contemplating of adjusting the advance receipt from the respondent towards loss arising out of the failure to open the letter of credit, the respondent came with the fresh enquiry for approximately 1,00,000MTS of the same product for its own requirement, which the petitioner was willing to supply on a certain price and on usual terms as per trade practice. The respondent requested the petitioner not to insist upon advance.

2.5. The petitioner would state that since the product was meant for own requirement of the respondent, as per the representation, the petitioner agreed to supply the required quantity. Pursuant to which they sourced the material from foreign suppliers. The petitioner by their e-mail dated 26.03.2012, informed the respondent that the product will arrive in Paradip Port on 19.12.2012 and will discharge about 28/30,000MTS and about 20/22,000MTs in Haldia Port around 23/24th April 2012. It is further stated prior to the shiftment the product was inspected by an

Independent Surveyor appointed jointly by the petitioner and the respondent on 03.04.2012 at Vietnam. After the shiftment was loaded into the vessel, the petitioner informed the respondent about the approximate date of discharge at Paradip/Haldia Ports.

2.6 It is further stated that while the goods were in transit (in High Seas), the respondent expressed certain difficulties in effecting the entire payment at the time of sale, however, informed the petitioner that they have buyers for the product and would effect part payments for the product, while it was on High Seas and would effect balance payment within 15 days after the same arrives in the Port. It is stated that the respondent in addition to paying invoice value relating to the High Seas Sale offered to share 50% of the profits realised out of the sale of the products by the respondents to third parties. The petitioner is said to have agreed to the payment terms proposed by the respondent considering various factors and that they have procured the material incurring huge costs.

2.7. It is stated that the respondent effected some payments to the petitioner, when the products were on High Seas and thereafter, the petitioner and the respondent entered into three High Seas Sale Agreements dated 17.04.2012, 27.04.2012 and 27.04.2012, pursuant to which the petitioner transferred ownership of the products to the

respondent subject to other terms and conditions contained in the High Seas Sales Agreement.

2.8. The details of the quantity of product and the agreed price as per the three High Seas Sale Agreements is as detailed below:-

(a) High Seas Sale Agreement dated 17.04.2012 for selling 52,163 MT of ordinary Portland Cement Clinker at the price of Rs.2,729.5/- PMT.

(b) High Seas Sale Agreement dated 27.04.2012 for selling 31,500MT of Cement Clinker at the price of Rs.2,950/-PMT.

(c) High Seas Sale Agreement dated 27.04.2012 for selling 20,401 MT of cement Clinker at the price of Rs.2,950/-PMT

2.9. The petitioner would further state that the respondent requested the petitioner to pay the Customs Duty and Wharfage and promised to reimburse the same and on that head, the petitioner is said to have effected payment of Rs.6,96,74,666/- towards Customs Duty and Rs.8,04,12,495/- as Wharfage charges.

2.10 The goods are said to have arrived in two vessels at Paradip Port on 22.04.2012 and 03.05.2012 and at Haldia Port on 30.04.2012 and 10.05.2012. The petitioner would further state that the respondent failed to effect the

balance payment for the products purchased within 15 days of the arrival of the vessels as agreed upon, but continue to sell it in parts to various third parties and payments were made in part to the petitioner. It is stated that the respondent failed to furnish full particulars regarding the sales effected by them to the purchasers, despite several letters and reminders. Further, it is stated that the respondent failed and neglected to make payments of the outstanding amount payable on account of sale proceeds under the High Seas Sale Agreements.

2.11 In order to sort out the differences, a meeting was convened on 09.07.2012 in which the parties are said to have agreed upon certain terms and conditions. The respondent by their e-mail dated 10.07.2012, informed the petitioner that they have handed over three cheques of Rs.1,00,00,000/- each and promised to effect the balance payment for the products sold before 30.07.2012. The three cheques were presented for encashment and one cheque for Rs.1,00,00,000/- was honoured and the two other cheques for Rs.1,00,00,000/- each were dishonoured. Subsequently, on assurance another cheque for Rs.1,00,00,000/- was presented and the same was honoured. However the third cheque for Rs.1,00,00,000/- which had been dishonoured, remained unpaid. It is stated that after several rounds of discussion, the respondent issued 18 cheques for a total value of Rs.9,00,00,000/- in favour of the petitioner

