

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

ARBITRATION PETITION NO.279 OF 2011

Bottero S.p.A.)
having its head office at Cuneo (Italy))
Via Genova 82) .. Petitioner
(Original Deft. No.2)

VERSUS

1. Euro Glass Limited)
registered under Companies Act,1956)
having its head office at Boston House,))
Suren Road, Chakala, Andheri,)
Mumbai.) .. Respondent No.1
(Original Plaintiff)

2. Gutal Trading (India))
having office at F-223, 2nd Floor,)
Tower No.7, International InfotechPark))
Vashi Station Complex, Vashi,)
Navi Mumbai – 400 703.) .. Respondent No.2
(Original Deft. No.1)

Mr.Rohan Rajadhakshya a/w Mr.Shahen Pradhan i/by has Advocates for the petitioner.

Mr.Ashutosh Thipsay a/w Ms.Neha Karnik i/by Mr.Vinod Juwale for the respondents.

CORAM : R.D. DHANUKA, J.
RESERVED ON : 10th November 2017
PRONOUNCED ON : 30th November 2017

Judgment :-

. By this petition filed under Section 45 of the Arbitration and Conciliation Act, 1996 (for short “the Arbitration Act”), the petitioner seeks an order and direction to refer the disputes raised in Suit No.1846 of 2009 to arbitration in accordance with Clause 27.2 of the Arbitration Agreement dated 14th April 2008 and seeks dismissal of the said suit. Some of the relevant facts for the purpose of the deciding this petition are as under :-

2. The petitioner herein is the original defendant no.2 in Suit 1846 of 2009 which was filed by the respondent no.1 herein (original plaintiff) against Gutal Trading (India)- the respondent no.2 herein (for the sake of convenience, the said Suit No.1846 of 2009 is referred to as “the said suit”). The said suit was filed by the respondent no.1 herein inter alia praying for recovery of Euro 4,25,100 alleged to have been paid by the respondent no.1 as an advance payment on account of the petitioner herein failing to fulfill the terms and conditions of the contract agreement despite the advance payment being released by the respondent no.1 in favour of the petitioner herein.

3. In the said suit, the respondent no.1 had prayed for an order and decree against the petitioner herein and Gutal Trading (India) in the sum of Euro 8,50,200 equivalent to Indian Rs.5,60,79,192/-. The petitioner herein appeared in the said suit. No written statement has been filed by the petitioner herein till date. In the said suit, the defendant no.1-Gutal Trading (India) filed Motion No.9 of 2011 under Order VII Rule 11 of the Code of Civil Procedure, 1908 inter alia praying

for dismissal of the said suit, in so far as the defendant no.1-Gutal Trading (India) is concerned, on the ground that there was no privity of contract whatsoever nature between the plaintiff and the defendant no.1 and on various other grounds.

4. By an order dated 29th October 2015 passed by this Court, the said Notice of Motion No.9 of 2011 filed by the said Gutal Trading (India) came to be allowed. This Court held that there was no cause of action against the said Gutal Trading (India) in the said suit. The plaintiff i.e. Euro Glass Limited preferred an appeal against the said order dated 29th October 2015. The Division Bench of this Court has condoned the delay in filing the said appeal. The said appeal is still pending. During the pendency of the said appeal, hearing of this arbitration petition was adjourned for sometime. Since the said order dated 29th October 2015 was admittedly not stayed by the Division Bench of this Court, in the said appeal filed by the petitioner herein, this Court therefore proceeded with hearing of this Arbitration Petition No.279 of 2011.

5. Mr. Rajadhakshya, learned counsel appearing for the petitioner invited my attention to the agreement entered into between the petitioner and the respondent no.1 dated 14th April 2008 annexed at Exhibit-A to the petition and more particularly the arbitration agreement recorded in Clause 27 of the said agreement which is extracted as under :-

27. DISPUTES AND ARBITRATIONS

27.1 Friendly Consultations

Any dispute arising from, out of or in connection with the contract shall be settled through friendly consultations between the parties. Such consultations shall begin

immediately after one party has delivered to the other party a written request for such consultation.

