

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

%

Date of decision: 3rd January, 2017

+

EX.P. No.422/2014 & EA No.793/2016

TAKAMOL INDUSTRIES PVT LTD

..... Decree Holder

Through: Mr. Sanjeev Kumar Bhardwaj, Adv.

Versus

KUNDAN RICE MILLS LTD

.... Judgement Debtor

Through: Mr. Rajshekhar Rao, Mr. Prithu Garg,
Mr. G.P. Tiwari & Mr. Sameer
Dawar, Adv.

AND

+CS(COMM) No.1416/2016 & IA.No.15265/2016(u/O XXXIX Rule 1&2

KUNDAN RICE MILLS LTD

..... Plaintiff

Through: Mr. Rajshekhar Rao, Mr. Prithu Garg,
Mr. G.P. Tiwari & Mr. Sameer
Dawar, Adv.

Versus

TAKAMOL INDUSTRIES PVT LTD & ANR

..... Defendants

Through: Mr. Sanjeev Kumar Bhardwaj, Adv.

CORAM:-

HON'BLE MR. JUSTICE RAJIV SAHAI ENDLAW

1. Execution Petition No.422/2014 filed by Takamol Industries Pvt. Ltd.

(TIPL) seeks execution as a decree of an Arbitral Award dated 2nd June,

2014 of one Shri Bhupinder Singh, S/o Sardar Gurcharan Singh (i) directing TIPL to return 72 Mts of rice to Kundan Rice Mills Ltd. (KRML); (ii) declaring that KRML does not have the right to receive any money from M/s. Ravinder Kumar Sumit Kumar or from Mr. Dev Kumar by way of Court/Legal or through *Panchayat*; (iii) declaring that any subsequent money received or to be received from M/s Ravinder Kumar Sumit Kumar or from Mr. Dev Kumar shall be received only by TIPL; (iv) directing KRML to co-operate in the proceedings against Mr. Dev Kumar; and, (v) directing that KRML shall not pursue the First Information Report (FIR) against any of the Directors of TIPL.

2. Notice of the Execution Petition was issued to KRML and vide order dated 3rd September, 2015 KRML was directed to file affidavit of assets under Order XXI Rule 41(2) of the Code of Civil Procedure, 1908 (CPC) and the record of the arbitral proceedings, award whereof was under execution, was requisitioned. Vide order dated 18th March, 2016, the Managing Director of KRML was directed to appear in person.

3. EA No.793/2016 filed by KRML under Order XXI Rule 29 CPC came up before this Court on 30th November, 2016 when the following order was passed:-

“1. The judgment-debtor / applicant, invoking Order XXI Rule 29 of the CPC, seeks stay of execution of Arbitral Award as a decree.

2. The counsel for the judgment-debtor / applicant contends that the judgment-debtor / applicant has filed CS(COMM) No.1416/2016 in this Court impugning the Arbitral Award and of which summons have been issued for 7th February, 2017.

3. I have enquired from the counsel for the judgment-debtor / applicant as to how a suit impugning the Arbitral Award is maintainable. As far as I recollect, it is the settled position in law, as held by the Supreme Court and followed by this Court, that such suits are not maintainable. Merely because the judgment-debtor / applicant has filed such a suit and summons of which have been issued by the Joint Registrar would not entitle the judgment-debtor / applicant to have stay of execution.

4. The counsel for the judgment-debtor / applicant seeks time to satisfy that the suit as filed is maintainable.

5. List on 8th December, 2016.

6. On enquiry it is informed that the summons of CS(COMM) No.1416/2016 have been issued by the Joint Registrar attached to this Bench.

7. On the next date i.e. 8th December, 2016 as already scheduled, CS(COMM) No.1416/2016 be also listed before this Court and the judgment-debtor / applicant to on that date come prepared to address on the maintainability of that suit”.