during First week of August 2012. However, the cheques on presentation were returned with an endorsement "payments were stopped by a drawer and insufficient funds". The petitioner caused legal notices to effect payments towards the returned cheques within 15 days. On receipt of the legal notice, reply notices were sent denying the liability and the petitioner has filed complaint under Section 138 of the Negotiable Instrument Act, before the VII Metropolitan Magistrate Court, George Town, Chennai, and the same were pending. While so, by letter dated 09.10.2012, the petitioner called upon the respondent to effect payment of the amounts outstanding besides returning the stock of 5289MTS. In reply to the said letter, the respondent by letter dated 25.10.2012 sought for return of the cheques and return of a sum of Rs.1,00,00,000/- in terms of the Proforma Invoice, dated 09.03.2012. The petitioner by their letter dated 03.11.2012, informed the respondent that the said sum of Rs.1,00,00,000/- has been given credit under the High Seas Sale Agreement. It is further stated that apart from these amounts payable as per the High Seas Sale Agreements, the respondent is also liable to pay 50% of the profit realised by them out of the sale of the products effected to third parties.

2.12 It is further stated that the respondent has filed a frivolous Suit in Kolkata for a declaration and permanent injunction to declare that the claim of

Rs.15,00,00,000/- as illegal and to restrain the defendants from using the 18 cheques for Rs.50,00,000/- each. It is submitted that the Suit filed in the Court at Kolkatta is without jurisdiction as the disputes arising between the parties, are to be decided by arbitration and the Courts in Chennai alone will have jurisdiction. It is stated that the petitioner has filed an application under Section 8 of the Act before the Kolkata Court to refer the matter for arbitration.

2.13 While so, by letter dated 23.11.2012, the petitioner called upon the respondent for appointment of an Arbitrator, either to concur with their appointment or alternatively appoint one more Arbitrator, so both could appoint umpires and decide the issue. The respondent by reply dated 08.12.2012, refused to accede to the request and disputed the High Seas Sale Agreements in total and stated that it is a Joint Venture deed in the ratio of 50:50. Thereupon, the petitioner has approached this Court and filed the present petitions.

3. The learned counsel appearing for the petitioner after referring to the above factual position submitted that the agreement between the parties is governed by the three High Seas Sale agreements among other things, the agreement provides that the dispute, if any between the parties arising to or relating to the agreement of High

1940 and the award of the Arbitrators or the umpire as the case may be, shall be final and binding on both the parties are here and it will be subject to the Madras Court jurisdiction only. Therefore, it is submitted that the dispute between the parties has to be resolved by arbitration.

4. After elaborately referring to the facts pertaining to the filing of the complaint under Section 138 of the Negotiable Instruments Act, the learned counsel further submitted that the petitioner had filed applications under Section 9 of the Act for grant of an order of injunction, garnishee order and appointment of an Advocate Commissioner and interim orders were granted. The petitioner lodged a Criminal complaint against the respondent and its Director before the Central Crime Branch, Chennai for alleged offences under Section 120B, 406, 409, 506(1) IPC, which was registered as Crime No.21 of 2013. The Managing Director of the respondent Mr.Mugesh Goel was arrested on 04.03.2013 and produced before the Additional Judicial Magistrate, Pithan Nagar (North) and thereafter, on transit warrant was brought to Chennai and produced before III Metropolitan Magistrate, George Town, Chennai and the Court remanded him to judicial custody. It is further submitted that on 11.03.2013, a compromise was arrived at between the petitioner and the Directors of the respondent in which they agreed that out of the total liability of

Rs.13,07,75,009/-, the petitioner would receive Rs.10,00,00,000/- as full and final settlement and the same was reduced into writing and signed by the parties on 12.03.2013, as a Memorandum of Compromise and a sum of Rs.3,00,00,000/- has been paid by way of Demand Draft and cheques for a sum of Rs.7,00,00,000/- were given to the petitioner. It is submitted that the compromise was arrived at when the Managing Director was in Judicial custody and in the presence of the Jail Superintendent. It is submitted that when the bail application was heard by the third Metropolitan Magistrate, Chennai on 12.03.2013, it was stated that a compromise has been entered into between the parties and they have no objection for grant of bail and recording the same, the Court granted bail to the Managing Director of the respondent. The two other Directors of the respondent moved this Court for anticipatory bail in CrI.O.P.Nos.7555 of 2013 and 8539 of 2013, by placing reliance on the Memorandum of Compromise and anticipatory bail was granted. Subsequently, on 08.04.2013, one of the Director Mr.Manoj Goel filed a Suit before the Original side of this Court in C.S.No.234 of 2013, to declare the deed of compromise, dated 12.03.2013 as illegal and for other consequential reliefs. In the said Suit and Interlocutory Application was filed in O.A.No.252 of 2013 for grant of an order of interim injunction to restrain the petitioner from encashing the

