

IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON : 06.04.2017

PRONOUNCED ON : 15.06.2017

CORAM

THE HONOURABLE MR. JUSTICE T.RAVINDRAN

C.S.No. 150 of 2011

M/S.ESS EMM ENTERPRISES
(A Proprietorship concern)

...
Vs.

Plaintiff

1. M/s. Shell India Markets Pvt Ltd
Represented by its Managing Director,
8th Floor, Dertminister,
No.70, Dr.Radhakrishnan Salai,
Mylapore, Chennai - 600 004.

2. M/s.Prosol
No.107, Mahatma Gandhi Road,
Tass Industrial Estate,
Ambattur, Chennai -600 098.

...

Defendants

For Plaintiff : Mrs. Rajeni Ramadas
for Mr. K.Rajasekaran

For Defendant : Mr.Ranganatha Reddy
No.1 for M/s. King & Partridge

For Defendant : Mrs. M.Gomathi
No.2

JUDGMENT

Suit for declaration and mandatory injunction.

2. The averments contained in the plaint are briefly stated as

follows:

The plaintiff was appointed as a distributor for the first defendant's lubricants and other cognate products and in this connection, the plaintiff and the first defendant entered into an agreement on 16.05.2009 at Chennai and as per the agreement, the plaintiff was appointed as a non-exclusive distributor of the first defendant's products in the territory and to enable the plaintiff, as distributor, to resell Shell products on plaintiff's own account through their own network. The agreement details the duties and responsibilities of the parties. As per the terms of the agreement, the first defendant may terminate the agreement by a written notice as provided under clause 15.2. The first defendant had not supplied the lubricants on placement of the order dated 31.01.2011 with advance remittance of Rs.3.16 lakhs and in the mean time, the second defendant had issued a letter dated 09.02.2011 addressed to the clients of plaintiff that they are the approved distributors of M/s.Shell Lubricants and they will be servicing all their future requirements of Shell lubricants in place of the plaintiff M/s.Ess Emm Enterprises as advised by M/s.Shell India Markets Private Limited and on seeing the letter, the plaintiff was put to shock as it had brought disrepute to the plaintiff before his customers. The first defendant stealthily permitted the second defendant to issue the above said letter and thus the act

of the first defendant constituted breach of the agreement and also not effecting supply as agreed upon and appointing a third party without terminating the agreement as provided therein is precisely the cause of action for the present suit.

3. The plaintiff has an outstanding book debts recoverable from its customers to the tune of Rs.1,58,85,941/-. As per the marketing practice, the sum due from the customers would be recovered only if fresh supply is effected. If the distributorship is allowed to be terminated by the act of the first defendant, the entire investments made by the plaintiff in setting up office and other infrastructure would have to be written off. The plaintiff has borrowed huge sums of money from the bank for setting up his office as per the standard of the first defendant and also towards the working capital requirements and as on date, there is an outstanding of Rs.158.28 lakhs in debit balance. Non supply of lubricants by the first defendant is causing loss as the clients have started cancelling the orders. The plaintiff is a distributor of the first defendant and there is no information or notice from the first defendant to the plaintiff informing that the above said relationship between them is snapped. The first defendant cannot act unilaterally against the terms of the agreement and the first defendant is duty bound and also owes responsibility to supply

the goods on receipt of the order and money, whereas, the first defendant had not supplied any material and hence, in the process of easing out the plaintiff. Thus the plaintiff has been necessitated to lay the suit for proper reliefs.

4. The averments contained in the written statement filed by the first defendant are briefly stated as follows:-

The suit is not maintainable either in law or on facts. The plaintiff is not entitled to the relief of mandatory injunction. The above said relief as per the section 39 of the Specific Relief Act 1963 is a discretionary remedy and further, the impugned contract is not specifically enforceable. The agreement entered into between the plaintiff and the first defendant envisages supply of the lubricants and other related products for resale as an independent distributor and the same is not a one-off act and needs continuous supervision and uninterrupted monitoring and in such view of the position, the enforcement of the agreement is clearly barred under section 14 (d) of the Specific Relief Act, 1963. Further, the agreement involves innumerable details with respect to business planning, sales forecast, payment of advance monies for lifting the products, compliance with quality and quantity parameters, appointment and training of

