

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

% **Date of decision: 2nd November, 2016.**

+ **CS(OS) 87/1998, IA No.353/1998 (u/O XXXVIII R-5 CPC), IA No.4241/1998 (u/O VI R-17 CPC), IA No.9833/1998 (u/O I R-10 CPC) & IA No.11482/1998 (u/S 8 of Arbitration Act) & IA No.9310/1999 (u/S 151 CPC)**

MARUTI UDYOG LTD. Plaintiff
Through: Mr. Mudit Shrama and Mr. Tanmaya
Nirmal, Advs.

Versus

CLASSIC MOTORS LTD. AND ANR. Defendants
Through: Mr. Kanwal Chaudhary, Adv.

AND

+ **CS(OS) 74/2016 (earlier OMP No.107 of 1999) & IA No.8518/2008 (u/O VI R-17 CPC)**

MARUTI UDYOG LTD. Plaintiff
Through: Mr. Mudit Shrama and Mr. Tanmaya
Nirmal, Advs.

Versus

CLASSIC MOTORS LTD. Defendant
Through: Mr. Kanwal Chaudhary, Adv.

CORAM:

HON'BLE MR. JUSTICE RAJIV SAHAI ENDLAW

1. CS(OS) No.87/1998 was filed by Maruti Udyog Ltd. (MUL) against Classic Motors Ltd. (CML) and Mr. Narender Anand for recovery of

Rs.4,26,93,000/- with interest, pleading:

- (i) that MUL, had in the year 1983 granted original dealership in favour of Competent Motors, of which Mr. Raj Chopra and Mr. Narender Anand were partners;
- (ii) that on termination of the original dealership, two separate independent dealerships were granted to the said Mr. Raj Chopra and Mr. Narender Anand in the year 1988, with dealership to Mr. Narender Anand being in the name of CML;
- (iii) that CML, being one of the authorised dealers of MUL, was required to take bookings of vehicles, customer payments and to provide after sales service in respect of the said vehicles;
- (iv) that on 31st August, 1994, MUL issued a 90 days notice of termination of dealership of CML and called upon CML to settle the accounts;
- (v) that CML failed to come forward and instead indulged in prolonged litigation;
- (vi) that during the course of the said litigation, CML submitted several pending customers/payments list but still failed to settle the

accounts and as a result whereof, the liability of CML mounted;

(vii) that CML otherwise also had committed serious and persistent violations of the sale policies and procedures of MUL;

(viii) that CML, instead of collecting payments from customers in the name of MUL, collected payments in its own name and which were not deposited in the account of MUL;

(ix) that this resulted in a shortfall of a large amount which became evident from reconciliation between the bookings reported and the payments actually received in vehicles purchase account;

(x) that pursuant to termination of dealership, while MUL was in the process of delivering vehicles to the customers who had booked against advance accounts, CML supplied different lists of pending customers from time to time to MUL, thus making it difficult and almost impossible for MUL to know and settle the claims of customers for purchase of vehicles;

(xi) that due to aforesaid breaches by CML, a sum of Rs.4,26,93,000/- was due from CML to MUL.

2. CS(OS) No.87/1998 was entertained and summons thereof issued to

the defendants.

3. Before CML or Mr. Narender Anand could file written statement in CS(OS) No.87/1998, MUL filed IAs No.4241/1998 and 9833/1998 for amendment of the plaint and under Order I Rule 10 of Code of Civil Procedure, 1908 (CPC) respectively for impleadment of another director namely Mr. Bobby Anand of CML as defendant No.3 to the suit and for amendment of the plaint *inter alia* to plead that the corporate veil of CML was liable to be pierced and decree for recovery of money also passed against Mr. Narender Anand as well as Mr. Bobby Anand.

4. CML, before submitting its first statement on the substance of the dispute in CS(OS) No.87/1998, filed IA No.11482/1998 under Section 8 of the Arbitration and Conciliation Act, 1996 (1996 Act) citing the following arbitration clause:

“36. ARBITRATION

If any difference or dispute shall arise between the parties hereto as to the construction or true intent and meaning of any of the terms and conditions herein contained or as to any payment to be made in pursuance hereof or as to any other matter arising out of or connected with or incidental to these presents or as to the rights, duties and obligation of either party, such difference or dispute whenever and so often as the same shall arise, shall be referred to the Tribunal of Arbitration, Indian Chamber of Commerce, Delhi, under their rules for the time being in force.”

in the dealership agreement between MUL and CML.