Cheques given under the Memorandum of Compromise and another application in A.No.2492 of 2013, for a direction to deposit for a sum of Rs.3,00,00,000/- received by the petitioner under the deed of compromise. The said applications were elaborately heard and dismissed by this Court by order dated 02.12.2014 and the appeal filed by the respondent and its Director before the Hon'ble First Bench of this Court in O.S.A.Nos.283 & 284 of 2014, were dismissed on 12.12.2014. It is submitted by the learned counsel for the petitioner that while considering the interim application in the Suit filed by the respondent and its Director, the Court has recorded a *prima facie* finding that there was no compulsion on the part of the respondent on its Director to sign the Memorandum of Compromise. It is submitted that the respondent having failed to fulfil the terms of the compromise, the petitioner is entitled to claim the entire amount due and payable in terms of the High Seas Sale agreements and the share of 50% of profit in respect of the products sold by the respondent to third parties and the present dispute arises out of the High Seas Sale agreement and therefore, the petitioner was entitled to appoint an Arbitrator in terms of the arbitration clause contained in the agreement. To support his contention the learned counsel submitted that the Memorandum of Compromise having not been complied with by the respondent, there was no concluded contract as held by the Hon'ble Supreme Court

in the case of **United Bank of India vs. Ramdas Mahadeo Prasad and Ors.**, reported in **(2004) 1 SCC 252**.

5. It is further submitted that the Hon'ble Supreme Court in the case of **National Insurance Company Limited vs. Boghara Polyfab Private Ltd** reported in **(2009) 1 SCC 267**, pointed out that the preliminary issues, which may arise for consideration in an application under Section 11 of the Act and broadly, there are three categories and the present dispute clearly falls within the second category of cases, which is capable of being decided by the Arbitral Tribunal. By referring to the recent decision of the Hon'ble Supreme Court in **Swiss Timing Limited vs. Organising Committee, Commonwealth Games** reported in **2014 (3) CTC 830**, it is submitted that the dispute in the present case is referable to arbitration. Reliance was also placed on the decision of the Hon'ble Chief Justice of this Court in the case of **M.Rajkumar vs. The General Manager, Sourthern Railway**, reported in **2015 (2) CTC 353**, wherein it was pointed out that even the scope of the dispute and defence, the claim was liable to be referred to the Arbitral Tribunal and to examine whether the claim would fall in the category of excepted matters, which was one of the defence raised by the Railway Administration in the said case. On the above submission, the learned counsel prayed for appointment of a single Arbitrator in all the three applications.

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6. The learned counsel appearing for the respondent

submitted that the issue whether the transaction between the petitioner and the respondent was a Joint Venture endeavour or a High Seas Sales transaction has to be first determined. The specific case of the respondent is that the High Seas Sale agreement is a sham and nominal document not intended to be acted upon and this Court while considering an application under Section 11 of the Act has to decide whether there is an Arbitration Agreement as defined under the Act and whether the person who made the request is a party to such an agreement and it is necessary to indicate that he can also decide the question whether the claim was a dead one; long barred claim sought to be resorted and whether the parties had concluded the transaction by recording satisfaction of their mutual rights and obligations or by receiving the final payment without objection and in support of such contention, reliance was placed on the decision of the Hon'ble Supreme Court in the case of **SBP & Co., vs. Patel Engineering Ltd., and Anr.**, reported in (2005) 8 SCC 618. It is further submitted that the Memorandum of Compromise is seriously disputed by the respondent and a Suit has been filed by the respondent before this Court and therefore, the petitioner has to first decide whether he has given up his claim under the Memorandum of Compromise and if he says so, the respondent would readily agree for appointment of an Arbitrator to resolve the dispute arising out of the Joint

Venture arrangement. Referring to the decision in the case of **National Insurance Company Ltd. vs. Boghara Folyfab P., Ltd.**, reported in **(2009) 1 SCC 267**, it is submitted that the Arbitration Agreement in a contract cannot be invoked when parties accept alteration of the terms or modification of the terms by substituting the original obligations. It is therefore submitted that the petitioner has to be very clear as to on what basis, he seeks to proceed with the matter.