4. Thereafter on 8th December, 2016 KRML was heard and after partly hearing the counsel for TIPL the need for recording of statement on oath of Mr. Sanjay Kumar Vashisth, Director of TIPL was felt and his statement was

so recorded. On the basis of the said statement it *prima facie* appeared that the document dated 2nd June, 2014 of which execution as an Arbitral Award is sought in Execution Petition No.422/2014 does not qualify as an Arbitral Award. On the stand of the counsel for TIPL that he was not prepared with the arguments on the aspect of, whether the document dated 2nd June, 2014 qualifies as an Award, the matter was adjourned to today.

5. The document dated 2nd June, 2014 sought to be executed as an Arbitral Award, besides purporting to bear the signatures of Mr. Bhupinder Singh as ‘Arbitrator’ and of ‘Director’ of TIPL & ‘Authorised Signatory’ of KRML with endorsement ‘Accepted’, also bears the signatures of two ‘witnesses’ and of ‘Proprietor’ of ‘Krishna Packers’ under the stamp of Krishna Packers on each of the two pages thereof and records (i) that Mr. Bhupinder Singh “proprietor of Krishna Packers had been appointed as a common arbitrator to resolve the issue amicably through *Panchayat* between KRML through its authorised signatory Mr. M.N. Singh and TIPL through its Director Mr. Sanjay Vashisth”; (ii) that TIPL had bought one parcel of rice Sela 1121 and sent its confirmation on 17th May, 2014 by e-mail to KRML through Mr. Dev Kumar (Broker); (iii) on asking of KRML, TIPL had communicated its Tin Number to KRML; (iv) TIPL had received total

2897 bags of rice, vide Invoices No.10426. 10427, 10429A, 10429B and 104230A dated 17th May, 2014, 17th May, 2014, 19th May, 2014, 19th May, 2014 and 21st May, 2014 respectively, from KRML; (v) TIPL had however not accepted the delivery of goods vide Invoice No.10430A and had sent it back; (vi) on the representation of the broker Mr. Dev Kumar that M/s Ravinder Kumar Sumit Kumar belonged to KRML, TIPL released the money to M/s Ravinder Kumar Sumit Kumar through proper banking channel, without consulting KRML; (vii) TIPL had been made a fool of by the broker Mr. Dev Kumar, without TIPL itself being at fault; similarly there was no fault of KRML; and, (viii) accordingly Mr. Bhupinder Singh as Arbitrator was pronouncing his “judgment” directing as aforesaid and the same had been accepted by both.

6. Mr. Sanjay Vashisth, Managing Director of TIPL in his statement on oath recorded on 8th December, 2016 *inter alia* stated (i) that he had approached the aforesaid Mr. Bhupinder Singh; Mr. Pradeep Garg, Managing Director of KRML had not approached Mr. Bhupinder Singh; however Mr. Bhupinder Singh told him that TIPL and KRML should jointly approach him for resolution of dispute; (ii) he and Mr. Pradeep Garg, Managing Director of KRML had one day before (the document dated 2nd

June, 2014) on telephone agreed that the goods supplied by KRML to TIPL will be returned to the extent of fraud done by Mr. Dev Kumar; (iii) on 2nd June, 2014, he and Mr. Bhupinder Singh had gone to the office of KRML and the document dated 2nd June, 2014 sought to be executed as an Arbitral Award was written in the office of KRML and was typed on the computer of KRML; (iv) Mr. Pradeep Garg, Managing Director of KRML did not sign the document dated 2nd June, 2014 and instead asked Mr. Munishwar Singh @ M.N. Singh of KRML present at that time to sign the same; (v) a need for witnesses was felt by him as he was of the opinion that “a *Faisla*” should be signed by two witnesses and accordingly the document dated 2nd June, 2014 was witnessed by the employees of KRML; (vi) that before 2nd June, 2014 there was no Arbitration Agreement between TIPL and KRML and on 1st June, 2014 there was a telephonic conversation; (vii) nothing in writing was submitted to Mr. Bhupinder Singh by TIPL and KRML; (viii) no writing of the respective claims and response of TIPL and KRML was also submitted to Mr. Bhupinder Singh; (ix) that the proposal for “this *Faisla*” was given by Mr. Pradeep Garg, Managing Director of KRML; (x) there was a substantial fall in price of rice between 17th May, 2014 and 2nd June, 2014; (xi) that he did not see any authority of Mr. Munishwar Singh @ M.N. Singh to sign on

