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IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION
APPEAL NO.556 OF 2015 IN
NOTICE OF MOTION NO.58 OF 2012 IN
SUMMARY SUIT NO.2086 OF 2011

T.A.I.Pharma Ltd. ...Appellant

In the matter between

T.A.I.Pharma Ltd. ...Appellants

vs.

Wockhardt Ltd. ...Respondents

Mr.D.N.Goburdhan a/w Mr.A.M.Khandekar i/b Ms Tamhane
& Co. for the appellants
Rohan Cama a/w Ms Sapna Rachure i/b T.N.Tripathi &
Co. for the respondents

CORAM : A.S.OKA, & A.A.SAYED,JJ.

DATE ON WHICH JUDGMENT IS RESERVED: JUNE 15, 2016

DATE ON WHICH JUDGMENT IS PRONOUNCED: NOVEMBER 29, 2016

JUDGMENT: (PER A.S.OKA,J.)

1 A Notice of Motion was taken out by the appellants-defendants in the suit filed by the respondents-plaintiffs for seeking an order to refer the dispute in the suit to arbitration. By the impugned order, the said Notice of Motion has been dismissed by the learned Single Judge.

2 There was a Clearing and Forwarding Agency agreement (for short "the said Agreement") executed by and between the plaintiffs and the defendants on 1st January 2007. In the said agreement, the

plaintiffs were described as Sellers and the defendants were described as Clearing and Forwarding Agents. The defendants agreed to act as agents of the plaintiffs' products for the purpose of importing/stocking the products and selling the products as instructed at the risk of the plaintiffs.

3 The case made out in the plaint is that upon the request of the defendants, the plaintiffs supplied and delivered certain pharmaceutical products to the defendants between the period from January 2008 till November 2009. Total 14 invoices were raised by the plaintiffs upon the defendants in respect of the pharmaceutical products supplied to the defendants. The plaintiffs drew 14 Bills of Exchange, the particulars of which have been set out in paragraph 5 of the plaint. According to the case of the plaintiffs, the Bills of Exchange were duly accepted by the defendants for payment. The case made out in the plaint is that the defendants have accepted the Bills of Exchange drawn by the plaintiffs which were payable to the Bankers of the plaintiffs or to their orders. According to the case of the plaintiffs, they paid and discharged the dues of their Bankers under the Bills of Exchange and therefore, they are entitled to recover the amounts payable under the Bills of Exchange from the defendants. The plaintiffs are relying upon Section 145 of the Indian Contract Act, 1872. According to the case of the plaintiffs, the defendants in their several e-mails acknowledged the outstanding amount

due and payable to the plaintiffs. As the amount was not paid, the summary suit which is the subject matter of this appeal was filed by the plaintiffs for recovery of the amounts more particularly specified in Exhibit-C to the plaint together with interest at the rate of 18% thereon.

4 The suit was lodged after the learned Single Judge granted leave under clause 12 of the Letters Patent. The plaintiffs took out Summons for Judgment. The Defendants took out a Notice of Motion for seeking an order to refer the dispute in the suit to arbitration in accordance with Rules of Arbitration of International Chamber of Commerce to be held at Berlin and decided as per the German law. The said Notice of Motion was taken up for hearing on which impugned order has been passed by the learned Single Judge holding that as the plaintiffs have filed the suit purely on the basis of the Bills of Exchange and not under the contract, the arbitration clause namely Article 12.1 of the said agreement cannot come into force. Therefore, Notice of Motion was dismissed.

5 Reliance was placed by the defendants on Articles 12.1 and 12.2 of the said Agreement dated 1st January 2007. Articles 12.1 and 12.2 read thus:

"ARTICLE 12 – Miscellaneous

12.1 Any dispute between the parties, whether resulting from a provision in this agreement

or from the applicable statutory 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 the proceedings, excluding ordinary proceedings. The place of Arbitration proceedings shall Berlin.