Following such written request the Project Managers of each party shall meet and try to reach a settlement.

If the Project Managers are unable to reach a settlement within one month, they shall draft within two further weeks a joint report stating the exact subject of the dispute, the facts on which they agree, the points of disagreement and the reasons of such disagreement.

This report shall be handed over to the management of both parties. The management of both parties shall then try to reach a settlement.

27.2 Continued Implementation of Contract

During the period when a dispute is being resolved, the parties shall in all other respects continue their implementation of the contract. In particular, when a dispute arises between the parties, the seller, during the pendency of the dispute, shall proceed with work as set forth in the contract.

All disputes that cannot be settled between the parties by amicable negotiation shall be finally settled by arbitration in Geneva in accordance with the rules of the ICC (International Chamber of Commerce). Any award made by the arbitrators shall be binding upon the parties hereto and judgment thereon may be enforced in any court of competent jurisdiction.

27.3 Governing Law and Place of Jurisdiction

Both parties shall try to solve their differences through friendly consultations and if they fail to reach a mutually convenient settlement and have to go to Court, the exclusive place of jurisdiction shall be neutral to both parties and Internationally recognized as suitable for this condition.

Therefore we propose the following Rules and Location;
United Nations Convention on Contracts for the International Sale of Goods (CISG). The substantive law of Switzerland applies to all matters not provided for in the UN Convention on Contracts for the International Sale of Goods (CISG).

Place of Legal Arbitration : The International Court of Geneva, Switzerland.

6. It is submitted by the learned counsel that the arbitration agreement is very wide and would include all the disputes which are subject matter of the said suit bearing No.1846 of 2009. The name of the defendant no.1 in the said suit i.e. Gutal Trading (India) has already been deleted in view of the order dated 29th October 2015 passed by this Court allowing the application filed by Gutal Trading (India) under Order VII Rule 11 of the Code of Civil Procedure, 1908. He submits that the said order passed by the learned Single Judge of this Court on 29th October 2015 is not stayed or set aside by the Division Bench of this Court and thus now the said suit is only between the petitioner herein (original defendant no.2) and the respondent no.1 herein (original plaintiff). Learned counsel for the petitioner placed reliance on the judgment of the Supreme Court in the case of Chloro Controls India Private Limited Vs. Severn Trent Water Purification Inc. and others, reported in (2013) 1 SCC 641 and in particular paragraph 69 thereof and would submit that since the subject matter of the suit is governed by the arbitration agreement and in view of the petitioner having satisfied the conditions under Section 45 of the Arbitration Act, this Court is bound to refer the parties to the arbitration. All prerequisites stated under Sections 44 and 45 read with Schedule I of the Arbitration Act in this case have been satisfied according to the petitioner.

7. Learned counsel for the petitioner invited my attention to the averments made by the respondent in the affidavit-in-reply. He submits that merely because the petitioner herein had filed a suit in the Court of Cuneo and prayed the respondent herein for seeking interim relief in respect of the bank guarantee, the petitioner has not waived its rights to invoke the arbitration agreement and that would not amount to waiver on the part of the petitioner. He submits that the said suit was filed by the petitioner against the bank who was not a party to the arbitration agreement. The bank guarantee was not the subject matter of the arbitration proceedings. The said Court of Cuneo had initially granted injunction in favour of the petitioner but the same was subsequently vacated. The bank had paid the bank guarantee amount to the respondent in the suit. The reliefs claimed by the petitioner in the suit were not touching the subject matter of the arbitration agreement. He submits that Article 23 of the Rules of Arbitration framed by the International Chamber of Commerce would be applicable. He submits that under second part of Article 23, since the petitioner was permitted to file proceedings before the competent judicial authority for interim or conservatory measures before the file of arbitration proceedings is transmitted to the arbitral tribunal, it would not amount to an infringement or a waiver of the arbitration agreement and would not affect the rights of the petitioner to make an application under Section 45 of the Arbitration Act.