behalf of KRML; and, (xii) Mr. Munishwar Singh @ M.N. Singh had not signed any other papers on behalf of KRML in dealings of KRML with TIPL.

7. I may record that KRML had on 31st May, 2014 lodged an FIR of the offence under Sections 420/406/34 of the Indian Penal Code, 1860 (IPC) against Mr. Dev Kumar and Mr. Sanjay Vashisth of TIPL and Mr. Sanjay Vashisth in his statement on oath aforesaid also admitted of the same and that the Investigating Officer had rung him up on 31st May, 2014 and he had gone to Police Station Alipur and joined the investigation on 31st May, 2014 itself.

8. The counsel for KRML has argued, (i) that prior to the FIR on 31st May, 2014, KRML had lodged a complaint with the Police on 29th May, 2014; (ii) that KRML did not participate at all in any proceeding before Shri Bhupinder Singh that Mr. Munishwar Singh @ M.N. Singh though earlier in the employment of KRML had left the employment in the year 2011; and, (iii) that KRML learnt of the document dated 2nd June, 2014 for the first time on receipt of the legal notice dated 11th August, 2014 preceding the execution petition from TIPL enclosing the document dated 2nd June, 2014. Reliance was placed on *Akhil Bhartiya Mahajan Shiromani Sabha Vs.*

Dharamveer Mahajan 2008 (105) DRJ 625 to contend that the document dated 2nd June, 2014 does not qualify as an Award.

9. Though the counsel for KRML in response to the query of this Court as to how the suit filed by KRML impugning the Arbitral Award is maintainable had also referred to ***A. Ayyasamy Vs. A. Paramasivam*** 2016 SCC OnLine SC 1110 and ***Northern Coalfields Limited Vs. Heavy Engineering Corporation Limited*** (2016) 8 SCC 685 but in view of the fact that on full hearing I am of the view that document dated 2nd June, 2014 does not qualify as an Arbitral Award, the need to go into the said aspect is not felt. I may however notice that it has been held by the Supreme Court in ***Kvaerner Cementation India Ltd. Vs. Bajranglal Agarwal*** (2012) 5 SCC 214 followed by this Court in ***Spentex Industries Ltd Vs. Dunavant SA*** 2009 SCC OnLine Del 1666, ***Roshan Lal Gupta Vs. Parasram Holdings Pvt. Ltd.*** 157 (2009) DLT 712 and ***Ashok Kalra Vs. Akash Paper Board Pvt. Ltd.*** 2013 SCC OnLine Del 3299 and recently again by Supreme Court in ***Vimal Kishor Shah Vs. Jayesh Dinesh Shah*** (2016) 8 SCC 788 that a suit impugning an Arbitral Award is not maintainable.

10. As far as reliance by the counsel for KRML on ***Akhil Bhartiya Mahajan Shiromani Sabha*** supra is concerned, in the facts of that case it

was held that reference by this Court to a retired Judge of this Court was as a “Referee” within the meaning of Section 20 of Indian Evidence Act, 1872 and not as an Arbitrator. The same thus has no application.

11. What has however emerged from the statement on oath of Mr. Sanjay Vashisth of TIPL is that the document dated 2nd June, 2014 sought to be executed as an Arbitral Award is admittedly not preceded by any Arbitration Agreement, there was no mention of arbitration in the documents exchanged by KRML and TIPL regarding transaction of sale purchase of rice and no statement of claim or defence was exchanged between TIPL and KRML before Mr. Bhupinder Singh who is claimed by TIPL to have acted as the arbitrator or before any other court or authority. The question which thus arises is, whether without an Arbitration Agreement there can be an Arbitral Award.

