

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

**NOTICE OF MOTION NO. 2676 OF 2016
IN
SUMMARY SUIT NO. 2062 OF 2002**

MSTC Ltd. ...Plaintiff
Vs.
M/s.Omega Petro Products Pvt.Ltd. & Ors. ...Defendants/Applicants

Mr.Phiroze Colabawalla with Ms.Anamika I/b. HSA Advocates for the Plaintiff.
Mr.Shadab S. Jan I/b. Manilal Kher Ambalal & Co. for Defendants.

CORAM : S.C. GUPTE, J.

DATE : 16 JANUARY 2018

ORAL JUDGMENT :

This notice of motion is taken out under Section 8 of the Arbitration and Conciliation Act, 1996 ("the Act"). The case of the Defendants in the notice of motion is that the matter in the present suit is the subject of an arbitration agreement and the parties be accordingly referred to arbitration. The notice of motion is taken out before submitting the Defendants' first statement dealing with the substance of the dispute.

2 The present suit is filed by the Plaintiff claiming to be a creditor under an agreement dated 27 August 1998 entered into with Defendant No.1 for purchase of goods as also a supplementary agreement dated 16 January 1999. The Plaintiff's case under these two agreements is that liability is owed by Defendant No.1 to it as a principal debtor, whilst Defendant No.3 is liable under a personal guarantee to secure those dues. The Plaintiff's suit is for non-payment of its dues under the main contract

by Defendant No.1 as also non-payment of the dues by Defendant No.3 under the personal guarantee. Defendant No.2 is said to be the chairman and managing director of Defendant No.1 and is purportedly sued in his capacity as a guarantor, at whose specific request the Plaintiff agreed to supply goods to Defendant No.1 under the main contract. There is no written guarantee executed by Defendant No.2 in favour of the Plaintiff agreeing to pay the dues of Defendant No.1 on default.

3 The suit was filed on 3 May 2002. The writ of summons was issued on 1 July 2002. There is no record of service of the writ of summons. It is, however, not in dispute that the writ of summons was served on all the Defendants and that was sometime in 2002. No written statement was filed by the Defendants in the suit till 2014. On 18 June 2014, the suit was dismissed for default. Neither the Plaintiff nor the Defendants appeared on that day. On the Plaintiff's application, on 1 October 2016, the dismissal order was recalled and the suit was restored to file. On the same date, the Defendants were directed to file their written statement, latest by 15 October 2016. On 20 October 2016, the Defendants took out the present notice of motion praying for reference of the parties to arbitration under Section 8 of the Act. After taking out the notice of motion, the Defendants also filed their written statement. It appears that the written statement was taken on record.

4 Learned Counsel for the Defendants submits that the main contract between the Plaintiff and Defendant No.1 for supply of goods contains an arbitration clause. Learned Counsel submits that since the main claim of the Plaintiff arising under that contract is covered by an arbitration agreement, the parties must be referred to arbitration under Section 8 of

the Act. Learned Counsel submits that the Defendants, as guarantors of the Plaintiff's claim arising under the main contract, are sued as a party claiming by or under Defendant No.1, who is the principal debtor. Alternatively, learned Counsel submits that the agreement of guarantee is inextricably linked to the main contract for supply of goods and also makes a specific reference to it. Relying on the judgment of the Supreme Court in the case of **Chloro Controls India Pvt.Ltd. vs. Severn Trent Water Purification Inc.**¹ and the judgment of our court in **M/s.Sahyadri Earthmovers vs. L & T Finance Ltd.**² and of Delhi High Court in the case of **Canbank Financial Services Ltd. vs. M/s.SFL Industries Ltd.**³, learned Counsel submits that even if the guarantee executed by Defendant No.3 does not contain any arbitration agreement, such agreement must be treated as part of the contract of guarantee on account of the inextricable linkage of the two agreements (i.e. main contract and the contract of guarantee) as also for the reason that there is a specific reference to the main contract in the agreement of guarantee.