8. Articles 4 and 23 of the Rules of Arbitration framed by the International Chamber of Commerce are extracted as under :-

Article 4 - Request for Arbitration :-

1. A party wishing to have recourse to arbitration under these Rules shall submit its Request for Arbitration (the “Request”) to the Secretariat, which shall notify the claimant and respondent of the receipt of the Request and the date of such receipt.
2. The date on which the Request is received by the Secretariat shall, for all purposes, be deemed to be the date of the commencement of the arbitral proceedings.
3. The Request shall, inter alia, contain the following information :
 - a) the name in full, description and address of each of the parties;
 - b) a description of the nature and circumstances of the dispute giving rise to the claim(s);
 - c) a statement of the relief sought, including, to the extent possible, an indication of any amount(s) claimed;
 - d) the relevant agreements and, in particular, the arbitration agreement;
 - e) all relevant particulars concerning the number of arbitrators and their choice in accordance with the provisions of Articles 8, 9 and 10, and any nomination of an arbitrator required thereby; and
 - f) any comments as to the place of arbitration, the applicable rules of law and the language of the arbitration.
4. Together with the Request, the claimant shall submit the number of copies thereof required by Article 3(1) and shall make the advance payment on administrative expenses required by Appendix III (“Arbitration Costs and Fees”) in force on the date the Request is submitted. In the event that the claimant fails to comply with either of these requirements, the Secretariat may fix a time limit within which the claimant must comply, failing which the file shall be closed without prejudice to the right of the claimant to submit the same claims at a later date in another Request.
5. The Secretariat shall send a copy of the Request and the documents annexed thereto to the respondent for its Answer to

the Request once the Secretariat has sufficient copies of the Request and the required advance payment.

6. When a party submits a Request in connection with a legal relationship in respect of which arbitration proceedings between the same parties are already pending under these Rules, the Court may, at the request of a party, decide to include the claims contained in the Request in the pending proceedings provided that the Terms of Reference have not been signed or approved by the Court. Once the Terms of Reference have been signed or approved by the Court, claims may only be included in the pending proceedings subject to the provisions of Article 19.

Article 23 – Conservatory and Interim Measures :-

1. Unless the parties have otherwise agreed, as soon as the file has been transmitted to it, the Arbitral Tribunal may, at the request of a party, order any interim or conservatory measure it deems appropriate. The Arbitral Tribunal may make the granting of any such measure subject to appropriate security being furnished by the requesting party. Any such measure shall take the form of an order, giving reasons, or of an Award, as the Arbitral Tribunal considers appropriate.

2. Before the file is transmitted to the Arbitral Tribunal, and in appropriate circumstances even thereafter, the parties may apply to any competent judicial authority for interim or conservatory measures. The application of a party to a judicial authority for such measures or for the implementation of any such measures ordered by an Arbitral Tribunal shall not be deemed to be an infringement or a waiver of the arbitration agreement and shall not affect the relevant powers reserved to the Arbitral Tribunal. Any such application and any measures taken by the judicial authority must be notified without delay to the Secretariat. The Secretariat shall inform the Arbitral Tribunal thereof.

9. It is submitted that there was no suppression about the said proceedings filed by the petitioner before the Court of Cuneo in this

proceeding as both the proceedings were totally different. Scope of enquiry under Section 25 of the Arbitration Act is very limited.

10. It is submitted by the learned counsel that there is no delay in filing the proceedings by the petitioner under Section 45 of the Arbitration Act. There is no progress in the said suit. He submits that by an order dated 15th July 2011 passed by this Court, it was made clear that the participation of the petitioner in the said suit would be without prejudice to the rights and contentions of the petitioner. He submits that the provisions of Section 45 of the Arbitration Act are mandatory and thus this Court shall refer the parties to the arbitration in view of the petitioner having satisfied all the conditions of Section 45 of the Arbitration Act.