personnel, arrangement of working capital etc. and the Court cannot be persuaded to go into such minute and numerous details and thus, not enforceable under section 14 (b) of the Specific Relief Act, 1963. As per Clause 22 of the agreement dated 16.05.2009, which provides for dispute resolution, any dispute between the parties shall be referred to the Senior Management of the first defendant and of the distributor and only on their failure, disputes can be resorted to Courts at New Delhi with its exclusive jurisdiction. On the other hand, the plaintiff by suppressing the above said stipulations has approached this Court with unclean hands and hence, on the above sole ground, the suit deserves to be dismissed. The plaintiff is a proprietorship concern whose sole owner was one N.Shankar, who passed away recently and the present suit and application had been signed by T.S.Pichumani in a representative capacity and T.S.Pichumani is neither the legal heir nor has been duly authorized in the manner known to law by late Shankar to represent the plaintiff and as such, Pichumani does not have the locus standi to initiate and maintain the suit or any other legal proceedings against the defendant. The agreement entered into between the parties is determinable by giving notice, which comes into effect with immediate effect under certain conditions. The contract, which is determinable in nature, is not specifically enforceable under Section

14 of the Specific Relief Act. The agreement had been duly terminated by the first defendant by giving due notice. In as much as the plaintiff was in gross violation of the express provisions of the agreement and the plaintiff has not complied with the distributor business principle as contemplated under the agreement, even though the agreement envisaged just one month's notice, the defendant has actually given the plaintiff more than two month notice, which is more than sufficient. As discussions between the parties, on the subject were going on for some time, it has been mutually agreed by the parties that the defendant on its part to extend the notice period to two months instead of just one month and the plaintiff on its part would begin to hand over the customers to the second defendant from mid February onwards to ensure smooth transition. In fact, the plaintiff himself sought to be attached with the second defendant and another distributor to get all supplies and accordingly, the plaintiff was allowed to lift stocks from the defendant. The plaintiff was appointed as a non exclusive distributor as per the clause 2.1 of the agreement. The agreement enables the first defendant to appoint other distributors for the territory covered under the agreement as provided therein. There is no cause of action for the suit. It is false to state that on account of the termination of the agreement by the first defendant on 29.01.2011 by email, which is legally sustainable, the

plaintiff had been put to great shock and financial loss. The plaintiff has resorted to unethical business. The plaintiff has suppressed the material facts and hence, the suit is liable to be dismissed.

5. The averments contained in the written stated filed by the second defendant are briefly stated as follows:

The suit is not maintainable either in law or on facts. The suit is not maintainable as per Section 14 of the Specific Relief Act. The plaintiff was appointed as only non exclusive distributor under the agreement in question and the agreement reserves the right of appointment of other distributors with the first defendant, even within the territory. As provided in the agreement, even if the agreement had not been cancelled, the second defendant was well within its rights to operate as an additional distributor for the area covered under the agreement. In furtherance of the arrangement worked out between the parties, the second defendant had written to the various prospective customers soliciting business as regards the products of the first defendant and there is nothing amiss on the part of the second defendant in approaching the prospective customers. As per the arrangement entered into between the parties, the plaintiff had also taken supplies from the second defendant from the first of

February onwards which reinforced the faith of the second defendant in the arrangement that had been worked out between the parties and accordingly, the second defendant had invested heavily in enhancing its capacities and capabilities. The second defendant had acted bonafide on the strength of the assurances given by plaintiff and the actions of the plaintiff and hence, the plaintiff is not entitled to obtain the reliefs sought for and the suit is liable to be dismissed.

6. On the pleadings set out above, the following issues are framed for determination:

- 1. Whether the suit is maintainable by the plaintiff?***
- 2. Whether the suit is maintainable where alternate dispute redressal mechanism has been provided?***
- 3. Whether the contract has been validly terminated as per the terms of contract?***
- 4. Whether the plaintiff is entitled for mandatory injunction as prayed for?***
- 5. Whether the plaintiff is an exclusive***

distributor of the first defendant?