12. The counsel for TIPL, besides referring to Section 7(4)(b) of the Arbitration and Conciliation Act, 1996 (1996 Act) has also referred to Section 24 holding that the Arbitrator, unless otherwise agreed to by the parties, is entitled to decide on oral hearings and to Section 30 providing that it is not incompatible with an Arbitration Agreement for an Arbitral Tribunal to encourage settlement of the dispute.

13. I am however of the view that before Section 24 and Section 30 can be invoked, it is essential that there has to be an Arbitration Agreement in as much as without an Arbitration Agreement there can be no Arbitration and Arbitral Award.

14. Per Section 7(1) of the 1996 Act, an “Arbitration Agreement” means 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. Section 7(2) provides that an Arbitration Agreement may be in the form of an arbitration clause in a contract or in the form of a separate agreement. Section 7(3) mandates an Arbitration Agreement to be in writing and Section 7(4) provides that an Arbitration Agreement is in writing if it is contained in, a document signed by the parties; or, in an exchange of letters, telex, telegrams or other means of telecommunication including through electronic means which provide a record of the agreement; or, in an exchange of statements of claim and defence in which the existence of the Agreement is alleged by one party and not denied by the other.

15. Here, as per statement of Mr. Sanjay Vashisth of TIPL, a) there was no agreement to submit to arbitration disputes which “may arise” in relation

to transaction of sale purchase of rice between KRML and TIPL; b) after the disputes had arisen, Mr. Sanjay Vashisth of TIPL approached Mr. Bhupinder Singh; c) Mr. Mr. Bhupinder Singh told Mr. Sanjay Vashisth that TIPL and KRML should jointly approach him for resolution of disputes; d) Mr. Sanjay Vashisth and Mr. Bhupinder Singh went to office of KRML on 2nd June, 2014 where the document claimed to be Arbitral Award was written and executed.

16. The counsel for TIPL fairly and without wasting any time has pegged his case only on Section 7(4)(b) i.e. of an Arbitration Agreement contained in an exchange of telecommunication as provided in Section 7(4)(b) of the Act.

17. I may notice that the words “including communication through electronic means” were added to Section 7(4)(b) only vide the amendment w.e.f. 23rd October, 2015 and per Section 26 of the Arbitration and Conciliation (Amendment) Act, 2015 the amendments brought thereby are prospective. The document dated 2nd June, 2014 is of prior to 23rd October, 2015 and thus the words “including communication through electronic means” are not to be read while deciding the present *lis*.

18. The counsel for TIPL however states that he is relying upon the telephonic conversation between Mr. Pradeep Garg, Managing Director of KRML and Mr. Sanjay Vashisth of TIPL which took place on 1st June, 2014 and in pursuance where to Mr. Sanjay Vashisth of TIPL and Mr. Bhupinder Singh visited the office of KRML on 2nd June, 2014. He contends that such telephonic conversation is “other means of telecommunication” within the meaning of Section 7(4)(b) as existed prior to the amendment w.e.f. 23rd October, 2015.

19. I may at the outset state that neither the document dated 2nd June, 2014 so records that the said Mr. Pradeep Garg and Sanjay Vashisth in teleconversation of day before had agreed to his arbitration nor has Mr. Sanjay Vashisth so deposed. Though Mr. Sanjay Vashisth in his statement mentioned teleconversation of day before 2nd June, 2014 but stated that Mr. Pradeep Garg in the said teleconversation had agreed that the good supplied by KRML to TIPL shall be returned to the extent of fraud done by Mr. Dev Kumar. However even if it is to be believed that during such teleconversation arbitration of Mr. Bhupinder Singh was agreed, Section 7(4)(b) provides that an Arbitration Agreement has to be in writing, even if contained in an exchange of letters, telex, telegrams or other means of

telecommunication ‘which provide a record of the agreement’. Letters, telex, telegrams all provide a record of what is contained therein. The said words are followed by the words “other means of telecommunication”. For such mean of telecommunication to satisfy the requirements of Section 7(4)(b), it must also ‘provide a record of the agreement’ arrived at in such telecommunication. A verbal telephonic conversation cannot provide a record of oral/verbal agreement even if any arrived at therein and thus cannot be other means of telecommunication within the meaning of Section 7(4)(b).