5. CS(OS) No.87/1998 stood at the said stage for nearly ten years and was adjourned from time to time.

6. On 27th May, 2009, the counsels for the parties in CS(OS) No.87/1998 stated that the proceedings in CS(OS) No.87/1998 be adjourned *sine die* so that the parties could pursue other suits, being CS(OS) No.1575/2004 and CS(OS) No.1360/1997, first and come to know the outcome of the said suits. On the said statement of the counsel for the parties, proceedings in CS(OS) No.87/1998 were adjourned *sine die* with liberty to the parties to revive as and when required.

7. Neither party applied for revival of CS(OS) No.87/1998 for nearly six years and the Registry of this Court of its own listed CS(OS) No.87/1998 on 8th October, 2015, since when again the matter it is being adjourned. Vide orders dated 31st August, 2016 and 27th October, 2016, it was informed to the counsels that unless they proceed, CS(OS) No.87/1998 will be dismissed for non-prosecution. In this regard it may be noticed that though CS(OS) No.1575/2004 and CS(OS) No.1360/1997 on account whereof the proceedings in CS(OS) No.87/1998 were stayed are stated to be still pending but it was noted in the order dated 8th October, 2015 that without knowing

what the said suits were and without finding a case for stay under Section 10 of CPC, CS(OS) No.87/1998 cannot be kept adjourned *sine die*. Neither party has shown any justification for stay of proceedings in CS(OS) No.87/1998 on account of CS(OS) No.1575/2004 or CS(OS) No.1360/1997 and on account whereof stay of proceedings therein was earlier sought and granted. All that can be said is that MUL does not appear to be in any hurry to recover the monies claimed in CS(OS) No.87/1998.

8. The other, CS(OS) No.74/2016 is a petition under Section 33 of the Arbitration Act, 1940 (1940 Act) and when initially filed was numbered as OMP No.107/1999 and seeks determination of the effect of the arbitration clause as reproduced hereinabove and declaration thereof as having become invalid, illegal, inoperative, discharged, superseded, nonest and void. It is *inter alia* the case of MUL therein:

(a) that prior to the termination vide notice dated 31st August, 1994 supra of the dealership of CML, MUL had earlier also issued a notice dated 6th April, 1991 to CML to show cause why its dealership should not be terminated;

(b) that CML, on 20th April, 1991, filed a petition under Section 20 of the 1940 Act along with an application under Section 41(b) of 1940

Act before this Court and the said petition was registered as Suit No.1224A/1991 and in the said proceeding vide *ex-parte* order MUL was restrained from terminating the dealership of CML pursuant to the show cause notice dated 6th April, 1991;

(c) that upon MUL applying for vacation of the said order, its application was dismissed but upon the matter being taken to the Supreme Court, it was clarified that the interim order would not come in the way of MUL exercising its right of termination under the dealership agreement;

(d) accordingly, MUL vide notice dated 31st August, 1994 *supra* terminated the dealership;

(e) that CML again filed a petition under Section 20 of the 1940 Act and which was registered as Suit No.2005/1994 of this Court;

(f) that vide interim order in the aforesaid Suit No.2005/1994, CML was permitted to continue booking the vehicles but the said order was also vacated by the Supreme Court;

(g) that CML thereafter on 15th November, 1994 instituted a suit (being CS(OS) No.2544/1994) for declaration that the termination of dealership was bad and for permanent injunction restraining MUL

from acting in pursuance to termination of dealership;

(h) that CML, by instituting the civil suit, superseded and abandoned the arbitration clause;

(i) that in view of institution of the civil suit aforesaid, the petition under Section 20 of the 1940 Act being CS No.2005/1994 was dismissed as withdrawn on 22nd November, 1994;

(j) that vide interim order in the CS(OS) No.2544/1994 supra, the termination of dealership of CML was stayed but the said order was vacated by the Supreme Court;