***6. Whether the plaintiff itself has
agreed for termination of its
distributorship?***

7. In support of the plaintiff's case, PW1 has been examined and Exs.P1 to P19 have been marked. In support of the case of the defendants, DWs1 & 2 have been examined and Exs.D1 to D15 have been marked.

8. Issue No.1:

The plaintiff, as seen from the averments contained in the plaint, is a proprietorship concern. In the short cause title, the plaintiff is described as M/s.Ess Emm Enterprises, (a proprietorship concern) and in the long cause title, the plaintiff is described as M/s.Ess Emm Enterprises, a proprietorship concern represented by its Chief Executive. A perusal of the plaint would go to show that the plaint is conspicuously absent as regards the name of the person, who owns the plaintiff proprietorship concern. Nowhere in the plaint, the name of the proprietorship of the plaintiff concern has been mentioned. However, as seen from the verification column contained in the plaint, it is noted that one T.S.Pichumani describing himself as the chief executive of the plaintiff concern had verified the

averments and other facts contained in the plaint.

9. A specific defence has been put forth by the first defendant that the plaintiff, which is a proprietorship concern, is not entitled to maintain the suit. That apart, it is also pleaded that the sole proprietor of the plaintiff concern by name N.Shankar had passed away and inasmuch as T.S.Pichumani is neither the legal heir nor had been duly authorized in the manner known to law by the deceased N.Shankar to represent the plaintiff concern, according to the first defendant, T.S.Pichumani does not have the locustandi to initiate and maintain the suit or any other legal proceedings against the first defendant in respect of the agreement in question. The suit has been laid by the plaintiff for enforcing the distributor agreement entered into between the plaintiff and the first defendant on 16.05.2009, which has been marked as Ex.P2.

10. In the light of the above said defence set out by the first defendant, it has to be seen whether the plaintiff proprietorship concern as such is entitled to maintain the suit and whether T.S.Pichumani is entitled to maintain the suit as the Chief Executive of the plaintiff concern.

11. It is not in dispute that the deceased N.Shankar was the

sole proprietor of the plaintiff concern. As seen from the documents putforth in the lis, it is found that T.S.Pichumani has come forward with the suit in the name of the plaintiff based upon the authorisation letter given by the proprietor N.Shankar dated 19.03.2009, which has been marked as Ex.P1. Therefore, according to the plaintiff, T.S.Pichumani is empowered to initiate legal proceedings, if any, under the agreement above mentioned on behalf of the plaintiff concern under Ex.P1. Without providing any legal colour to Ex.P1 as such, even assuming for the sake of arguments that Ex.P1 could be accepted as empowering T.S.Pichumani to institute the suit on behalf of the plaintiff as having been authorised by its proprietor, even then as rightly putforth by the first defendant as well as the second defendant, the suit, in the name of the proprietorship concern, as such, is found to be not maintainable.

12. The counsel for the defendant with reference to the above issue straightaway placed reliance upon the decision reported in **2005 (79) DRJ 209 (DB) (Miraj Marketing Corporation Vs. Vishaka Engineering and Another)**, wherein, it had been held by the Division Bench of the Delhi High Court that a sole proprietorship firm is not a legal entity, which can sue or be sued in its own name and such suit relating to or against the affairs or claims of a

proprietorship concern has to be brought or made against the person, who is the sole proprietor of the firm and in that view of the matter, the Division Bench in the above said decision had held that the suit laid in the name of the proprietorship concern and not instituted by a duly authorized person is not maintainable. Further, the above said decision has been followed by the Delhi High Court in another case, which had come to be reported in **(2006) 127 DLT 80 (SVAPN constructions Vs. IDPL Employees Cooperative Group)**, wherein also, it has been held that a sole proprietorship firm is not a legal entity, which can sue in its own name and accordingly, it had been held that the suit or petition laid in the name of a sole proprietorship firm, which is not a legal entity, is not maintainable.