20. The counsel for TIPL faced therewith contends that the records of the telephone companies can be requisitioned.

21. However the said records also would at best show a telephone call having been made between KRML and TIPL and duration thereof and would not provide a record of what was spoken by Pradeep Garg and Sanjay Vashisth.

22. The counsel for TIPL then contends that there was nothing else to talk between TIPL and KRML except resolution of the disputes.

23. I am not willing to accept the aforesaid. The counsel for TIPL stretches the mandatory requirement of an Arbitration Agreement to be in writing a little too far and forgets that what is verbal can never be said to be

in writing. Moreover the contention is beyond the scope of Section 7 of the Arbitration Act.

24. It has thus but to be held that there was no Arbitration Agreement between KRML and TIPL.

25. The counsel for KRML has in this regard referred to i) ***Prem Sagar Vs. M/s. Security and Finance (Pvt). Ltd.*** AIR 1968 Delhi 21 (FB), in the context of Section 33 of the Arbitration Act, 1940 (1940 Act), holding that if the Arbitration Agreement is non-existent, so must be the award, with the result that there would be nothing to set aside; and, ii) ***Ramesh Kumar Vs. Furu Ram*** (2011) 8 SCC 613 where, while holding a suit to challenge an order making an Arbitral Award under the 1940 Act rule of the Court and passing a decree in terms thereof on the ground of fraud and misrepresentation, to be maintainable it was observed that there can be a reference to arbitration only if there is a dispute and an agreement to settle the dispute by arbitration.

26. Though the counsel for TIPL has not urged but I have also considered that if Mr. Munishwar Singh @ M.N. Singh did indeed sign the document dated 2nd June, 2014 on behalf of KRML, as contended by TIPL and denied by KRML, and the document were to otherwise qualify as an Arbitral

Award, whether such Arbitral Award itself would constitute an Arbitration Agreement within the meaning of Section 7 supra. If it is so, then the need to put the said factual controversy to trial may arise.

27. At least under the 1940 Act, I find the Supreme Court in *Vaidya Harishankar Laxmiram Rajyaguru of Rajkot Vs. Pratapray Harishankar Rajyaguru of Rajkot* (1988) 3 SCC 21 to have held that an award in writing signed by both parties, about which there is no factual dispute, reiterating that the parties had agreed to refer the dispute to arbitration of the arbitrator who made the award, can be construed as an Arbitration Agreement. It was held that from the conduct of the parties of signing the award it could be said that the parties had agreed in writing within the meaning of Section 2(a) of the 1940 Act to refer the disputes to arbitration and the award could not be challenged on that ground. Relying thereon, a Division Bench of this Court in *Sudesh Mahajan Vs. Rattan Kumar* 44(1991) DLT 171 also held that when the arbitrator has in the award stated that the parties had mutually appointed her as an arbitrator and referred the disputes to her and when the award is signed by both the parties, the contention that the award was a nullity because there was no reference to arbitration could not be accepted.

28. However as distinct from definition as aforesaid of Arbitration Agreement in Section 7 of 1996 Act, Section 2(a) of 1940 Act defined Arbitration Agreement as a written agreement to submit present or future differences to arbitration, whether an arbitrator is mentioned therein or not. Though Section 7(1) and (3) of the 1996 Act are more or less the same, Section 7(2), (4) and (5) explain further that Arbitration Agreement may be a) in the form of an arbitration clause in a contract or in the form of a separate agreement; b) when all it is in writing; and c) when it can be by reference.