12.2 The validity, construction and performance of 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 In support of the Appeal, the learned counsel for the appellant urged that the learned Single Judge has completely ignored that section 45 of the Arbitration and Conciliation Act, 1996 (for short 'the said Act of 1996') starts with a non-obstante clause. He urged that the Courts have taken expanded and liberal view of section 45 of the said Act of 1996. He urged that the dispute in the suit was in connection with the said Agreement. His submission is that though the suit may be based on Bills of Exchange, the bills were raised for making payment in accordance with the terms of the said Agreement. Reliance was placed by the appellant on the

decision of the Apex Court in the case of State of Orissa vs. Klockner and Company and others¹. It was submitted that once it is pointed out that the dispute is covered by the arbitration clause, in view of section 8 of the Arbitration Act, the Court had no discretion. He urged that action is brought in a matter which is the subject matter of the said agreement. Reliance was also placed on the decision of the Calcutta High Court in the case of The Pench Valley Coal Co.Ltd. vs. The Indian Cable Co.Ltd.². The submission is that the view taken by the learned Single Judge is completely erroneous. It was submitted that the decision of this Court in the case of M/s.Kishan Swaroop Ashokkumar and others vs. Podar Mills Limited³ will have no application. He urged that the learned Single Judge ought to have made a reference to the arbitration in accordance with section 8 of the Arbitration Act.

7 The learned counsel for the respondent supported the impugned order. He placed reliance on the various decisions. He relied upon the decision of the Apex Court in the case of Milkhiram (India) Private Limited and others vs. Chamanlal Brothers⁴. Reliance was also placed on the decision of the Apex Court in the case of Renusagar Power Co.Ltd. vs. General Electric Company and another⁵. Lastly, reliance was also placed on the decision of the learned Single Judge in the case of M/s.Kishan

1 AIR 1996 SC 2140

2 AIR 1975 Calcutta 284

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

4 AIR 1965 SC 1698

5 AIR 1985 SC 1156

Swaroop Ashokkumar and others.

8 Our attention was also invited to the decision of the Apex Court in the case of Chloro Control India Pvt Ltd vs Severn Trent Water Purification Inc and others⁶ which interprets Section 45 of the Arbitration Act.

9 We have given careful consideration to the submissions. We have perused the plaint and other documents on record. In paragraph 2 of the plaint, there is a specific reference to the said Agreement. Paragraph 3 refers to the sale, supply and delivery of the certain pharmaceutical products of the plaintiffs to the defendants. Paragraph 5 refers to the details of the Bills of Exchange which were allegedly accepted by the defendants for payment. Paragraph 6 is material which reads thus:

"6 The plaintiffs submit that the pharmaceutical products imported under the aforesaid Invoices were duly delivered to the defendants. At no point of time, had the defendants raised any dispute as to the quality, quantity or price in respect of the said products. The defendants have accepted the Bills of Exchange drawn by the plaintiffs payable to the plaintiffs' Bankers or to their orders. The plaintiffs have paid and discharged dues of the Bankers under the above Bills of Exchange. The plaintiffs are

entitled to recover the amount under the Bills of Exchange from the defendants as per statutory provisions contained in section 145 of the Indian Contract Act."

(emphasis added)

In paragraph 9, the plaintiffs have stated thus:

"9 The plaintiffs' claim is arising out of Bills of Exchanges and statutory provisions contained in Section 145 of the Indian Contract Act...."

10 Thus, the suit is based on Bills of Exchange and the claim for recovery of the amount under the Bills of Exchange is on the basis of section 145 of the Indian Contract Act, 1872.

11 We may also make useful reference to the reply filed by the plaintiffs to the Notice of Motion on which impugned order has been passed. In paragraph 7, it is contended that the goods were supplied in accordance with the agreement. However, it is further contended that the claim in the suit is based on the Bills of Exchange.

12 The learned Single Judge has heavily relied upon the decision of the learned Single Judge in the case of M/s. Kishan Swaroop Ashokkumar and others. In the said case, the learned Single Judge was dealing with the appeals against the order of the

Trial Court on the Notice of Motion taken out under section 34 of the Arbitration Act, 1940 (for short 'the old Arbitration Act'). The suits were filed on the basis of the Hundis. The respondent before the learned Single Judge had sold the cloth to the appellant-firm under different invoices and had drawn Hundies on the appellant for the price of the goods. The Hundies were drawn in favour of the State Bank of India and were duly accepted by the appellant but the same were dishonoured for non payment. The respondent before the learned Single Judge filed a summary suit under Rule 2 of Order XXXVII of the Code of Civil Procedure, 1908. By placing reliance upon the arbitration clause in the standard contract, an application under section 34 of the old Arbitration Act was made by the appellant for the stay of the suit. Paragraph 4 of the said decision quotes clause 21 of the relevant contract which reads thus:

"4. Clauses 21 and 22 of the standard contract, which are invoked by the appellants in support of their notices of motion, read as follows:

"Clauses 21 : All disputes and questions whatsoever which shall arise between the parties hereto out of or in connection with this agreement or as to the construction or application or the respective rights and obligations of the parties hereunder or as to any clause or thing herein contained or any account or a valuation to be made hereunder or as to any other matter in any way relating to these presents shall be referred to arbitration in accordance with the rules of the Mill Owner Association, Bombay for the time being in force regulating arbitrations with respect piece goods.