13. In the above said authorities, observations were made as to the entitlement of the institution of the suit by the proprietorship concern vis-a-vis the provisions contained in Order XXX of the Civil Procedure Code and it has been held that Order XXX of the Civil Procedure Code does not empower laying of the suit, in the name of the proprietorship concern, which is not a legal entity.

14. In addition to the above said legal support, the counsel for

the first defendant also relied upon the decision of our High Court reported in ***2016-2-L.W.40 (S.K.M.Egg Products Exports (India) Ltd., Reprresented by its Managing Director Sivakumar Having its registered office at 185, Chennimalai Road Erode - 1 and its Factory at Cholangapalayam Erode Vs. V.Jothimani, w/o C.Selvaraj Proprietorix M/s.Aravind Associates Door No.62, First Floor Thangaperumal Street Gandhiji Road, Erode)***, wherein, the legal entitlement of proprietorship concern to lay a suit vis-a-vis the provisions of order of XXX of CPC had been expatiated and in that decision, it had been held that a proprietorship concern is not a juristic persons and strictly speaking, no suit can be filed in the name of the proprietary concern as a plaintiff. Further, in that decision, it has been spelt out that Rule 10 of Order XXX of CPC enables only the persons dealing with the proprietary concern to sue the Proprietor in the name of the Proprietary concern and it does not permit the Proprietor to sue in te name of the Proprietary concern.

15. Following the above said authorities, it is evident that the proprietorship concern not being a juristic person and legal entity is not entitled to maintain a suit in its name. Therefore, it could be seen that the suit should have been laid only in the name of the proprietor of the plaintiff concern and the suit having been not so laid

and laid in the name of the plaintiff concern is found to be not legally maintainable.

16. However, it is contended by the plaintiff's counsel that based upon the authorisation letter given by the proprietor marked as Ex.P1, T.S.Pichumani has laid the suit. Even assuming for the sake of arguments that Ex.P1 legally empowers T.S.Pichumani to lay the suit, it could be seen that as contended by the counsel for the plaintiff, T.S.Pichumani should ensure that he is entitled to represent the plaintiff throughout, till the culmination of the proceedings, as the recognised agent of the plaintiff. In this connection, it is found that as per Order 3 Rules 1 and 2, the suit can be laid on behalf of the plaintiff by its recognized agent and in such view of the matter, it has to be seen whether T.S.Pichumani continues to hold the authority given by the proprietor N.Shankar to maintain the suit throughout the proceedings.

17. As seen from the evidence projected in this case and also from the defence set out by the first defendant, the proprietor of the plaintiff concern N.Shankar had passed away and in this connection, the death certificate of N.Shankar has been marked as Ex.P14. As seen from Ex.P14, it is noted that N.Shankar had died on 02.03.2011.

It is thus found that N.Shankar, the proprietor of the plaintiff concern had died immediately after the institution of the suit. In this connection, it is noted that the suit had come to be filed on 21.02.2011. Therefore, it could be seen that on the demise of the sole proprietor N.Shankar on 02.03.2011, the authority given by him to T.S.Pichumani to represent the plaintiff concern as such does not have any legal force. Admittedly, T.S.Pichumani is not the legal heir of the deceased N.Shankar. It is also found that the deceased N.Shankar had left behind his wife and children as his legal heirs and the legal heirship certificate has been marked as Ex.P16. Further, from Ex.P15, it is seen that the legal heirs of the deceased N.Shankar had transferred the rights of the ownership of the plaintiff concern to T.S.Pichumani. However, it has not been established that as to how Ex.P15 would partake the character of a legal document empowering T.S.Pichumani to obtain the rights of the plaintiff proprietorship concern. Be that as it may, even assuming for the sake of arguments that Ex.P15 is the legal document transferring the rights of the plaintiff proprietorship concern to T.S.Pichumani, as a prudent person, on the obtainment of Ex.P15, if the same legally empowers T.S.Pichumani to continue the suit as the sole proprietor of the plaintiff concern, as rightly contended by the first defendant's counsel, T.S.Pichumani should have taken appropriate steps to amend the

plaint, particularly, describing himself as the sole proprietor of the plaintiff concern on the death of N.Shankar and thereby inviting the defendants to place objection, if any, on the entitlement of Pichumani to continue the suit as the proprietor of the plaintiff concern, following the death of N.Shankar and in the light of Ex.A15. However, no step have been taken by T.S.Pichumani to amend the plaint. Accordingly, even as on date, it is found that the suit has been laid only in the name of the plaintiff proprietorship concern represented by its Chief Executive.