7. Further, it is submitted that the petitioner has alleged fraud when the Memorandum of Compromise was entered into and when fraud is alleged the Arbitrator has no jurisdiction to decide the issue as to whether the Memorandum of Compromise was obtained under duress and wherever fraud is alleged, the matter has to be decided by the Court after trial. It is further submitted that if the petitioner gives up his claim under the Memorandum of Compromise, he is bound to return the amount of Rs.3,00,00,000/- and it is too late for the petitioner to plead contrary to the Memorandum of Compromise and the compromise itself is an accord and satisfaction of the claim. In support of such contention reliance was placed on the decision of the Hon'ble Supreme Court in the case of **The Union of India, vs. Kishorilal Gupta & Bros.**, reported in **AIR 1959 SC 1362 (I)**. The learned counsel referred to the e-mail exchanged between the parties dated 26.03.2012,

05.04.2012, 17.04.2012, 18.07.2012, with regard to the Joint Venture agreement on 50:50 basis. It is further submitted that the e-mail dated 17.07.2012, from the petitioner to the respondent was much after the High Seas Sale agreement wherein there is a clear mention about the manner of contract, the Joint Venture arrangement on 50:50 basis. Further, by referring to the covenants in the deed of compromise, dated 12.03.2013, it is submitted that the conditions contained therein clearly establish that the agreement was signed under duress and an illegal condition has been added in the agreement stating that if the conditions in the agreement are not complied with, the bail granted by the Criminal Court will deem to have cancelled automatically. Therefore, it is submitted that the entire facts as placed by the respondent before this Court will go to show that the dispute cannot be adjudicated by the Arbitrator. The learned counsel referring to the minutes of the meeting between the parties on 09.07.2012, submitted that the parties agreed to proceed with the contract as a joint venture arrangement and the High Seas Sale agreement was never intended to be acted upon.

8. In reply, the learned counsel for the petitioner submitted that the Memorandum of Compromise also refers to arbitration proceedings in clause 9 of the terms agreed to.

It is further submitted that the question whether the type of transaction was a Joint Venture arrangement or not, is

also an issue, which falls within the scope of arbitration. It is further submitted that the respondent did not adhere to the terms of compromise and will have no effect on the claim for arbitration, more so when he has filed a Suit challenging the compromise, however in the compromise, there is an admission of liability. Therefore, it is the submission of the learned counsel that the only issue is a claim for money and whether it is payable on the High Seas Sales agreement or as a Joint Venture transaction is an arbitrable dispute falling within the scope of the arbitration clause.

9. Heard the learned counsels appearing for the parties and perused the materials placed on record.

10. Before we venture to consider the factual matrix of these petitions, it would be first essential to take note of the preliminary issues that may arise for consideration in a petition filed under Section 11 of the Act. In the celebrated decision of the Hon'ble Supreme Court in **SBP & Co., vs. Patel Engineering Ltd., and Anr.**, (supra), the Hon'ble Supreme Court identified and segregated such preliminary issues that may arise for consideration in an application under Section 11 of the Act. The three categories as pointed out by the Apex Court are (i) issues which the Chief Justice or designate are bound to decide the issues; (ii) issues which he can also decide, i.e., issues which he may choose to decide and;

(iii) issues which should be left to the Arbitral Tribunal to decide. In the first category of issues, which are to be decided by the Hon'ble Chief Justice or its designate are (a) whether the party making the application has approached the appropriate High Court and (b) whether there is an Arbitration Agreement and (c) whether the party who has applied under Section 11 of the Act is a party to such an agreement.

11. The second category of issues, which the Hon'ble Chief Justice or his designate may choose to decide or leave them to the decision of the Arbitral Tribunal are (a) whether their claim is a time barred claim or a live claim; and (b) whether the parties have concluded the contract by recording satisfaction or by receiving the final payment without objection.

12. The third category of issues, which the Hon'ble Chief Justice or his designate should leave exclusively to the Tribunal are (a) whether a claim falls within the Arbitration clause and (b) merits or any claim involved in the arbitration.