11. Mr.Thipsay, learned counsel for the respondent (original plaintiff) submits that there was no privity of contract between his client and the petitioner herein. He invited my attention to Article 4 of the Rules of Arbitration framed by the International Chamber of Commerce and would submit that under the said Article, a party wishing to have recourse to arbitration under those Rules has to submit its request for Arbitration to the Secretariat which shall notify the parties of the receipt of the said request. Upon receipt of the such request by a party, arbitral proceedings be deemed to have commenced. He submits that the petitioner had admittedly not invoked the arbitration agreement and had not made any request for arbitration as contemplated under Article 4(2) to the Secretariat, the question of transmitting the file of arbitration proceedings to the arbitral tribunal under first part of Article 23 did not

arise. He submits that the provisions of waiver prescribed in second part of Article 23, in the event of such party applying to any competent judicial authority for interim or conservatory measures in appropriate circumstances before the file is transmitted to the arbitral tribunal cannot be availed of by a party who has not made a request for recourse to arbitration in terms of Article 4 of the ICC Rules.

12. Learned counsel for the respondent submits that since there was waiver on the part of the petitioner of its right to arbitrate by invoking the arbitration agreement, the arbitration agreement has become inoperative by virtue of such waiver. The petitioner had abandoned its rights to apply for arbitration and thus cannot file this application under section 45 of the Arbitration Act on that ground also. He submits that the suit was filed by his clients in the year 2009, whereas the arbitration petition has been filed only in the month of February, 2011 i.e. after delay of about 2 years. The arbitration petition does not show whether any other proceedings were filed by the petitioner. The petitioner has disclosed about the proceedings filed by it in the Court of Cuneo for the first time in the affidavit in rejoinder. In those proceedings filed by the petitioner in the Court at Cuneo, there was no reference to the arbitration agreement. The petitioner had no intention to invoke arbitration agreement at any point of time. No notice invoking arbitration agreement came to be issued by the petitioner till date.

13. Learned counsel placed reliance on the judgment of the Madras High Court in case of Mr. **Ramasamy Athappan & Anr. vs. The Secretary of the Court, International Chamber of Commerce, (2009) 3**

L.W. 580 and in particular paragraph 29 thereof. He also placed reliance on the judgment of the Supreme Court of **Victoria at Melbourne** in the case of **LA Donna Pty. Ltd. vs. Welford AG, (2005) VSC 359** and would submit that since the petitioner had participated in the suit filed by the respondent no.1 in this Court for two years, in view of all its conduct, action, intention, motion and commission, the petitioner has waived its right to invoke arbitration agreement. He submits that on this ground itself, the application under section 45 of the Arbitration Act is not maintainable.

14. Mr.Rajadhyaksha, learned counsel for the petitioner in rejoinder submits that admittedly the bank against whom certain reliefs were sought by the petitioner in the Court of Cuneo was not a party to the arbitration agreement. The said bank thus could not have been a party to the arbitral tribunal. The petitioner had filed those proceedings for various reliefs in respect of the bank guarantee against the said bank independently and that would not amount to waiver. He invited my attention to a passage from treatise of Shri.O.P. Malhotra, on Law of Arbitration and would submit that the waiver cannot be easily assumed. Various factors are to be considered by this Court before rendering any finding on the waiver since the consequence of finding on the issue of waiver may be serious.

15. Insofar as the submission of the learned counsel for the respondent that since the petitioner had not invoked the arbitration agreement and the file was not transmitted to the arbitral tribunal by International Chamber of Commerce, the petitioner could not avail of

exemption from waiver is concerned, it is submitted that it was not necessary for the petitioner to first invoke the arbitration agreement by making an application before the International Chamber of Commerce before filing an application for interim measures or for other reliefs before any other Court during the interregnum period of the arbitration file not having been transmitted by the International Chamber of Commerce to the arbitration tribunal. He submits that in any event the alleged inaction on the part of the petitioner would not fall under the expression 'inoperative' and thus the second part of Article 23 of the arbitration rules framed by the International Chamber of Commerce would apply to the facts of this case and thus by filing an application for interim reliefs against the bank who was not a party to the arbitration agreement by filing a suit in the Court of Cuneo, it cannot amount to waiver and the petitioner cannot be precluded from filing an application under section 45 of the Arbitration Act.