18. However, following the death of N.Shankar, the sole proprietor who died on 02.03.2011, Ex.P1 has been denuded of legal character and further, Ex.P15 also not shown to be having any legal force empowering T.S.Pichumani to act as the proprietor of the plaintiff concern and in addition to that, T.S.Pichumani having not even taken steps to amend the plaint, thereafter, describing himself as the sole proprietor of the plaintiff concern in the wake of Ex.P15, it could be seen that, as such, after the death of N.Shankar, T.S.Pichumani cannot be held to be entitled to maintain the suit on behalf of the plaintiff proprietorship concern based upon Ex.P1.

19. As adverted to earlier, admittedly T.S.Pichumani is not the

legal heir of the deceased N.Shankar. In such view of the matter, it has to be seen as to what is the effect of the suit laid in the name of the proprietorship concern following the death of its sole proprietor. In this connection, it is contended by the first defendant's counsel that on the death of the sole proprietor of the plaintiff concern, the suit abates and according to him, even if the right to sue survives to the legal representatives of the sole proprietor, in the absence of any application made by the legal representatives or other parties to continue the suit within the time allowed by law, according to him, the suit abates as per Rule 3 (2) of the Order 22 CPC. With reference to the above position of law, the decision reported in **(2011) 12 Supreme Court Cases 773 (Mangluram Dewangan V. Surendra Singh and others)** is relied upon and in the said decision, the following position is illuminated on a combined reading of the several provisions of Order 22 of CPC:

"10. A combined reading of the several provisions of Order 22 of the Code makes the following position clear:

(a) When the sole plaintiff dies and the right to sue survives, on an application made in that behalf, the court shall cause the legal representative of the deceased

plaintiff to be brought on record and proceed with the suit.

(b) If the court holds that the right to sue does not survive on the death of the plaintiff, the suit will abate under Rule 1 of Order 22 of the Code.

(c) Even where the right to sue survives, if no application is made for making the legal representative a party to the suit, within the time limited by law (that is, a period of 90 days from the date of death of the plaintiff prescribed for making an application to make the legal representative a party under Article 120 of the Limitation Act, 1963), the suit abates, as per Rule 3(2) of Order 22 of the Code.

(d) Abatement occurs as a legal consequence of (i) court holding that the right to sue does not survive; or (ii) no application being made by any legal representative of the deceased plaintiff to come on record and continue the suit. Abatement is not dependent upon any formal order of the court that the suit has abated.

(e) Even though a formal order declaring the abatement is not necessary when the suit abates, as the proceedings in the suit are likely to linger and will not be closed without a formal order of the court, the court is usually to make an order recording that the suit has abated, or dismiss the suit by reason of abatement under Order 22 of the Code.

(f) Where a suit abates or where the suit is dismissed, any person claiming to be the legal representative of the deceased plaintiff may apply for setting aside the abatement or dismissal of the suit under Order 22 Rule 9 (2) of the Code. If sufficient cause is shown, the court will set aside the abatement or dismissal. If however such application is dismissed, the order dismissing such an application is open to challenge in an appeal under Order 43 Rule 1 (k) of the Code.

(g) A person claiming to be the legal representative cannot make an application under Rule 9 (2) of Order 22 for setting aside the abatement or dismissal, if he had already applied under

Order 22 Rule 3 for being brought on record within time and his application had been dismissed after an enquiry under Rule 5 of Order 22, on the ground that he is not the legal representative."