(k) that ultimately CS(OS) No.2544/1994 filed by CML for declaration and permanent injunction was dismissed on 13th December, 1996;

(l) that the arbitration petition under Section 20 of 1940 Act being Suit No.1224A/1991 earlier filed by CML was also dismissed vide order dated 13th December, 1996 in view of the subsequent events;

(m) that MUL had been served with the notice of an arbitration claim lodged by CML before the Tribunal of Arbitration of Federation of Indian Chambers of Commerce and Industry (FICCI), even though

the arbitration clause in the dealership agreement provided for arbitration of the Arbitral Tribunal of Indian Chambers of Commerce;

(n) that FICCI had wrongly assumed jurisdiction;

(o) that the arbitration clause aforesaid in the dealership agreement between the parties had been discharged, become inoperative and invalid and did not survive owing to the events aforesaid.

9. The aforesaid OMP No.107/1999 was entertained and vide order dated 16th April, 1999 therein, the arbitration proceedings before FICCI were stayed and remain stayed.

10. Pleadings in OMP No.107/1999 were completed and the same was adjourned from time to time and it appears that it was being taken up along with CS(OS) No.87/1998 and on statement of counsels for MUL and CML, proceedings in OMP No.107/1999 also, as aforesaid, were adjourned *sine die* vide order dated 27th May, 2009 and were revived *suo moto* by the Registry of this Court as aforesaid.

11. On 20th November, 2015, OMP No.107/1999 was ordered to be re-numbered as a suit, observing that MUL had not invoked any specific provision of 1996 Act and thus the proceedings could not be numbered as an OMP and had to be numbered as suit; hence it was re-numbered as CS(OS)

No.74/2016.

12. The counsels have been heard on the pending applications as aforesaid in CS(OS) No.87/1998 and on OMP No.107/1999 renumbered as CS(OS) No.74/2016.

13. OMP No.107/1999 renumbered as CS(OS) No.74/2016 was instituted on 12th April, 1999.

14. I have at the outset enquired from the counsel for MUL, as to how after the coming into force of 1996 Act, which came into force on 22nd August, 1996 and was in fact preceded by the Arbitration and Conciliation Ordinance, 1996 which came into effect on 16th January, 1996, a petition under Section 33 of the 1940 Act could be filed.

15. The counsel for MUL has referred to Section 85 of the 1996 Act, sub-section (1) whereof repeals 1940 Act and sub-section (2) whereof provides that notwithstanding the repeal of 1940 Act, the provisions of 1940 Act shall apply in relation to arbitral proceedings which commenced before 1996 Act came into force. Sub-section (2) of Section 85 of 1996 Act further provides that 1996 Act shall apply in relation to arbitral proceedings which commence on or after 1996 Act comes into force. The arbitration proceedings before FICCI challenging which OMP No.107/1999 renumbered as CS(OS)

No.74/2016 under Section 33 of 1940 Act has been filed, admittedly commenced after coming into force of 1996 Act.

16. The counsel for MUL contends that since the dispute regarding termination by MUL of dealership of CML arose on 15th November, 1994, when CML filed CS(OS) No.2544/1994 impugning the termination notice dated 31st August, 1994, the said date would be relevant.

17. I am unable to agree. The reference in Section 85(2) of 1996 Act is to ‘commencement of arbitral proceedings’ and not to ‘accrual of the dispute’. The relevant date is not of ‘accrual of dispute’ but of ‘commencement of arbitral proceedings’. Per Section 21 of 1996 Act, the arbitral proceedings in respect of a particular dispute commence on the date on which a request for that dispute to be referred to arbitration is received by the respondent. Reference in this respect may be made to *Milkfood Ltd. Vs. GMC Icecream* (P) Ltd. (2004) 7 SCC 288 and to *Prem Sagar Khanna Vs. Ravi Khanna* AIR 2002 Delhi 98. In the latter, the suit in which application under Section 8 of the 1996 Act was filed, had been filed before coming into force of the 1996 Act though on the date of filing of the Section 8 application the 1996 Act was in force. The objection to the maintainability of the Section 8 application, on the ground of the 1940 Act being applicable owing to suit

having been filed before coming into force of 1996 Act, was held to be not tenable. The arbitral proceedings before FICCI, impugning which OMP No.107/1999 re-numbered as CS(OS) No.74/2016 has been filed, having commenced after coming into force of 1996 Act i.e. after the dismissal on 13th December, 1996 of CS(OS) No.2544/1994 earlier filed by CML, the said arbitral proceedings would not be governed by 1940 Act, for Section 33 thereof to be invoked by MUL. OMP No.107/1999 renumbered as CS(OS) No.74/2016 was thus misconceived on its inception and ought not to have been entertained and add to the arrears of pending cases of this Court.