16. It is submitted that under Article 23 of the Arbitration Rules framed by International Chamber of Commerce filing of such application was not at all barred and such application could be filed even before filing an application invoking the arbitration agreement by making an application to the Secretariat under Article 4 of Rules of Arbitration framed by the International Chamber of Commerce. It is submitted that there is no time period prescribed in section 45 of the Arbitration Act for making an application for referring the parties to arbitration. He submits that the principles laid down by the Supreme Court in case of ***Chloro Controls India Private Limited*** (supra) would squarely apply to the facts of this case and all such norms laid down by the Supreme Court in the

said judgment after interpreting section 45 of the Arbitration Act are already satisfied by the petitioner in this case.

REASONS AND CONCLUSIONS :

17. It is not in dispute that the petitioner and the respondent had entered into an agreement on 18th April, 2008 on the terms and conditions recorded in the said agreement. Clause 27 of the said agreement provided for an arbitration in case of disputes between the parties. Clause 27.2 of the said agreement provided that all disputes that cannot be settled between the parties by amicable negotiations shall be finally settled by arbitration in Geneva in accordance with the rules of the International Chamber of Commerce. Any award made by the arbitrator shall be binding upon the parties to the said agreement and the judgment thereon may be enforced in any Court of competent jurisdiction. Clause 27.3 provided that the exclusive place of jurisdiction shall be neutral to both the parties and internationally recognized as suitable for that condition. The place of legal arbitration provided in the said clause was “The International Cort of Geneva, Switzerland”.

18. It is not in dispute that on 8th May, 2009, the respondent no.1 herein had filed a suit (1846 of 2009) against Gutal Trading (India) and the petitioner herein *inter-alia* praying for an order and decree to pay to the plaintiff therein an amount of Euro 850200 equivalent to Indian Rs.5,60,79,192/- with interest thereon. The defendant no.1 in the said suit i.e. Gutal Trading (India) filed a notice of motion under Order VII Rule 11 of the Code of Civil Procedure, 1908 contending that there was no

cause of action against the defendant no.1 in the said suit and applied for dismissal of the suit against that party. By an order dated 29th October, 2015, this Court allowed the said Notice of Motion No.9 of 2011 filed by the defendant no.1 in that suit and held that there was no cause of action against the defendant no.1 based on the contract and that the plaint did not disclose any cause of action against the defendant no.1. The respondent no.1 herein has filed an appeal against the said order dated 29th October, 2015 before the Division Bench of this Court. The said appeal is still pending and the said order dated 29th October, 2015 is not stayed.

19. The question however, that arises for consideration of this Court is whether by filing a suit by the petitioner herein in the Court of Cuneo for various reliefs and not invoking arbitration agreement amounted to waiver and abandonment of the right to invoke the arbitration agreement and would fall within the expression 'inoperative' referred in section 45 of the Arbitration Act. The question also that arises for consideration of this Court is that whether the petitioner has satisfied the conditions set out in section 45 of the Arbitration Act or not.

20. The existence of the arbitration agreement in the agreement entered into between the parties on 14th April, 2008 is not in dispute. The case of the respondent no.1 however, is that since the petitioner had never invoked the arbitration agreement, had no intention to invoke the arbitration agreement, had already filed a civil proceeding for part of the relief in the Court of Cuneo arising under the said agreement dated 14th April, 2008, has participated in the suit filed by the respondent no.1

herein would amount to waiver and abandonment and thus the conditions of section 45 of the Arbitration Act were not satisfied.

21. Insofar as participation of the petitioner in Suit No.1846 of 2009 filed the respondent no.1 is concerned, it is not in dispute that this Court has already clarified in the order dated 15th July 2011 that the petitioner would be appearing in the said suit without prejudice to the rights and contentions of the petitioner. In my view, participation of the petitioner thus in the said suit cannot a ground for dismissing this petition as sought to be canvassed by the learned counsel for the respondent no.1. It is however, not in dispute that the application under section 45 of the Arbitration Act came to be filed by the petitioner only on 4th February, 2011 though the said Suit No.1846 of 2009 is pending since May, 2009.