5 On the other hand, it is submitted by learned Counsel for the Plaintiff that, in the first place, the present notice of motion does not satisfy the requirement of Section 8 of the Act inasmuch as the application thereunder is not made before expiry of the time stipulated for filing of the first statement of defence on the substance of the suit. Learned Counsel relies on the decision of Delhi High Court in the case of **Krishan Radhu vs. The Emmar MGF Construction Pvt.Ltd.**⁴ in this behalf. Secondly, it is submitted, the Plaintiff has filed the present suit invoking the joint and several liability of three parties, two of whom are not party to the

1 (2013) 1 SCC 641

2 2013(2) MAH.LJ. 302

3 2004 SCC OnLine Del 362 : ILR (2004) 1 Del 430

4 2016 SCC OnLine Del 6499

arbitration agreement. Learned Counsel submits that on the principle stated in the case of **Sukanya Holdings (P) Ltd. vs. Jayesh H. Pandya**⁵, the Plaintiff cannot be asked to split the cause of action and that the suit cannot be stayed merely as against Defendant No.1 on the basis of the arbitration agreement between itself and the Plaintiff. Learned Counsel submits that the guarantee executed by Defendant No.3 is a separate and independent contract and a mere reference to the main contract under the agreement of guarantee does not result into incorporation of the arbitration agreement contained in the main contract into the agreement of guarantee. Learned Counsel relies on the Supreme Court judgments in the cases of **S.N. Prasad, Hitek Industries (Bihar) vs. Monnet Finance Ltd.**⁶, **M.R. Engineers and Contractors Pvt.Ltd. vs. Som Datt Builders Ltd.**⁷ and **Duro Felguera S.A. vs. Gangavaram Port Ltd.**⁸ in support of his submissions.

6 Referring to the preliminary objection raised by the Plaintiff to the maintainability of the present notice of motion on the ground that it is beyond the date stipulated for submitting the first statement on the substance of the dispute, it is important to note that the present suit was filed in the year 2002. The relevant provision of Section 8, which applied as of that date, namely, Section 8 of the Act, as it stood before its amendment by the Amending Act of 2015, provided for application to be presented to any judicial authority before whom an action is brought in a matter which is the subject of an arbitration agreement “not later than when submitting his first statement on the substance of the dispute”. It is this provision, which will apply to the present notice of motion and not the

5 (2003) 5 SCC 531

6 (2011) 1 SCC 320

7 (2009) 7 SCC 696

8 (2017) 9 SCC 729

amended provision of Section 8, which was brought into force with effect from 23 October 2015. Since the writ of summons was served on the Defendants sometime in 2002, the original date stipulated for submitting of the written statement had long expired. It, however, had no significance *vis-à-vis* application under Section 8 which, until 23 October 2015, could be filed “not later than the date of submitting his first statement on the substance of the dispute”. In other words, there is no reason why the filing of the application under Section 8, as it then stood, should be linked to the stipulated date of submission of written statement. The provision, as it then stood, linked the filing of the application under Section 8 to the actual date of submission of the first statement on the substance of the dispute. The amendment was brought into force on 23 October 2015 by which time the suit had already stood dismissed on account of default of appearance of the Plaintiff. The suit was restored to file on the application of the Plaintiff and at that time, the Defendants were directed to file their written statement by 15 October 2016. The time for filing of written statement being fixed by the court in these circumstances could always be extended by the court. In fact, it appears that this time was indeed extended by this court, since the written statement was accepted on 23 October 2016. The present notice of motion is admittedly moved before filing of the written statement on that date. Viewed from any angle, the present notice of motion is filed within time. The judgment of Delhi High Court in the case of **Krishan Radhu** (supra) cited by learned Counsel for the Plaintiff has no application to the facts of the present case, though, I must make it clear, I have not applied my mind to the correctness of the proposition laid down by the learned Single Judge of Delhi High Court in the case of **Krishan Radhu**.