18. The counsel for MUL has then contended that the arbitration proceedings initiated by CML before the tribunal of arbitration of FICCI are not maintainable as CML has waived the arbitration clause by invoking the jurisdiction of the civil suit by filing CS(OS) No.2544/1994 for the reliefs of declaration and permanent injunction and that the claim of CML before the Arbitral Tribunal of FICCI is also barred by Order II Rule 2 of CPC.

19. Once the proceedings in which the said pleas are raised are not maintainable, no finding on the said pleas can be returned.

20. Needless to state that it will be open to MUL to take the said pleas, if entitled to, in accordance with 1996 Act.

21. I may in this regard also notice that the Arbitral Tribunal of FICCI comprised of Justice J.D. Jain, Justice H.L. Anand and Justice M.K. Chawla. None of the members of the Arbitral Tribunal so constituted survive today.

22. Thus, OMP No.107/1999 renumbered as CS(OS) No.74/2016 is dismissed as not maintainable and with liberty aforesaid to MUL.

23. That brings me to CS(OS) No.87/1998 and the applications pending therein.

24. Though the applications for amendment of the plaint and for impleadment of Mr. Bobby Anand are pending therein but before that, in my view, the application under Section 8 of 1996 Act has to be considered because if the said application were to succeed, the other pending applications in any case would be redundant and the entire controversy will have to be referred to arbitration.

25. The counsel for MUL, qua application under Section 8 of 1996 Act in CS(OS) No.87/1998 has contended that once CML had itself given a go-by to the arbitration clause aforesaid by invoking the jurisdiction of the Civil Court by filing CS(OS) No.2544/1994 and has lost in the said suit, it is not entitled to invoke arbitration clause.

26. In my view, the same would not affect the existence or validity of the

arbitration clause by which MUL will continue to remain bound. Merely because CML has not acted in accordance therewith would not mean that MUL also can give a go-by to the same and invoke the jurisdiction of the Court. Once CML has, in accordance with Section 8 of 1996 Act applied invoking the arbitration clause for referring the parties to arbitration, this Court cannot on such grounds continue with the suit.

27. Section 8 of the 1996 Act read with Section 5 thereof in my view does not allow any scope for entertaining any pleas of waiver and abandonment of arbitration clause by the applicant of an application under Section 8. The Legislature, while enacting the 1996 Act, in Section 8 thereof has used the language materially different from that used in corresponding Section 34 of the 1940 Act. While under Section 34 of the 1940 Act, upon any party to an arbitration agreement commencing legal proceedings against the other party to the Agreement in respect of any matter agreed to be referred, the other party could apply to the Judicial Authority before which the proceedings were pending, to stay the proceedings and the Judicial Authority only 'if satisfied that there was no sufficient reason why the matter should not be referred in accordance with the arbitration agreement and that the applicant was, at the time when the proceedings were commenced, and still remains,

ready and willing to do all things necessary to the proper conduct of the arbitration' had the discretion (as is evident from use of the word "may") to make an order staying the proceedings, under Section 8 of the 1996 Act the Judicial Authority before which an action is brought in a matter which is the subject matter of an arbitration agreement is mandated (as is evident from use of the word "shall") to refer the parties to arbitration "notwithstanding any judgment, decree or order of the Supreme Court or any Court unless it finds that *prima facie* no valid arbitration agreement exists". Though the reproduced words have been added to Section 8 by the amendment of the 1996 Act w.e.f. 1st January, 2016 but in my view the same have to be taken into consideration even for deciding this application under Section 8 of the 1996 Act which was filed long prior to the amendment of the 1996 Act w.e.f. 1st January, 2016. It has been so held recently in ***Raffles Design International India Private Ltd. Vs. Educomp Professional Education Limited*** 2016 SCC OnLine Del. 5521.