22. I shall first deal with the issue whether the petitioner can avail of the benefit of waiver in terms of the second part of Article 23 of the Rules of Arbitration framed by the International Chamber of Commerce or not. A perusal of the rules framed by the International Chamber of Commerce which are admittedly applicable to the parties clearly indicates that any party, who wish to have recourse to arbitration under those rules shall submit its request for arbitration to the Secretariat. On the date of receipt of such request by the Secretariat, the arbitral proceedings is deemed to have been commenced. It is not in dispute that neither on the date of filing a suit by the petitioner in the Court of Cuneo nor even thereafter the petitioner made any application to the Secretariat under Article 4 of the Rules of Arbitration framed by the International Chamber of Commerce till date.

23. A perusal of Article 4 of the Arbitration Rules framed by the International Chamber of Commerce thus clearly indicates that the arbitral proceedings would commence only when a request is received by a Secretariat under Article 4 from a party to the arbitration agreement. A conjoint reading of Article 4 with Article 23 clearly indicates that both the Articles have to be read together and the waiver described in the second part of Article 23 would apply only if the conditions set out in Article 4 are complied with by a party to the arbitration agreement as a condition precedent before claiming any waiver under the second part of Article 23.

24. The jurisdiction of the Court under section 45 of the Arbitration Act is very limited. A Court has to scrutinize as to there is an arbitration agreement referred to in section 44 of the Arbitration Act between the parties and one of those parties have filed an application under section 45 of the Arbitration Act before the judicial authority for referring the parties to the arbitration and also as to whether the said arbitration agreement described in section 44 of the Arbitration Act is null and void, inoperative and/or incapable of being performed.

25. There is no dispute that the parties had agreed to refer the disputes to arbitration. I shall now consider whether such arbitration agreement has become inoperative or not.

26. It is not in dispute that though the petitioner had filed a suit in the Court of Cuneo against the bank in respect of the bank guarantee furnished by the said bank, the petitioner has not till date invoked the arbitration agreement recorded in the agreement dated 14th April, 2008

entered into between the petitioner and the respondent no.1. The petitioner has also not made any claim against the respondent no.1 herein arising out of the said agreement dated 14th April, 2008 between the parties. The petitioner has disclosed about the said proceedings filed by the petitioner in the Court of Cuneo for the first time in the affidavit in rejoinder. There was no reference to the arbitration agreement in the said proceedings filed by the petitioner against the bank in the Court of Cuneo. It is thus clear that the petitioner has no intention to invoke the arbitration agreement at any point of time.

27. The Supreme Court in case of ***Chloro Controls India Private Limited*** (supra) has held that the expression 'any person' mentioned in section 45 of the Arbitration Act clearly referred to the legislative intent of enlarging the scope of the words beyond "the parties" who are signatory to the arbitration agreement. Such applicant however should claim through or under signatory party. Once this link is established, then the court shall refer them to the arbitration. It is held that the expression 'shall' in the language of section 45 is intended to require the court to necessarily make a reference to arbitration, if the conditions of that provision are satisfied. It is held that a party can seek the reference under section 45 only upon satisfaction of the prerequisites stated under sections 44 and 45 read with Schedule I of the Arbitration Act. It is a legal right which has its own contours and is not an absolute right, free of any obligations / limitations.

28. There is no dispute with the principles of law laid down by the Supreme Court in case of ***Chloro Controls India Private Limited***

(supra). A perusal of the said judgment clearly indicates that though it is a legal right of a party to the arbitration agreement to make an application under section 45 of the Arbitration Act to a judicial authority, it is not an absolute right, free of any obligation / limitation.

29. The Madras High Court in case of **Mr. Ramasamy Athappan & Anr.** (supra) has considered the expression “inoperative”. The Madras High Court in the said judgment has adverted to a judgment of the Supreme Court of **New South Wales, Commercial Division, Australia** in case of **Shanghai Foreign Trade Corporation (PR China) vs. Sigma Metallurgical Co. Pty. Ltd.** in which it was held that an agreement may be rendered inoperative even by acts of omission, or commission, on the part of the parties. Waiver, abandonment, renunciation, election, acquiescence etc. are some of the acts of commission or omission, by which an agreement may be made inoperative by a party.