7 Coming now to the merits of the application, it is important to

note that the present suit is a composite action against Defendant No.1, on the one hand, for a claim arising under the main contract between the Plaintiff and Defendant No.1, and Defendant Nos.2 and 3 herein, who are arraigned as guarantors, on the other hand. Defendant No.3 is said to have executed an agreement of guarantee, whereas there is no written document executed by Defendant No.2. It is not in dispute that the agreement of guarantee executed by Defendant No.3 does not contain any arbitration agreement. The argument, however, is that the agreement of guarantee being inextricably linked to the main contract for supply of goods, the arbitration agreement in the main contract must be treated as part of the agreement of guarantee. Reliance is placed in this behalf on the case of **Chloro Controls** (supra). Secondly, it is submitted that since the agreement of guarantee anyway makes a reference to the main contract for supply of goods, on the principle of law stated by this court in the case of **Sahyadri Earthmovers** (supra), the guarantor must be held to be bound by the arbitration agreement contained in the main contract.

8 In the case of **Sahyadri Earthmovers**, the principal borrower was sued on a loan-cum-hypothecation agreement, whereas the guarantor was sued on a deed of guarantee executed by him. This deed guaranteed payment of dues under the loan-cum-hypothecation agreement. An application was made before a learned Single Judge of this court under Section 9 of the Act by the claimant creditor. The application was moved after procuring an award from the arbitral forum. The application was opposed by the guarantor *inter alia* on the ground that the guarantor was not a signatory to the loan-cum-hypothecation agreement and the deed of guarantee did not contain any specific arbitration clause. The learned Single Judge of this court hearing the application was of the view that since

the deed of guarantee referred to the loan-cum-hypothecation agreement, the loan agreement and its terms and conditions could be said to be part and parcel of the deed of guarantee; the guarantee could not be dissected or read in isolation; it was interlinked and interconnected with the loan-cum-hypothecation agreement. The judgment of the Supreme Court in the case of **S.N. Prasad** (supra) was cited before the learned Single Judge. The Supreme Court in that case had held that the guarantor of a loan, who was not a party to the main loan agreement containing an arbitration clause, cannot be made a party to a reference to arbitration and subjected to an arbitration award for repayment of the loan. The arbitration agreement between the lender and the borrower cannot be deemed or construed to be an arbitration agreement in respect of a guarantor, who was not a party to the original loan agreement. The learned Single Judge hearing **Sahyadri Earthmovers**, however, distinguished this judgment presumably on the ground that the deed of guarantee in the case before the learned Single Judge specifically mentioned and referred to the loan agreement between the parties and since the loan agreement contained an arbitration agreement, the guarantor was bound by it, though there is no clear indication as to how the Supreme Court judgment in **S.N. Prasad** was actually distinguished. The learned Single Judge held that such reference was a permissible and recognized mode of entering into an arbitration agreement to settle the disputes arising under the referring agreement.

9 There is a binding authority of the Supreme Court in the case of **M.R. Engineers and Contractors Pvt.Ltd.** (supra), which deals with the subject of incorporation of an arbitration clause from another document into a contract. The Supreme Court has elaborately considered in **M.R. Engineers** the condition precedent for incorporation of the arbitration

clause in such a case. The court was concerned in that case with two contracts, one being the main contract between the employer and the contractor, which contained a specific arbitration agreement, and a sub-contract between the contractor and a third party, which contained a specific stipulation that the sub-contract shall be carried out on the terms and conditions as applicable to the main contract unless otherwise mentioned. Relying on this term and the interconnection between the two contracts, it was contended before the Supreme Court by the employer that the sub- contractor was bound by the arbitration agreement under the main contract. The Supreme Court negated the contention, holding that there was a difference between a reference to another document in a contract and incorporation of that other document in a contract by reference. The court noted that in the first case, what the parties intend to do is to adopt only specific provisions or parts of the referred document for the purpose of the contract, whereas in the second case, parties intend to incorporate the referred document itself in its entirety into the contract. Accordingly, whenever there is a reference to a document in a contract, the court has to consider whether the reference to the document is with the intention of incorporating the contents of that document in entirety into the contract or with the intention of adopting or borrowing specific portions of that document for application to the contract. After considering various instances of incorporation by reference versus mere reference by way of illustrated cases, the Supreme Court laid down the following principle: **A general reference to another contract will not be sufficient to incorporate the arbitration clause from the referred contract into the contract under consideration. There should be a special reference indicating a mutual intention to incorporate the arbitration clause from another document into the contract.** The court referred to the