Clause 22: (a) As and when any such dispute is referred to arbitration in respect of goods under goods dispute are 'no tender' the buyer shall be bound to accept the said goods on payment by the

sellers of allowances (if any) awarded to the buyers. If, however, the arbitration award is to the effect that the goods are 'no tender' the buyer shall be entitled to invoice back the said goods with any penalty the arbitrators may award.

No reference, however as aforesaid shall be made by the buyer in respect of goods, delivery whereof has not been taken by him unless he deposits with the Mill Owners Association, Bombay as security an amount equivalent to 10% of the total value there reference, if demanded by the seller. If the reference to arbitration is made by the seller then the arbitration is made by the before proceeding with the reference call upon the Buyers to make a deposit as aforesaid, if the Sellers request the arbitrators to do so. In case the Buyers refuse to make the deposit, it will be open to the arbitrators to award such penalty to the seller against the buyers as they may think fit.

In the event of any such dispute referred to arbitration, unless the arbitration award is to the effect that the goods under dispute are: "No tender", the buyer shall be bound to accept the said goods with the allowance (if any) awarded to the Buyer and take delivery thereof after making full payment. If however, the arbitration award is to the effect that the goods are 'no tender', the Buyer shall not be bound to take the delivery of the goods and shall be entitled to receive penalty (if any) that the arbitrators may award".

The question before the learned Single Judge was whether the dispute regarding dishonour of Hundies can be covered by the arbitration clause under the contract. Paragraph 10 of the said decision reads thus:

“ 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 price 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. v. Gordhandas Sagarmull*, AIR 1951 SC 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 are summary suits based on the negotiable instruments viz. the hundies. **It is also pertinent to note in this context that the hundies were drawn in favour of the State Bank of India and were endorsed in favour of the respondents 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 amounts of the hundies was conditional upon the appellants 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 the liability to pay for the goods was unconditional. Hence not only it was not open for the respondents to 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 the quality and quantity of the goods, or in respect of any counter-claim arising out of the terms of the contracts under which goods in question were supplied. 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 a bill of exchange are bound to pay the amount thereof at maturity according to the apparent tenor of the note or acceptance respectively, and the acceptor of a bill of exchange at or after maturity is bound to pay the amount thereof to the holder on demand.”

(emphasis added)

13 The learned Single Judge thereafter proceeded to rely upon the decision of the Lahore High Court in the case of *Bihari Diwan Singh vs. Jaffe & Sons*⁷. Thereafter, the learned Single Judge relied upon the decision of the Allahabad High Court in the case of *Dhiraj Lal vs. Sir Jacob Behrens and sons*⁸. The paragraph 12 of the said decision reads thus:

“12. The decision of the Allahabad High Court in *Diraj Lal v. Sir Jacob Behrens & 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 plaintiffs. Several orders were placed by the defendant-appellants with the respondents 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 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

⁷ AIR 1922 Lah.353

⁸ AIR 1933 Allahabad 74

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 bills of exchange and was not a suit for price 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 defendants' liability to the plaintiffs for the invoice value of the goods is discharged, and a liability to the Bank under the bills is substituted therefor. The defendants could not be liable to both, that is to the plaintiffs for the price of goods and to the bank for acceptance of the bills under S. 32, Negotiable Instruments 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 of the 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 of exchange in favour of the bank. The sellers have however reserved 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 was the Chartered Bank who had in the first instance 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 of the goods arose between the present appellants and the Chartered Bank, and there was no agreement between them containing any clause authorising a reference to arbitration. The Chartered Bank endorsed the bills of exchange to the plaintiffs, and the plaintiffs 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 their suit accordingly. Their 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 clause of the agreement between themselves as sellers and the defendants as buyers. But there is no agreement and no arbitration clause which can come into force as between the plaintiffs as holders and the defendants 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 to the respondents by the bank. Moreover the respondents have based their claims on the hundies and have not alternatively claimed the price of the goods, which obviously

they could 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 Behrens & Sons* (AIR 1933 All 74), is, therefore, clearly applicable to the facts of the present case."

(emphasis added)

14 Sections 32 and 37 of the Negotiable Instruments Act, 1881 read thus:

"32. Liability of maker of note and acceptor of bill.—In the absence of a contract to the contrary, the maker of a promissory note and the acceptor before maturity of a bill of exchange are bound to pay the amount thereof at maturity according to the apparent tenor of the note or acceptance respectively, and the acceptor of a bill of exchange at or after maturity is bound to pay the amount thereof to the holder on demand.