28. In my view, to hold that notwithstanding such change brought about by the Legislature in the 1996 Act, the pleas as of waiver and abandonment of arbitration clause are still available in opposition to an application under Section 8 of the 1996 Act, would amount to whittling down the amendment.

29. MUL, which had agreed to refer the disputes as have been made the subject matter of CS(OS) No.87/1998, to arbitration cannot now be permitted to instead of invoking the arbitration approach the Civil Court.

30. The pleas as raised by the counsel for MUL and which are for adjudication herein are on the basis of CML, for adjudication of disputes raised by it with respect to the same Dealership Agreement containing arbitration clause, having approached the Civil Court instead of invoking the arbitration and the said civil proceedings being CS(OS) No.2544/1994 having been dismissed by the Civil Court. I have wondered whether not to hold that owing thereto CML is barred from applying in this suit under Section 8 of the 1996 Act would be in the teeth of the words “notwithstanding any judgment, decree or order of the Supreme Court or any Court” in Section 8. In my opinion it would be.

31. Not only is the said plea as raised by MUL, not entertainable under Section 8 of the 1996 Act but Section 5 of the said Act which commences with non-obstante clause “notwithstanding anything contained in any other law for the time being in force” prohibits this court from intervening except where so provided in Part-I of the 1996 Act. Part-I of the 1996 Act as aforesaid does not permit a suit, subject matter whereof is the subject of an

arbitration agreement, to be entertained if an application under Section 8 has been filed.

32. In my view, the concept of waiver, applies to Section 8 of the 1996 Act only if no application thereunder is filed before submitting the first statement on the substance of the dispute and not otherwise.

33. I am conscious that there are some judgments which may appear to be contrary.

34. In *Ministry of Sound International Ltd. Vs. Indus Renaissance Partners Entertainment Pvt. Ltd.* 156 (2009) DLT 406, the applicant of an application under Section 8 of the 1996 Act had after the filing of the application filed a civil suit and for reason whereof the application was opposed by contending that the applicant had waived the right under Section 8 of the 1996 Act. However the said opposition was rejected observing that the civil suit had since been withdrawn. The judgments of this court in *Bharti Televentures Ltd. Vs. DSS Enterprises Private Ltd.* 123 (2005) DLT 532 and in *Raj and Associates Vs. Videsh Sanchar Nigam Limited* 113 (2004) DLT 318 cited by the plaintiff in that case were distinguished by observing that in those cases the parties had earlier invoked jurisdiction of civil courts, ignoring the arbitration clause.

35. Another Single Judge of this court in *Kush Dairy Ltd. Vs. H.P. Printers Pvt. Ltd.* 2013 (135) DRJ 724 dismissed the application under Section 8 of the 1996 Act observing that the action of the applicant of, before filing the application, a civil suit with respect to the Agreement containing the arbitration clause, amounts to waiving its right to invoke or enforce the arbitration clause but without any discussion on the said aspect.

36. Undoubtedly in *Raj and Associates* supra it was observed that once the plaintiff opts to file a suit it is no longer open to him to pray to the court that the parties be referred to arbitration but in the said case there was no application also under Section 8 of the Act. With respect, I am unable to decipher on a reading of *Bharti Televentures Ltd.* supra, any proposition that an application under Section 8 can be defeated by waiver; though it refers to two judgments but which are found to be with respect to the provisions of the 1940 Act.

37. Else, Supreme Court in *P. Anand Gajapathi Raju Vs. P.V.G. Raju* (2000) 4 SCC 539 has held that the language of Section 8 is peremptory and it is obligatory for the Court to refer the parties to arbitration in terms of their arbitration agreement. It was further held that the object of Section 5 is of encouraging resolution of disputes expeditiously and less expensively and

when there is an arbitration agreement, the Courts intervention should be minimal and Section 8 has to be construed keeping the Legislative intention in mind.