scope and intent of Section 7 of the Act defining an arbitration agreement with particular reference to sub-section (5) thereof, which deals with reference in a contract to another document containing an arbitration clause constituting an agreement in writing under the first mentioned contract. The court put the matter thus :

“24. The scope and intent of Section 7(5) of the Act may therefore be summarized thus:

(i) An arbitration clause in another document, would get incorporated into a contract by reference, if the following conditions are fulfilled :

(1) The contract should contain a clear reference to the documents containing arbitration clause,

(2) the reference to the other document should clearly indicate an intention to incorporate the arbitration clause into the contract,

(3) The arbitration clause should be appropriate, that is capable of application in respect of disputes under the contract and should not be repugnant to any term of the contract.

(ii) When the parties enter into a contract, making a general reference to another contract, such general reference would not have the effect of incorporating the arbitration clause from the referred document into the contract between the parties. The arbitration clause from another contract can be incorporated into the contract (where such reference is made), only by a specific reference to arbitration clause.

(iii) Where a contract between the parties provides that the execution or performance of that contract shall be in terms of another contract (which contains the terms and conditions relating to performance and a provision for settlement of disputes by arbitration), then, the terms of the referred contract in regard to execution/performance alone will apply, and not the arbitration agreement in the referred contract, unless there is special reference to the arbitration clause also.

(iv) Where the contract provides that the standard form of terms and conditions of an independent Trade or Professional Institution (as for example the Standard Terms

& Conditions of a Trade Association or Architects Association) will bind them or apply to the contract, such standard form of terms and conditions including any provision for arbitration in such standard terms and conditions, shall be deemed to be incorporated by reference. Sometimes the contract may also say that the parties are familiar with those terms and conditions or that the parties have read and understood the said terms and conditions.

(v) Where the contract between the parties stipulates that the conditions of contract of one of the parties to the contract shall form a part of their contract (as for example the general conditions of contract of the Government where Government is a party), the arbitration clause forming part of such general conditions of contract will apply to the contract between the parties.”

10 The binding authority of **M.R. Engineers’** case neither cited before nor considered by the learned Single Judge in **Sahyadri Earthmovers** (supra). The law stated by the learned Single Judge in that case, namely, having signed the deed of guarantee which specifically mentions and refers to the loan agreement between the parties, which contains an arbitration agreement, the guarantor is bound by the arbitration agreement under the loan agreement, is clearly contrary to the law stated by the Supreme Court in **M.R. Engineers** and is *per incuriam*. Every guarantee is necessarily linked to another contract, which is said to be the main contract, and must by definition refer to the main contract. After all, Section 126 of the Contract Act defines a ‘contract of guarantee’ as “*a contract to perform the promise, or discharge the liability, of a third person in case of his default.*” The promise or the liability arising thereunder, which forms part of that other contract, is the very basis of a contract of guarantee and without making a reference to that promise or liability, it is unthinkable that a contract of guarantee can be entered into. Every contract of guarantee, therefore, by definition must make a reference to the

main agreement, the promise whereunder is sought to be performed or the liability whereunder is sought to be discharged under the contract of guarantee. By making a mere reference to such contract, the contract of guarantee cannot be said to either incorporate the terms of the main contract or particularly incorporate the arbitration agreement contained thereunder. We are bound by the decision of the Supreme Court in the case of **M.R. Engineers** and unless the three conditions laid down in that case, namely, (i) clear reference to the document contained in the arbitration clause, (ii) such reference indicating an intention to incorporate the arbitration clause, and (iii) the arbitration clause being appropriate or capable of being applied in respect of all disputes under the referring contract and not being repugnant to any term of that contract, are satisfied, there is no warrant for treating the arbitration clause in the referred document as having been incorporated into the referring contract. The proposition laid down by the Supreme Court in **M.R. Engineers** was once again affirmed by the Supreme Court in the case of **Duro Felguera S.A.** (supra).