In default of such payment as aforesaid, such maker or acceptor is bound to compensate any party to the note or bill for any loss or damage sustained by him and caused by such default."

"37. Maker, drawer and acceptor principals.—The maker of a promissory note or cheque, the drawer of a bill of exchange until acceptance, and the acceptor are, in the absence of a contract to the contrary, respectively liable thereon as principal debtors, and the other parties thereto are liable thereon as sureties for the maker, drawer or acceptor, as the case may be."

(emphasis added)

The Plaintiffs in the present case invoked section 145 of the Contract Act which reads thus:

"145. Implied promise to indemnify surety.—In every contract of guarantee there is an implied promise by the principal debtor to indemnify the surety; and the surety is entitled to recover from the principal debtor whatever sum he has rightfully paid under the guarantee, but no sums which he has paid wrongfully.

Illustrations

(a) *B* indebted to *C*, and *A* is surety for the debt. *C* demands payment from *A*, and on his refusal sues him for the amount. *A* defends the suit, having reasonable grounds for doing so, but is compelled to pay the amount of the debt with costs. He can recover from *B* the amount paid by him for costs, as well as the principal debt.

(b) *C* lends *B* a sum of money, and *A*, at the request of *B*, accepts a bill of exchange drawn by *B* upon *A* to secure the amount. *C*, the holder of the bill, demands payment of it from *A*, and, on *A*'s refusal to pay, sues him upon the bill. *A*, not having reasonable grounds for so doing, defends the suit, and has to pay the amount of the bill and costs. He can recover from *B* the amount of the bill, but not the sum paid for costs, as there was no real ground for defending the action.

(c) *A* guarantees to *C*, to the extent of 2,000 rupees, payment for rice to be supplied by *C* to *B*. *C* supplies to *B* rice to a less amount than 2,000 rupees, but obtains from *A* payment of the sum of 2,000 rupees in respect of the rice supplied. *A* cannot recover from *B* more than the price of the rice actually supplied."

15 The plaintiffs have claimed in paragraph 6 of the plaint that they have discharged the dues of their Bankers under the Bills of Exchange. That is

how the plaintiffs seek to enforce the liability of the defendants as sureties in view of section 37 of the Negotiable Instruments Act read with section 145 of the Contract Act. Thus, the defendants are being sued only on the basis of the rights and liabilities arising under the Bills of Exchange.

16 Reliance was placed on the decision of the Apex Court in the case of State of Orissa (supra) which in turn relied upon the earlier decision of the Apex Court in the case of Renusagar Power Co.Ltd. (supra). The Apex Court made a distinction between the provision of section 34 of the old Arbitration Act and section 3 of the Foreign Award (Recognition and Enforcement) Act, 1961. Relying upon the said finding, it was contended that the Court has no discretion in the present case. However, we find that the Apex Court was not dealing with a case where the claim was based on the liability arising out of a Negotiable Instrument. In the case of the Pench Valley Coal Co Ltd, the learned Judge of the Calcutta High Court was dealing with an application under section 34 of the old Arbitration Act in a money suit. Paragraphs 1 and 2 of the said decision reads thus:

“1. This is an application under Section 34 of the Arbitration Act, 1940. The application relates to a suit filed under O. 37 of the CPC. In the suit the plaintiff has claimed a decree for Rupees 1,07,604.64 P. against the applicant. The claim is based on certain hundies drawn and accepted by the applicant in respect of certain goods delivered against the challans by the plaintiff. That the hundies were drawn and accepted in discharge of delivery of the goods is apparent from the hundies - negotiable instruments - themselves which are annexed to the plaint. The suit was filed on the 5th February, 1974, and this application was made

under Section 34 of the Arbitration Act, 1940, on the 12th March, 1974. It is the case of the applicant that the goods which were delivered by the plaintiff-respondent were defective and damaged and there was also failure to deliver the goods in time as a consequence whereof the applicant had suffered damages and in respect of which the applicant is entitled to claim the damages. The goods were delivered under certain contracts and that position is undisputed. These written contracts contained arbitration clauses to the following effect:—

“If any dispute or differences shall arise between the buyer and the seller concerning this order it shall be referred to arbitration in Calcutta under the rules of the Tribunal of Arbitration of the Indian Chamber of Commerce in Calcutta and any award or awards made shall be final and binding on both the parties.”