20. In the light of the above said decision of the Apex Court, it could be seen that on the death of N.Shankar, the sole proprietor of the plaintiff concern, the suit abates and even if the right to sue survives to his legal representative, inasmuch as no legal steps have been taken by them to continue the suit within the time allowed by law, it is found that the suit abates as per Rule 3 (2) Order 22 CPC. That apart, even assuming for the sake of arguments that T.S.Pichumani is entitled to step into the shoes of the sole proprietor based upon Ex.P15, inasmuch as he has also failed to take suitable steps to represent the plaintiff concern, on the death of N.Shankar, it is found that the suit abates and it is therefore evident that following the death of N.Shankar, the suit having been abated, further continuance of the suit is not legally maintainable.

21. In any event, as pointed out above, the suit laid in the name of the proprietorship concern on its own is not legally maintainable. In the light of the above discussion, I hold that the suit laid by the plaintiff is not maintainable in law. Accordingly, issue No.1 is answered against plaintiff.

22. Issue No.2:

As seen supra, the suit has been laid to enforce the distributor agreement dated 16.05.2009 marked as Ex.P2. The first defendant has raised a defence that the agreement Ex.P2 provides for redressal mechanism as regards the settlement of the dispute between the parties under the agreement and as per the same, according to the first defendant, in the case of any dispute between the parties under the agreement, the same shall be referred to the Senior Management of the first defendant and the plaintiff, the distributor and only on their failure, the dispute be resorted to Court at New Delhi with its exclusive jurisdiction. The abovesaid position is not controverted by the plaintiff. Therefore, it could be seen that when clause 22 of the agreement provides for dispute resolution between the parties in a particular manner and both parties having agreed to confer the Court at New Delhi to be having exclusive jurisdiction for settling their

dispute in the event of the failure settlement of the dispute between the parties by the senior management of the parties concerned, as rightly contended by the first defendant's counsel, the suit laid by the plaintiff in this Court is found to be not maintainable. In this connection strong reliance is placed upon the decision reported in **(2013) 9 Supreme Court Cases 32 (Swastik Gases Private Limited Vs. Indian Oil Corporation Limited)** by the first defendant's counsel, wherein, it has been specifically held that when the jurisdiction clause in the agreement provides that the agreement shall be subject to jurisdiction of a particular court, only the court mentioned in the agreement shall have the jurisdiction to entertain the suit and the above position of law is expatiated by the Apex Court in the following manner:

"31. In the instant case, the appellant does not dispute that part of cause of action has arisen in Kolkata. What appellant says is that part of cause of action has also arisen in Jaipur and, therefore, the Chief Justice of the Rajasthan High Court or the designate Judge has jurisdiction to consider the application made by the appellant for the appointment of an arbitrator under

Section 11. Having regard to Section 11(12)(b) and Section 2(e) of the 1996 Act read with Section 20 (c) of the Code, there remains no doubt that the Chief Justice or the designate Judge of the Rajasthan High Court has jurisdiction in the matter. The question is, whether parties by virtue of Clause 18 of the agreement have agreed to exclude the jurisdiction of the courts at Jaipur or, in other words, whether in view of Clause 18 of the agreement, the jurisdiction of the Chief Justice of the Rajasthan High Court has been excluded?

32. For answer to the above question, we have to see the effect of the jurisdiction clause in the agreement which provides that the agreement shall be subject to jurisdiction of the courts at Kolkata. It is a fact that whilst providing for jurisdiction clause in the agreement the words like "alone", "only", "exclusive" or "exclusive jurisdiction" have not been used but this, in our view, is not decisive and does not make any material difference. The intention of the parties-by having Clause 18 in the agreement -is clear and unambiguous that the courts at

Kolkata shall have jurisdiction which means that the courts at Kolkata alone shall have jurisdiction. It is so because for construction of jurisdiction clause, like Clause 18 in the agreement, the maxim expressio unius est exclusio alterius comes into play as there is nothing to indicate to the contrary. This legal maxim means that expression of one is the exclusion of another. By making a provision that the agreement is subject to the jurisdiction of the courts at Kolkata, the parties have impliedly excluded the jurisdiction of other courts. Where the contract specifies the jurisdiction of the courts at a particular place and such courts have jurisdiction to deal with the matter, we think that an inference may be drawn that parties intended to exclude all other courts. A clause like this is not hit by Section 23 of the Contract Act at all. Such clause is neither forbidden by law nor it is against the public policy. It does not offend Section 28 of the Contract Act in any manner.