13. Explaining the above scheme, the Hon'ble Supreme Court in **National Insurance Company Ltd.**, (supra), pointed out that with regard to the issues falling in the second category, if an application is filed under Section 11 of the Act, the Hon'ble Chief Justice or his designate may decide them, if necessary, by taking evidence or in the

alternate he may leave those issues open with a direction to the Arbitral Tribunal to decide the same. It was further pointed out that if the Hon'ble Chief Justice or his designate chooses to examine the issues and decides it, the Arbitral Tribunal cannot re-examine the same. Further, it was pointed out that where allegations of forgery/fabrication are made in regard to the document recording discharge of contract by full and final settlement, it would be appropriate if the Hon'ble Chief Justice or his designate decides the issue. Further, it was held that a claim for arbitration cannot be rejected merely or solely on the ground that a settlement agreement or discharge voucher had been executed by the claimant, if its validity is disputed by the claimant. Further, it was held that whether the contract has been discharged by performance or not, it is a mixed question of fact and law and if there is a dispute in regard to that decision, the same is arbitrable.

14. In **SBP & Co., vs. Patel Engineering Ltd., and Anr.**, (supra), the Hon'ble Supreme Court while explaining the scope of Section 11 of the Act pointed out that it may not be possible at the stage while considering a petition under Section 11 to decide whether a live claim made, is one which comes within the purview of the arbitration clause and it would be appropriate to leave that question to be decided by the Arbitral Tribunal on taking evidence

along with the material claim involved in the arbitration. That the Hon'ble Chief Justice has to decide whether applicant has satisfied the condition for appointing an Arbitrator under Section 11(6) of the Act. It was further pointed out that for the purpose of taking a decision on these aspects, the Hon'ble Chief Justice can either proceed on the basis of affidavits or documents produced or take such evidence or get such evidence recorded as may be necessary and such procedure in the context of the Act would best serve the purpose sought to be achieved by the Act to expedite the process of arbitration without too many approaches to the Court at various stages of the proceedings before the Arbitral Tribunal.

15. Reliance was placed on the decision of the Hon'ble Supreme Court in the case of ***The Union of India, vs. Kishorilal Gupta & Bros.***, (supra), with regard to the aspect on "accord and satisfaction". While considering such issue, the Hon'ble Supreme Court held that one of the modes by which a contract can be discharged is by the same process, which created it, i.e., by mutual agreement; the parties to the original contract may enter into a new contract in substitution of an old one and that when such an "accord and satisfaction" takes place the prior rights of the parties are extinguished.

16. With the above legal principle in mind, we may now proceed to consider the merits of the contentions put forth by the learned counsels on either side.

17. The sheet anchor of the submissions of the learned counsel for the respondent is that the deed of compromise, dated 12.03.2013, puts an end to the earlier transaction based on which the petitioner has laid his claim and the prior rights stand extinguished. Therefore, it is the endeavour of the respondent to convince this Court to state that a claim for arbitration based on the High Seas Sale Agreement is not maintainable and the deed of compromise being subject matter of challenge in C.S.No.234 of 2013, as having been brought about under duress and fraud having been alleged, the same is wholly outside the jurisdiction of the Arbitrator to adjudicate upon. This contention was infact canvassed in the Interlocutory Applications filed by the respondent in C.S.No.234 of 2013. The respondent contended in those applications that the compromise deed was obtained under coercion and clauses in the said deed was opposed to public policy. Both these contentions raised by the respondent were negatived and the Interlocutory Applications filed by the respondent in the said Suit were dismissed by a speaking order dated 02.12.2014. The said order was confirmed by the Hon'ble First Bench in appeals filed by the respondent in O.S.A.Nos.283 & 284 of 2014, dated 12.12.2014. Therefore,

this Court is of the view that the contention advanced by the respondent stating that the Civil Suit is pending, challenging the validity of the deed of compromise cannot *ipso facto* be a ground to throw out the petition filed by the petitioner under Section 11 of the Act.

18. Having held so, it has to be next considered as to whether the petitioner could maintain these petitions by placing reliance on the arbitration clause as contained in the High Seas Sale Agreements in the light of the deed of compromise which was subsequently entered into. Notwithstanding the challenge to the deed of compromise in the Civil Suit, it is an undisputable fact that the covenants and conditions contained in the deed of compromise did not fructify. As a result of which the dispute between the parties did not stand resolve in the light of the deed of compromise which was subsequently entered into much after the High Seas Sale Agreements. There was no accord or satisfaction recorded pursuant to such compromise deed. Therefore, the deed of compromise cannot have an effect on the petitioner's right to seek for reference to an Arbitration Tribunal by relying on the arbitration clause contained in the High Seas Sale Agreement.