30. The Madras High Court has also quoted the passage from Law and Practice of Arbitration and Conciliation (2nd Edition) by Shri.O.P. Malhotra with approval on the expression “waiver”. The judgment of the Supreme Court in case of **F.C.I. vs. Yadav Engineer And Contractor (1982) 2 SCC 499** on the issue of abandonment of right to arbitration is also adverted to by the Madras High clearly manifested by the stand taken by such a party and has held that once such unequivocal intention is declared or abandoned of the right to claim the benefit of the agreement which becomes manifested from the conduct, such party would then not be entitled to enforce the arbitration agreement because there is a breach of the agreement by both the parties disentitling both to

claim any benefit of the arbitration agreement. A party who makes an application for stay of the proceeding before filing the written statement or before taking any other steps in the proceedings must simultaneously show its readiness and willingness to do all things necessary to proper conduct of the arbitration. In my view the principles laid down by the supreme Court in case of ***F.C.I. vs. Yadav Engineer And Contractor*** (supra) and by the Madras High Court in case of Mr.***Ramasamy Athappan & Anr.*** (supra) would squarely apply to the facts of this case. I am respectfully bound by the principles of law laid down by the Supreme Court in case of ***F.C.I. vs. Yadav Engineer And Contractor*** (supra). I am in agreement with the views expressed by the Madras High Court in case of Mr.***Ramasamy Athappan & Anr.*** (supra).

31. The Madras High Court in the said judgment has held that while exercise of right to seek arbitration under section 34 of the Arbitration Act, 1940 or section 8 of the Arbitration & Conciliation Act, 1996 is time bound and not really substance – bound, exercise of right to seek arbitration under section 45 of the Arbitration & Conciliation Act, 1996 is actually substance – bound and not time bound. Section 45 of the Arbitration Act empowers a judicial authority to reject an application for arbitration if the agreement is inoperative. An agreement can be made inoperative by abandonment. The abandonment may also arise when the contract is followed by a long period of delay or inactivity. The abandonment of a right may arise by virtue of a party making an election. The suit filed by the respondent no.1 in this Court is pending since 2009. It also would be important factor for this Court to decide whether at this stage in view of inaction on the part of the petitioner to apply under

section 45 of the Arbitration Act to refer the parties to arbitration after delay of about 2 years would also amount to abandonment or inaction on the part of the petitioner and would fall within the expression 'inoperative' referred in section 45 of the Arbitration Act.

32. In my view, though no limitation is prescribed under section 45 of the Arbitration Act to make an application to refer parties to arbitration inordinate delay or inaction on the part of a party would be a relevant factor to arrive at a conclusion that by such inaction on the part of a party to arbitration agreement would amount to abandonment or waiver which would fall within the expression of “inoperative” prescribed or referred under section 45 of the Arbitration Act. Even if no time is prescribed for making such an application under section 45 of the Arbitration Act by a party to arbitration agreement in a pending proceeding before the judicial authority, such action under section 45 of the Arbitration Act has to be initiated within a reasonable period of time. A party who has no intention to invoke arbitration agreement and has not exercised his rights under the said arbitration agreement cannot compel the other party to refer his disputes to arbitration. It is not in dispute that though the petitioner had filed a suit against the bank arising in respect of the bank guarantee furnished by the bank in favour of the respondent no.1, neither any claim is made by the petitioner by invoking any arbitration agreement, nor any notice invoking arbitration agreement has been issued in the last several years.

33. In my view, the petitioner has not satisfied the mandatory conditions prescribed under section 45 of the Arbitration Act. In view of

the fact that the arbitration agreement is inoperative and in view of the petitioner having abandoned or waived its right to invoke the said arbitration agreement, the parties cannot be referred to arbitration under section 45 of the Arbitration & Conciliation Act, 1996. Waiver and abandonment of right to invoke the arbitration agreement would fall the expression 'inoperative' prescribed under section 45. In my view the petition is devoid of merits.

34. I therefore, pass the following order :-

- i) Arbitration Petition No.279 of 2011 is dismissed.
- ii) There shall be no order as to costs.

(R.D. DHANUKA, J.)