33. The above view finds support from the decisions of this Court in Hakam Singh, A.B.C. Laminart, R.S.D.V. Finance, Angile

***Insultations, Shriram City, Hanil Era
Textiles and Balaji Coke."***

23. In the light of the above position of law, when the parties to the present case had agreed under the agreement Ex.P2 that dispute arising under the agreement is subject to the jurisdiction of the Courts at New Delhi, it could be seen that the parties have impliedly excluded the jurisdiction of the other Courts and in such view of the matter, it is found that the present suit laid by the plaintiff at Madras is not maintainable and contrary to the alternate dispute redressal mechanism provided under Ex.P2. Accordingly, I hold that this Court has no jurisdiction to entertain the suit and on the above ground also, the suit is not maintainable and accordingly, issue No 2 is answered against the plaintiff.

24. Issue Nos.3 and 6:

The grievance of the plaintiff seems to be that the first defendant has not validly terminated the distributor agreement Ex.P2 as per the terms contained therein. As seen from the clause 15.2, it is found that the first defendant may terminate the agreement with one month's prior written notice with effect from the date of such notice without any additional formalities or the intervention of any Court of

law or Arbitral Tribunal, if the distributor violates the conditions stipulated therein. Now according to the first defendant, on account of the persistent non-performance of the plaintiff in accordance with the Annual business plan contemplated between the parties under the agreement, after discussions between the parties over a period of time, it had terminated the agreement by a written notice dated 29.01.2011 and further, according to the first defendant, the same had been communicated to the plaintiff through e-mail and thus, it is the case of the first defendant that the agreement Ex.P2 being determinable and accordingly, having been determined by the first defendant on 29.11.2011, the suit laid by the plaintiff has become infructuous and as such, the plaintiff is not entitled to obtain the reliefs sought for. Per contra, according to the plaintiff, the agreement had not been validly terminated by the first defendant and no notice had been given thereof to the plaintiff. It is found that as per Ex.D14 e-mail dated 29.01.2011, the first defendant had terminated the agreement. It is also found that from the documents marked as Exs.D1 to D15 cumulatively, it could be seen that over a long period of time, correspondence had been made between the plaintiff and the first defendant regarding the performance capability of the plaintiff in carrying out its task in the agreement and accordingly, it is found that the plaintiff had persistently not

performed its task as envisaged under the agreement to the satisfaction of the first defendant as per the annual business plan contemplated under the agreement and accordingly, it is found from the correspondence between the parties and also the minutes of the meeting between the parties concerned particularly, Ex.D2, it is found that the first defendant had made up its mind to terminate the agreement and also, apprised the same to the plaintiff without any doubt and accordingly, it is found that the plaintiff had also agreed to the same and thereupon, proceeded to place orders for lifting the stocks of the first defendant from the second defendant, which could be seen from the invoices marked as Exs.D4 to D19 and also as seen from the minutes of the meeting between the parties concerned marked as Ex.D2. It could be thus seen that the plaintiff was well-informed that the first defendant had made up its mind to terminate the agreement in question. Accordingly, it is found that on 29.01.2011, the first defendant had terminated the agreement by giving two months notice to the plaintiff through e-mail marked as Ex.D14. Following the same, it is also found that the termination had been validly communicated to the plaintiff and the plaintiff had knowledge of the same and thereafter, placed invoices upon the second defendant for lifting stocks of the first defendant to comply with the business commitments. Hence, the contention of the plaintiff

that it had no notice of termination of the agreement under Ex.D14 as such cannot be countenanced. The contention of the plaintiff, as a whole , as seen from the correspondence between the parties, the minutes of meeting and placement of the orders from the second defendant as seen from Exs.D1 to 15 cumulatively, it is found that the plaintiff had knowledge of the termination of the agreement by the first defendant and the plaintiff cannot be allowed to feign ignorance of the termination of the agreement and in such view of the matter, it is found that the agreement had been duly terminated by the first defendant in accordance with the terms of Ex.P2 and the plaintiff had noticed the same and also proceeded to place orders with the second defendant as regards the products of the first defendant.