19. It is to be noted that the respondent does not dispute that they entered into the High Seas Sale Agreements, rather their plea is that those agreements were

sham and nominal and not intended to be acted upon. The further case is that the nature of transaction between the petitioner and the respondent is in the nature of a Joint Venture arrangement. To substantiate such contention references were made to the e-mails which were exchange between the parties to cull out a joint venture arrangement, which admittedly there is no written joint venture agreement. Likewise, there is no written agreement by which the parties agreed to share the profits in respect of the products sold by the respondent to third parties and it is stated that such was the oral arrangement and this according to the petitioner was thrust upon them and they had no option except to accept the same, since by then the goods had arrived in the Indian Ports and the respondent was unable to muster funds to pay the cost of the product in accordance with the terms and conditions of supply as mentioned in the proforma invoice and the High Seas Sale Agreements.

20. The proforma invoice dated 09.03.2012, while mentioning the price of the product at Rs.4225 PMT specifically stated that the clearance of the goods will be on High Seas Sale basis. Therefore, High Seas Sale entered into between the petitioner and the respondent is in pursuance to the condition in the proforma invoice.

Therefore, the terms and conditions as contained in the High Seas Sale Agreement would bind the parties and it is

for the respondent to establish that the High Seas Sale Agreements were not intended to be acted upon, but sham and nominal and this could very well be raised before the Arbitral Tribunal/Arbitrator.

21. Likewise the issue as to whether there was a joint venture arrangements and parties had agreed upon certain terms is equally an issue, which is arbitrable. Therefore, this Court has no hesitation to hold that merely on account of a deed of compromise having been entered into would foreclose the rights of the petitioner to seek for arbitration in accordance with the arbitration clause contained in the High Seas Sale Agreement. Whether the terms of payment stood alter or varied by subsequent agreement or arrangement is equally an issue, which would fall within the scope of arbitration. The claim made by the petitioner is a pure and simple money claim and the issue would be regarding the quantum payable is it on the terms as agreed upon in the High Seas Sale Agreement or a joint venture arrangement or in terms of certain oral understanding reiterated in the form of e-mails exchanged between the parties etc are also arbitrable.

22. As held by the Hon'ble Supreme Court in the case

of **National Insurance Company Limited vs. Boghara Polyfab**

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Private Ltd (supra), the right of the parties whether stood

superseded by a subsequent agreement is also an arbitrable issue, which could be examined by the Arbitrator. As pointed out by the Hon'ble Supreme Court in ***Swiss Timing Limited vs. Organising Committee, Commonwealth Games*** (supra), to shut out arbitration at the initial stage would destroy the very purpose for which the parties had entered into an arbitration agreement.

23. Thus, first among the three categories of issues which are to be considered by this Court in an Application under Section 11 of the Act, namely whether the party making the application has approached the appropriate High Court and whether there is an arbitration agreement and whether the party who applied under Section 11 is a party to the said agreement. The High Seas Sale Agreement vests jurisdiction at Madras and the petitioner has approached the appropriate Court namely this Court. The High Seas Sale Agreement contains a arbitration clause under clause 5 of the General Conditions of sale and therefore, the second requirement is met. Thirdly the petitioner is a party to the High Seas Sale Agreement and the respondent is also a signatory and therefore, the third requirement is also met. With regard to the second category of issues, which may decided by this Court or left the decision of the Arbitral Tribunal, there are two subsidiary issues under the said category, firstly to examine whether the claims is time

barred or a live claim. The respondent has not pleaded that the claim is time barred either in any of their correspondence nor before this Court, since the respondent has not filed any counter affidavit. Therefore, this issue does not arise for consideration in these petitions.