38. I may in this regard also notice that the subject matter of CS(OS) No.2544/1994 filed by CML was entirely different from the subject matter of the present suit. It is rather MUL which could have taken the plea of Section 8 of the 1996 Act or of Section 34 of the 1940 Act in CS(OS) No.2544/1994 but is not found to have so taken. That in my view would not deprive CML from applying under Section 8 of the 1996 Act in CS(OS) No.87/1998 wherein MUL has made monetary claim against CML and when even MUL does not controvert that claim made in CS(OS) No.87/1998 is the subject matter of admitted arbitration agreement between the parties.

39. Recently in *Sundaram Finance Limited Vs. T. Thankam* 2015 SCC OnLine SC 147 it was held that once an application in due compliance of Section 8 is filed, the approach of the Civil Court should not be to see whether the court has jurisdiction but to see whether its jurisdiction has been ousted and that the general law is to yield to the special law.

40. As far as the presence of Mr. Narender Anand already a defendant in CS(OS) No.87/1998 or the application for impleadment of Mr. Bobby Anand

in the said suit and who are not party to the arbitration clause is concerned, Supreme Court has now in ***Chlora Controls India Pvt. Ltd. Vs. Severn Trent Water Purification Inc.*** (2013) 1 SCC 641 held that owing to the persons such as them being not privy to the arbitration clause, the arbitration clause cannot be defeated. The counsel for CML and Mr. Narender Anand and Mr. Bobby Anand also agrees and states that MUL in arbitration proceedings can, if makes out a case, make a claim against the said Mr. Narender Anand and Mr. Bobby Anand as well.

41. The counsel for MUL has also argued that there is no Indian Chamber of Commerce for reference of disputes for arbitration whereto the arbitration clause aforesaid provides.

42. The said question is no longer *res integra*. Supreme Court in ***Pricol Limited Vs. Johnson Controls Enterprise Ltd.*** (2015) 4 SCC 177 was concerned with a clause for reference of disputes to an Arbitrator to be appointed in accordance with the Rules of Arbitration of the Singapore Chamber of Commerce. It was not in dispute that the Singapore Chamber of Commerce mentioned in the said clause is not an arbitration institution having any rules for appointment of Arbitrators. However construing the reference to Singapore Chamber of Commerce as to Singapore International

Arbitration Centre (SIAC), SIAC was approached for appointment of Arbitrator and impugning which the other party initiated legal proceedings in India. It was held that on a reasonable and meaningful construction of arbitration clause, the Arbitrator was to be appointed by SIAC inasmuch as Singapore Chamber of Commerce was admittedly not an arbitration institution having its own rules for appointment of Arbitrators. It was further held that the most reasonable construction of the said clause would be to understand the reference to Singapore Chamber of Commerce as to SIAC.

43. Reference in this context may also be made to ***Enercon (India) Ltd. Vs. Enercon GMBH*** (2014) 5 SCC 1 where it was held that when faced with a seemingly unworkable arbitration clause, it is the duty of the Court to make the same workable within the permissible limits of the law, without stretching it beyond the boundaries of recognition. It was further held that Sections 8, 10, 11 & 45 of the 1996 Act confer power upon court to prevent failure of arbitration; a common sense approach has to be adopted to give effect to the intention of the parties to Arbitrate – attitude of a reasonable business person and an officious bystander has to be adopted and the court can thus legitimately supply the missing line/obvious omission to give effect to the intention of the parties. Finding the arbitration clause in that case to be

though providing for arbitration of three arbitrators but not finding an agreed mechanism for appointment of the three arbitrators, the words “two arbitrators appointed by the parties shall appoint the third arbitrator” were read into the arbitration clause and in the facts and circumstances the Supreme Court itself appointed the third arbitrator.

44. Taking cue from the above I may add that Section 7(1) defines arbitration agreement only as an agreement by the parties to submit to arbitration all or certain disputes which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not. It does not require the arbitration agreement to also provide who will be the arbitrator and how the arbitrator will be chosen. Section 10(1) of the 1996 Act provides that the parties are free to determine the number of arbitrators and only places the limitation that such number shall not be an even number. Section 10(1) by using the words “the parties are free to determine the number of arbitrators” makes it optional and not mandatory for the parties to determine the number of arbitrators. Rather, Section 10(2) provides that failing the determination the arbitral tribunal shall consist of a sole arbitrator. Section 11(2) again provides that the parties are “free to agree on a procedure for appointing arbitrator or arbitrators”, again, making it

optional for the parties to agree to a procedure for appointment of arbitrators and not making it mandatory for the parties to do so. Further, Section 11(3) provides for the contingency of the parties having not agreed and provides the procedure for such appointment.