29. I have wondered whether the aforesaid changes would affect the law as enunciated in *Vaidya Harishankar Laxmiram Rajyaguru of Rajkot* supra. Once the Legislature has in Section 7(4) has specified the documents wherein an Arbitration Agreement can be contained, to hold that it can also be contained in an Arbitral Award if signed by the parties would in my opinion amount to the Court adding to Section 7(4) and/or introducing in the statute what the Legislature has not deemed to specify therein and would be against the tenets of interpretation of statutes. It cannot be lost sight of that the Legislature stopped at specifying the statements of claim and defence exchanged by the parties as a document in which an Arbitration Agreement

in writing can be said to be contained. Admittedly in the present case there are no statements of claim and defence. In my view when the Legislature, though specifying the documents in which an Arbitration Agreement can be contained, having not included an Arbitral Award, cannot be treated as a document in which an Arbitration Agreement can be contained.

30. I have in this regard also drawn the attention of the counsels to the recent judgment in *Vimal Kishor Shah Vs. Jayesh Dinesh Shah* supra holding that a clause in an agreement which mandates for deciding the disputes arising out of such agreement through private arbitration, affects the jurisdiction of the Civil Court and the ouster of jurisdiction of Courts cannot be inferred readily. It was further held that Arbitration Act is one such law, which provides for ouster of jurisdiction of the Civil Courts and requires strict rule of interpretation to find out whether there is any such ouster. For this reason also it appears that Section 7 cannot be read as permitting an Arbitration Agreement to be contained in an Arbitral Award.

31. Mention may also be made of *Yashvant Chunilal Mody Vs. Yusuf Karmali Kerwala* 2013 SCC OnLine Bom. 1246 where a Single Judge of the High Court of Bombay held that Section 7(3) of the 1996 Act specifies the mandate of a written agreement and 7(4) contemplates the types of written

agreement – the three modes provided therein are the only modes specified under the Statute in which the agreement can be taken to be in writing; Section 7(4), by use of the word ‘if’ therein is exhaustive and does not contemplate that an oral account of a document signed by the parties would also be an Arbitration Agreement. It was held that had that been so, Section 7(4) would have mentioned that provision as sub-Section 'd' thereof. Special Leave Petition (C) No.332/2014 preferred against the said judgment is found to have been dismissed in *limine* on 20th January, 2014.

32. I however refrain from returning any conclusive opinion on the said aspect as it is not the contention of the counsel for TIPL herein that the Arbitration Agreement is contained in the document dated 2nd June, 2014.

33. I therefore hold that TIPL has totally failed to show the existence of an Arbitration Agreement for the document dated 2nd June, 2014 to qualify as an Arbitral Award.

34. Even otherwise, the document dated 2nd June, 2014 does not inspire confidence as an Arbitral Award. Every decision of a person whom the parties may approach for settlement of their disputes would not qualify as an Arbitral Award and such decision can be either as a referee under Section 20 of Evidence Act or by way of a settlement or a contract of settlement of

disputes between the parties. Such a settlement or contract of settlement of disputes or decision as a referee would not become executable as a decree and would require a further suit to be filed on basis thereof.

35. Shri Bhupinder Singh, in the document dated 2nd June, 2014, states that he had been appointed as a common Arbitrator to resolve the issue amicably through '*Panchayat*' between KRML through its Authorised Signatory Mr. M.N. Singh and TIPL through its Director Mr. Sanjay Vashisth and then proceeds to state that the matter had been resolved as recorded thereunder. If as deposed by Mr. Sanjay Vashisth, Mr. Pradeep Garg, Managing Director of KRML was also present at time of making of document dated 2nd June, 2014, ordinarily Mr. Bhupinder Singh should have mentioned him in the document. Getting the said document witnessed from two witnesses is also not in consonance with an Arbitral Award and akin to an agreement.