11 The learned Single Judge of Delhi High Court in the case of **Canbank Financial Services Ltd.** can also accordingly be treated as having been impliedly overruled and the law stated therein as not good law after the judgment of the Supreme Court in the case of **M.R. Engineers**. Anyway, **Canbank** case is distinguished by the Delhi High Court itself later in **STCI Finance Ltd. vs. Sukhmani Technologies Pvt.Ltd.**⁹ This later decision was rendered after considering the cases of **Chloro Controls** as well as **M.R. Engineers** and **S.N. Prasad** (supra). The Delhi High Court in **STCI Finance** held that an agreement to stand as a surety for due

9 235(2016) DLJ-150

performance of the contract between the principal debtor and the lender, although linked to the principal contract, is nonetheless an independent contract and unless the arbitration agreement contained in the principal contract is specifically incorporated in the agreement of surety by a specific reference, the surety cannot be said to be bound by the arbitration agreement contained in the main contract.

12 If the arbitration agreement contained in the main contract for supply of goods is not binding on the two Defendants purportedly sued as guarantors, there is no warrant for referring the parties to arbitration. As stated by the Supreme Court in the case of **Sukanya Holdings (P) Ltd.** (supra), the expression “*a matter which is the subject of an arbitration agreement*” used in Section 8 of the Act, must include “*the entire subject matter of the suit and not merely a part of it*”. When the entire subject matter of the suit is not subject to arbitration agreement, the Plaintiff cannot be asked to bifurcate the subject matter of the suit in two parts, one to be decided by the arbitral tribunal and the other to be decided by ordinary civil courts. As held by the Supreme Court, bifurcation of the subject matter of action brought before a judicial authority is not permissible under Section 8 for various reasons. Neither was it contemplated nor anyway indicated in the language of the section and such bifurcation would result inevitably in delaying the proceedings and defeating the whole purpose of speedy disposal of a dispute with minimum cost of litigation. In the present case, the Plaintiff, as *dominus litus*, is well within its rights to choose to invoke the joint and several liability of the principal debtor and the guarantor in one action. The Plaintiff, in such a case, cannot be asked to prosecute his remedy separately against the principal debtor and the guarantor. Even under the old law, namely,

Arbitration Act, 1940, which contained a provision for stay of suit in case of identity between the subject matters of a suit and an arbitration agreement (Section 34), Calcutta High Court in the case of **Asiatic Shipping Co. (Private) Ltd. vs. P.N. Djakarta Lloyd**¹⁰ had held that the court was justified in refusing to stay a suit between a creditor, and his principal debtor and guarantor under Section 34, when there was an arbitration agreement only between the plaintiff creditor and principal debtor and the guarantor was not a party to it. The court held that any decision upon the liability of a guarantor necessarily involved determination of the liability of the principal debtor and as the same issue would have to be gone into both in the suit and the arbitration proceedings, there was every likelihood of conflicting findings and the suit, in the premises, should not be stayed.

13 In the premises, the notice of motion has no merit. The subject matter of the present suit, which is a composite action of a creditor against his principal debtor and guarantors, cannot be referred to arbitration, since the alleged guarantors are not party to the arbitration agreement between the creditor and the principal debtor.

14 The notice of motion is, accordingly, dismissed. Costs to be costs in the cause.

(S.C. GUPTE, J.)

¹⁰ AIR 1969 CALCUTTA 374