45. I thus conclude that an agreement between the parties to submit to arbitration their disputes in presentie or in future is enough for invoking Section 8 of the 1996 Act and for invoking the said Section 8 it is not necessary that the parties should have also agreed to the number of arbitrators or to the procedure of appointing the arbitrators or that the number of arbitrators or the procedure for appointing arbitrators should be correct. Even if the number of arbitrators agreed upon between the parties is an even number or even if the procedure agreed upon by the parties is unworkable, it would be a case of parties having not so agreed, setting in motion the procedure statutorily prescribed in Sections 10 and 11 of the 1996 Act. I have in *Dr. Deepashree Vs. Sultan Chand & Sons* AIR 2009 Delhi 85 and *Pooja Gambhir Vs. Parveen Jain* 2009 SCC OnLine Del. 1504 held that an arbitration between the parties for appointment of an even number of arbitrators is to be construed as inviting the application of Section 10(2) of the Act.

46. Applying the aforesaid principles to the arbitration clause in the present case, it is found that the parties had unequivocally agreed to refer their disputes to the arbitration and the same constitute an arbitration agreement within the meaning of Section 7 of the 1996 Act. Even if the contention of the counsel for the MUL were to be correct that there is no Indian Chamber of Commerce, Delhi, it would not make the arbitration agreement otiose or redundant. Similarly even if CML has wrongly approached FICCI instead of Indian Chamber of Commerce, Delhi, the same would also not be a ground for defeating the application under Section 8.

47. Reference may also be made to *Shree Bhowani Cotton Mills Vs. Union Textile Traders* AIR 1966 Cal 588 where the arbitration agreement was for reference of disputes to the arbitration of Indian Chamber of Commerce and the courts at Calcutta alone were agreed to have jurisdiction. The said arbitration clause was challenged on the ground that it was not agreed that the arbitration was to be of Indian Chamber of Commerce of which city. It was held that since the exclusive jurisdiction had been agreed to be of the courts at Calcutta, the arbitration clause has to be read as providing for arbitration of the Indian Chamber of Commerce, Calcutta. I may mention that the arbitration in *Gangadhar Gourisankar Vs.*

Bissessarlal Kanhaiyalal MANU/WB/0275/1958 (DB) was also agreed to be of Indian Chamber of Commerce, Calcutta. Similarly, in ***Jindal Aromatics Vs. South Coast Spices Exports Private Limited*** MANU/DE/1065/2001 also the arbitration agreed to was of the Indian Chamber of Commerce, Delhi. The contention of the counsel for the MUL that here is no Indian Chamber of Commerce, Delhi is thus found to be misconceived. Reference may also be made to ***Gaurishankar Bhagwandasji Dubey Vs. M.P. Housing Board, Bhopal*** MANU/MP/0087/1976 (DB) where the challenge to the clause for arbitration of Housing Commissioner of the Circle on the ground of there being no such authority was defeated by holding that the reference has to be construed as the Housing Commissioner of the Madhya Pradesh Housing Board.

48. Thus, IA No.11482/1998 under Section 8 of 1996 Act in CS(OS) No.87/1998 succeeds and parties to CS(OS) No.87/1998 are referred to arbitration with observations aforesaid and CS(OS) No.87/1998 is disposed of.

49. The parties are left to bear their own costs.

50. The interim order in force in CS(OS) No.87/1998 to however continue in force till 7th January, 2017 to enable MUL to take appropriate orders in

proceedings to be instituted.

51. I may record that though the counsel for CML stated that this court may vide this order itself appoint a sole arbitrator in place of the Arbitral Tribunal earlier constituted by FICCI and proceedings before which were stayed by interim order in CS(OS) No.87/1998, but the counsel for MUL is not agreeable.

RAJIV SAHAI ENDLAW, J.

NOVEMBER 02, 2016

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