36. Though the 1996 Act does not define Arbitral Award but Section 31 specifies the form and contents of Arbitral Award and Section 31(3) mandates an Arbitral Award to state the reasons upon which it is based unless the parties have agreed that no reasons are to be given or the Award is an Arbitral Award on agreed terms under section 30. Section 30 lays down

that it is not incompatible with an Arbitration Agreement for an Arbitral Tribunal to encourage settlement of the dispute and the Arbitral Tribunal may with the agreement of the parties use mediation, conciliation or other proceedings at any time during the arbitral proceedings to encourage settlement. It further provides that if during arbitral proceedings the parties settled the dispute, the Arbitral Tribunal shall terminate the proceedings and if requested by the parties record the settlement in the form of an Arbitral Award on agreed terms and which Award shall have the same status and effect as any other Arbitral Award on the substance of the dispute. It is thus clear that for mediation or conciliation to result in an Arbitral Award also, the existence of Arbitral Agreement and the constitution of an Arbitral Tribunal in accordance with law is essential. Mediation or conciliation, resulting in settlement of disputes in the absence of an Arbitration Agreement, even if with the assistance of a third party, cannot take the form of an Arbitral Award.

37. Supreme Court in *Mysore Cements Ltd Vs. Svedala Barmac Ltd.* (2003) 10 SCC 375 held that it is not every agreement or arrangement between parties to the disputes arrived at in whatever manner or form during the pendency of conciliation proceedings that automatically acquires the

status of a Settlement Agreement within the meaning of Section 73 of the Arbitration Act so as to have the same status and effect as if it is an Arbitral Award, for being enforced as if it were a decree of the Court. It was held that it is only that agreement which has been arrived at in conformity with the manner stipulated and form envisaged in Section 73 which alone can be assigned the status of a Settlement Agreement within the meaning of and for effective purposes of the Act and not otherwise. Mention may also be made of a judgment of a Five Judge Bench in ***Waverly Jute Mills Co. Ltd Vs. Raymon & Company (India) Pvt. Ltd.*** AIR 1963 SC 90 where, with respect to the 1940 Act, it was held that an agreement for arbitration is the very foundation on which the jurisdiction of the Arbitrators to act rests and where that is not in existence at the time when the Arbitrators enters on their duties, the proceedings must be held to be wholly without jurisdiction and this defect is not cured by the appearance of the parties in those proceedings even if that is without protest because it is well settled that consent cannot confer jurisdiction. Following the same also it appears that without an Arbitration Agreement, a Settlement Agreement signed by parties with assistance of a conciliator or mediator, even if described as an Arbitrator, would not constitute an Arbitral Award. Reference may further be made to a

judgment of the Full Bench of this Court in *M/s. Ram Lal Jagan Nath Vs. Punjab State* ILR XIX (2) Punjab Series 428 laying down that mere use of the terms "arbitrator" or "arbitration" does not make it an Arbitration Agreement or an Arbitral Award and vice-a-versa the absence thereof also cannot have the effect of taking an Agreement out of the category of Arbitration Agreement or a document from the category of Arbitral Award if otherwise so. The same view was taken in *Jagdish Chander Vs. Ramesh Chander* (2007) 5 SCC 719. It was held that even if the words 'arbitration' and 'arbitral tribunal (or arbitrator)' are not used with reference to the process of settlement or with reference to the private tribunal which has adjudicated upon the disputes, in a clause relating to settlement of disputes, it does not detract from the clause being an Arbitration Agreement if it has the attributes or elements of an Arbitration Agreement. Conversely it was held that where the clause relating to settlement of disputes contains words which specifically exclude any of the attributes of an Arbitration Agreement or contains anything that detracts from the Arbitration Agreement, it will not be an Arbitration Agreement and that mere use of the word 'arbitration' or 'arbitrator' will not make it an Arbitration Agreement, or make a settlement which is not an Arbitral Award, an Arbitral Award. This Court also in