2. It is the case of the applicant that as the suit related to the hundies which were given in discharge of the obligations for payment in respect of delivery of the goods and as there were disputes as to the quality and time for delivery of the goods, the disputes that the applicant was raising were covered by the arbitration agreements and as such the suit under Order 37 filed by the respondent/plaintiff should be stayed. The first question that requires consideration in this case, is, whether the suit is in respect of the matter agreed to be referred to arbitration under the clauses of the contracts mentioned hereinbefore. Counsel for the respondent contended that the suit was only a suit on the negotiable instruments and his client had accepted the negotiable instruments, namely, the hundies in this case in discharge of the right to get payment and his cause of action was based on the said negotiable instruments and as such the arbitration clauses did not cover or did not contemplate any dispute in respect of the suit filed by the plaintiff on the negotiable instruments given in discharge of the obligation for payment. In support of this argument counsel for the respondent drew my attention to the decision of the Supreme Court in case of *Commr. of Income-tax, Bombay South, Bombay v. Ogale Glass Works Ltd.*, AIR 1954 SC 429 where the Supreme Court observed that when it was said that a payment by negotiable instrument was a conditional payment, what was meant was that such payment was subject to a condition subsequent that if the negotiable instrument was dishonoured on presentation, the creditor might consider it as waste paper and resort to his original demand. In my opinion the proposition that negotiable instrument gives a cause of action independent as such and of original consideration cannot be disputed, but that proposition, in my opinion, has no relevance in determining the present controversy before me. Reliance was also placed on the decision of the Supreme Court in the case of *Ramlal Onkarmal Firm v. Mohanlal Jogani Rice and Atta Mills*, AIR 1965 SC 1679 and on the observations at pages 1681 and 1682 of the report. This case in my opinion held the similar proposition and is not quite germane to the point in issue before me. Looking at the arbitration clauses it appears to me that the clauses were wide enough to include a dispute arising in respect of a discharge of the obligation for payment. **Therefore, even if there has been a discharge of the obligation for payment by the negotiable instrument and acceptance thereafter by the buyer if dispute is raised regarding the delivery of the goods, in respect of which the negotiable instruments were given then in view of the amplitude of the arbitration clauses such disputes are covered by the arbitration agreements. Therefore, in this case when the applicant/defendant is contending that the goods delivered were defective and were not in time and as such the discharge of obligation for payment in this case was made wrongfully and was liable to be refunded, the disputes, regarding the same is in my opinion referable and concerning the order of the contracting parties and in that view of the matter I am of the opinion that it should be held that the disputes are covered by the arbitration agreements.”**

(emphasis added)

17 In the present case, we have perused the affidavit in support of the Notice of Motion filed by the defendants. There is no dispute raised therein regarding the delivery of the goods or the quality or quantity of the goods delivered. In paragraph 6 of the affidavit, it is admitted that the goods were delivered by the plaintiffs in Russia. Only dispute raised is that the Bills of Exchange were not accepted by the defendants. Though this defence is specifically pleaded, no dispute is raised whatsoever about the quantity and/or quality of the goods admittedly supplied by the plaintiffs. The Calcutta High Court dealt with a case where a dispute was raised regarding delivery. The dispute regarding delivery was naturally covered by the arbitration clause in the agreement on the basis of which the goods were sold/supplied. In the present case, only dispute seems to be about the liability based on the Bills of Exchange. Therefore, the decision of the learned Single Judge of the Calcutta High Court will have no application in the present case.

18 Perusal of the plaint in the present case shows that there is no prayer made even in the alternative for the price of the goods sold or delivered. The suit is founded only on the Bills of Exchange. The cause of action pleaded is not as regards the failure to pay price of the goods. If the dispute would have been about the delivery of the goods sold or quantity or quality of the goods sold, perhaps

the dispute could have been covered by the arbitration clause.

19 Even by adopting the test of liberal interpretation laid down by the Apex Court in the case of Chloro Controls and other cases, in the facts of the case, it is not possible to accept that the dispute subject matter of the suit is covered by the arbitration clause. Therefore, we concur with the view taken by the learned Single Judge in the impugned order.

20 We must clarify here that none of the observations made in this Judgment shall be construed as any findings on merits or any adjudication on the probable defence of the defendants and all contentions of the parties in that behalf are expressly kept open.

21 Accordingly, we find no merit in the Appeal and the same is dismissed with no order as to costs. The suit will not proceed further for a period of two months from today.

(A.A.SAYED,J.)

(A.S.OKA,J.)