24. The other issue would be whether the parties have concluded the contract by recording satisfaction. Though a deed of compromise was entered into, it is an admitted case that the compromise did not fructified, the respondent did not effect payments as per the schedule agreed to. Therefore, it is not a case of recording full satisfaction of having received payment. In such circumstances, this Court would be full satisfied in exercising jurisdiction under Section 11 and referring the matter for arbitration. It is equally well settled that whether the contract has been discharged by performance or not is a mixed question of fact and law and if there is a dispute in regard to that question, the same is arbitrable. The only other issue which remains is that the allegation of fraud made by the respondent against the petitioner in the matter of entering into the deed of compromise. In any event, the validity of the compromise deed is subject matter of Civil litigation before this Court. Fraud has not been alleged on the High Seas Sale Agreement, rather the respondent does not dispute having signed those agreements, but set up a defence

stating that the High Seas Sale Agreements were not intended to be acted upon. The claim for arbitration is in accordance with the High Seas Sale Agreements. There is no fraud alleged in the execution of those agreements and therefore, there is no necessity for this Court to decide in these petitions, the validity of the deed of compromise or await the decision in the Civil Suit for considering as to whether the matter has to be referred for arbitration in a petition filed under Section 11, which is based on an agreement between the parties agreeing to refer the dispute to arbitration. Therefore, this is all the more one reason for rejecting the plea raised by the respondent.

25. In the background of the above conclusion and having taken note of clause 5 of the General Conditions of sale as contained in the High Seas Sale Agreement, the present dispute squarely falls within the ambit of the said clause and liable to be referred to arbitration.

26. In the result, the petitioner is entitled to succeed and the petitions are allowed and Hon'ble Mr. Justice AR. Lakshmanan retired Judge of the Hon'ble Supreme Court, is appointed as the Sole Arbitrator to enter upon the reference and after issuing notice to the parties and upon hearing them, pass an award as expeditiously as possible. The learned Arbitrator is at liberty to fix the

remuneration and other incidental expenses, which shall be borne equally by both the parties.

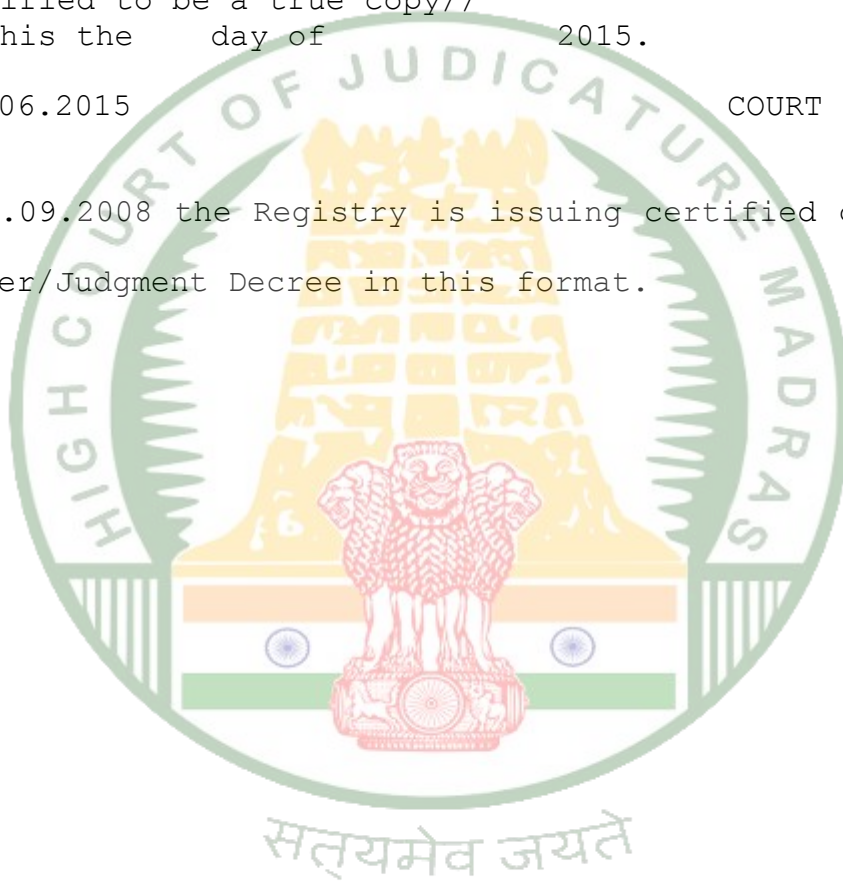
sd/.T.S.S.J
28.04.2015

//Certified to be a true copy//
Dated this the day of 2015.

R.s/12.06.2015

COURT OFFICER

From 25.09.2008 the Registry is issuing certified copies of the Order/Judgment Decree in this format.



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