25. In the light of the above discussion, I hold that the agreement marked as Ex.P2 had been validly terminated and from the correspondence between the parties, minutes of the meeting between them and the subsequent conduct of the plaintiff, the plaintiff has also agreed for the termination of the distributorship under the agreement and accordingly, issue nos.3 and 6 are answered against the plaintiff and in favour of the first defendant.

26. **Issue No.5**

As seen from the terms of the agreement marked as Ex.P2 and also admitted by the plaintiff, even in the plaint as well as during the course of evidence, the plaintiff is only appointed as a non exclusive distributor of the first defendant under the agreement above mentioned. Therefore, the plaintiff cannot claim any exclusive distributorship of the first defendant under the agreement in question. That apart, as seen from the terms of the agreement, it is noted that the first defendant is empowered to appoint others as distributors even in the area covered under the agreement including the primary area of responsibility and accordingly, it is found that based upon the arrangement between the parties, as seen from the documents marked on the side of the defendants, the second defendant had been appointed as the distributor of the first defendant and accepting the same, it is found that the plaintiff had also placed orders with the second defendant for lifting the products of the first defendant to comply with its business commitments.

27. In the light of the above position, I hold that the plaintiff is not appointed as the exclusive distributor of the first defendant under Ex.P2. Accordingly, Issue No.5 is answered.

28. Issue No.4.

Under Issue No.3, it had been found and held that Ex.P2 agreement had been validly terminated by the first defendant and the plaintiff had notice of the same. A perusal of the terms of Ex.P2 agreement would go to show that it is determinable in nature as per the terms contained therein. That apart, it is also found that the duties and responsibilities placed upon the parties to the agreement envisages continuous supervision and uninterrupted monitoring of the terms of the agreement, which Courts of law cannot supervise and monitor and therefore, as rightly put forth by the first defendant, the agreement Ex.P2 also takes within its purview, the conditions stipulated under Section 14(d) of the Specific Relief Act, 1963 and on that ground alone, it is found that the agreement Ex.P2 is not specifically enforceable. In addition to that, it is also noted that considering the commercial nature of the contract between the parties entered into under Ex.P2, which involves various and innumerable details with respect to the business transactions such as planning as well as forecast payment of advance money for lifting the products, monitoring the quality and quantity parameters, appointment and training of personnel, arrangement of working capital etc.it could be seen that the Court as such cannot enforce specific performance of the above said aspects for its due compliance and in such view of the

matter, it is also found that the agreement is Ex.P2 is not specifically enforceable also under Section 14 (b) of the Specific Reliefs Act. As per section 39 of the Specific Reliefs Act, the relief of mandatory injunction being a discretionary relief could be granted by the Court provided the Court is capable of enforcing the agreement in question. However, in the light of the above discussions, when it is found that the agreement in question Ex.P2 cannot be specifically enforced as provided under clauses b, c and d of Section 14 of the Specific Relief Act, it is found that the plaintiff is not entitled to seek and obtain the reliefs of declaration as well as mandatory injunction sought for in the plaint.

29. In this connection, strong reliance is placed upon the decision reported in **(1991) 1 Supreme Court Cases 533 (Indian Oil Corporation Ltd., Vs. Amritsar Gas Service and others)** by the first defendant's counsel. As seen from the above discussion, it is found that when the agreement is not specifically enforceable under Section 14 of the Specific Reliefs Act, the relief sought for by the plaintiff cannot be granted. The Principles of Law enunciated in the above said decision are taken into consideration and followed as applicable to the facts and circumstances of the case at hand.

30. I therefore hold that the plaintiff is not entitled to obtain the reliefs for declaration and mandatory injunction, in view of the bar under Sections 14 & 39 of the Specific Reliefs Act vis-a-vis Ex.P2 agreement. Accordingly, issue No.4 is answered against the plaintiff.

In conclusion, the suit is dismissed with costs.

.06.2017

Index : Yes/No

Internet : Yes/No

sms

T.RAVINDRAN,J.

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PRE-DELIVERY JUDGMENT
MADE IN
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