Madhukar Goel Vs. M.S. Goel 2009 SCC OnLine Del 2240, notwithstanding the person making the document having recorded that he had been asked to be the sole Arbitrator/Mediator as both the families were well-known to him and had confirmed faith in him, held the document to be not amounting to an Arbitration Award but only a Mediation Award. The High Court of Madhya Pradesh in ***Maharaj Singh Vs. Ramratan*** 2001 SCC OnLine MP 199 held a *Panch Faisla* without an Arbitration Agreement between the parties to be not entitled to qualify as an Arbitration Award under the 1940 Act.

38. The counsel for KRML in this regard relied on (i) ***Northern Coalfields Limited Vs. Heavy Engineering Corporation Limited*** supra holding that the Permanent Machinery of Arbitration put in place for resolution of disputes between Public Sector Corporations is outside the statutory provisions regulating arbitration in the country and that the Award made in terms of the Permanent Machinery of Arbitration being outside the provisions of Arbitration Law would not constitute an Arbitral Award to be enforceable as a decree of the Court; and, (ii) ***K.K. Modi vs K.N. Modi*** (1998) 3 SCC 573 laying down that a Memorandum of Understanding recording of family settlement of disputes regarding division of assets

between two groups belonging to the same family business house providing for appointment of an expert for valuation and preparing scheme for division of company's owned by family and for referring the implementation of the Agreement to the Chairman, Industrial Finance Corporation of India whose decision was agreed to be final does not constitute an Arbitration Agreement but amounts to a reference of issues to an expert for decision.

39. It having been held that the document dated 2nd June, 2014 is not an Arbitral Award, Execution Petition no.422/2014 seeking its execution as an Arbitral Award has to be dismissed and the same is dismissed.

40. I refrain from imposing any costs on TIPL as KRML is also found to be lacking and having not acted expeditiously in the matter.

41. That brings me to the aspect of maintainability of CS(COMM) No.1416/2016.

42. KRML has instituted the suit (i) for declaration of the document dated 2nd June, 2014 as sham, null, inoperative, void and not binding upon the parties; (ii) for specific performance by directing TIPL to collect the balance quantity of rice agreed to be purchased and to pay the balance consideration; and, (iii) for recovery of damages.

43. Once the document dated 2nd June, 2014 of which execution as an Arbitral Award has been sought is held to be not an Award, in my opinion the prayer in the suit for declaration with respect thereto does not survive. Though the counsel for KRML has argued that KRML otherwise also is entitled to seek a declaration with respect thereto but the cause of action pleaded in the plaint for seeking such declaration is the execution sought of the said document dated 2nd June, 2014 as an Arbitral Award and which cause of action has disappeared. Similarly, no claim for specific performance of an Agreement for Sale of goods is maintainable and if TIPL has not paid the full price of the goods purchased from KRML and/or not lifted the entire quantity of goods agreed to be purchased, the remedy of KRML is to sue for recovery of the balance price and/or for damages for breach of contract of purchase. Though KRML has included a prayer in the plaint for compensation/damages but without quantifying the same and without quantification no claim for damages can be entertained.

44. The counsel for KRML states that an application for amendment of the plaint has been filed but which has not been listed.

45. KRML, in the light of the earlier orders reproduced hereinabove should have ensured that such application is listed today.

46. The counsel for KRML states that though IA No.16241/2016 has been filed and is listed today but needs changes and a fresh application has already been filed.

47. In view of the above it is deemed appropriate to grant indulgence. IA No.16241/2016 is dismissed as withdrawn with liberty to apply again.

48. List CS(COMM) No.1416/2016 on 23rd February, 2017.

49. The date of 7th February, 2017 before the Joint Registrar stands cancelled.

RAJIV SAHAI ENDLAW, J.

JANUARY 03, 2017

‘pp’

(corrected & released on 11th January, 2017)