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

14+ CS(OS) 2554/2008

LAL MAHAL LIMITED

..... Plaintiff

Through: Mr. Davinder N. Grover, Mr. Vishrutraj, Mr. Vishal K. Panwar, Mr. Rajesh Gupta, Mr. Narinder Chandila, Mr. Shailend Choudhary and Mr. Prateek Aggarwal, Advs.

Versus

ABDUL GHAFAR & ANR

..... Defendants

Through: Mr. Kailash Vasdev, Sr. Adv. with Mr. Shreyans Singhvi, Ms. Ekta Mehta and Mr. Umrao Singh Rawat, Advs.

AND

16+ O.M.P. 300/2001 & IA No.8552/2010 (u/S 151 CPC)

SHIV NATH RAI HARNARAIN (INDIA) LTD.

..... Petitioner

Through: Mr. Davinder N. Grover, Mr. Vishrutraj, Mr. Vishal K. Panwar, Mr. Rajesh Gupta, Mr. Narinder Chandila, Mr. Shailend Choudhary and Mr. Prateek Aggarwal, Advs.

Versus

ABDUL GHAFAR ABDUL REHMAN

..... Respondent

Through: Mr. Kailash Vasdev, Sr. Adv. with Mr. Shreyans Singhvi, Ms. Ekta Mehta and Mr. Umrao Singh Rawat, Advs.

CORAM:

HON'BLE MR. JUSTICE RAJIV SAHAI ENDLAW

ORDER

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16.03.2017

IA No.9251/2009 in CS(OS) 2554/2008 (of defendants u/O VII R-11 CPC)

1. The defendants in CS(OS) No.2554/2008 (filed for recovery of Rs.6,46,00,000/- with interest and for mandatory injunction to discharge the liability of Railways and excise duty) seek rejection of the plaint on the grounds of (i) the suit claim being barred by time; (ii) the subject matter of the suit being the subject matter of arbitration and being barred by *res judicata*; and, (iii) the jurisdiction of the Court being barred owing to the claim subject matter of the suit being subject matter of arbitration agreement between the parties.
2. The claim of the plaintiff for recovery of monies as well as for mandatory injunction is for breach of contract by the defendants. It is *inter alia* the case of the plaintiff that the breach of the agreement occurred in the year 2001. It is thus the contention of the defendants that the suit filed in or about the year 2008 is barred by time.
3. The counsels were heard at length on 7th March, 2017, when the counsel for the plaintiff admitted that the concerned Article of the Schedule to the Limitation Act, 1963 is Article 27 which provides limitation of three years commencing from the time when the contract was to be performed. The counsel for the plaintiff on 7th March, 2017 contended that the plaintiff was seeking benefit of Section 14 of the Limitation Act.
4. It is the plea of the plaintiff (i) that the claim as made in the suit was

subject matter of an arbitration at Singapore; (ii) that an Arbitral Award was pronounced upholding the claim of the plaintiff; and, (iii) that the defendants challenged the said Award in the Courts at Singapore which set aside the Award. It is further stated by the counsel for the plaintiff that the plaintiff thereafter applied to the Supreme Court of India under Section 11(6) of the Arbitration and Conciliation Act, 1996 ('Arbitration Act') but which application was dismissed *inter alia* for the reason that it was the Singapore Court only which could be approached. It is further stated that though the plaintiff again approached the same Arbitrator who had earlier rendered the Award and who entered upon reference but upon the defendants denying even the existence of the Arbitration Agreement, the said Arbitrator abandoned the arbitration.

5. It was on 7th March, 2017 enquired from the counsel for the plaintiff, whether Section 14 of the Limitation Act is applicable to the time taken during the arbitration proceedings.

6. The counsel for the plaintiff in response to the aforesaid has today drawn attention to the written arguments filed by him as far back as in February, 2011 along with copies of the judgments in ***Panchu Gopal Bose Vs. Board of Trustees for Port of Calcutta*** (1993) 4 SCC 338, ***Fatechand Ganeshram Agarwal Vs. Wasudeo Shrawan Dalal*** AIR 1948 Nag 334 and ***Firm Behari Lal Baij Nath Prasad Vs. Punjab Sugar Mills Co. Ltd.*** AIR 1943 All 162 laying down that the arbitration proceedings are like civil proceedings before Court within the meaning of Section 14 of Limitation Act and therefore Section 14 of Limitation Act would be applicable to the arbitration proceedings as well. The counsel for the plaintiff contends that

the same principle has recently been reiterated in *M.P. Steel Corporation Vs. Commissioner of Central Excise* (2015) 7 SCC 58.

7. It is inexplicable that if the said question has been dealt with in the written arguments on record for the last over five years and judgments in support have also been filed, why time was taken on 7th March, 2017 to reply in this respect.

8. The counsel for the plaintiff in addition has also drawn attention to Sections 3 & 43 of the Arbitration Act to contend that thereunder also time taken in the arbitration proceedings is liable to be excluded.

9. As per the aforesaid judgments, the time taken between the date of commencement of the arbitration proceeding and the Arbitral Award is to be excluded. It was enquired from the counsel for the plaintiff that even if Section 14 of the Limitation Act were to apply, on what date the cause of action for the reliefs claimed in this suit accrued, on which date were the arbitration proceedings commenced and whether the time till the date of the Arbitral Award only was to be excluded or the time till the date of setting aside of the Arbitral Award by the Singapore Court to be excluded.

10. Though I have waited for considerable time but no clarity emerges on the aspect of the date of accrual of cause of action or on the date of commencement of arbitral proceedings. It is thus not deemed appropriate to waste any further time thereon and the counsels were asked to address on the next ground urged for rejection of the plaint.

11. There is admittedly no Arbitral Award in existence adjudicating the rights and liabilities of the parties. Thus, the question of application of the principles of *res judicata* does not arise.

12. The only other question which remains to be adjudicated is, whether owing to the arbitration agreement between the parties, the jurisdiction of this Court is ousted.

13. In this regard, the following facts are not in dispute:

(I) That on accrual of disputes between the parties in the year 2001, the plaintiff on the basis of a clause contained in the agreement between the parties for “settlement of disputes through Indian Arbitration Council, Delhi” filed a petition being OMP No.300/2001 under Section 9 of the Arbitration Act in this Court.

(II) That the disputes were thereafter referred to one Mr. Samuel J. Marshall who was the agent for both the parties in the transaction and who also agreed to mediate between the parties; with the intervention of Mr. Samuel J. Marshall, the parties arrived at an agreement to resolve the disputes between themselves; the settlement agreement entered into on 18th January, 2002 in Clause 18 thereof provided as under:

“18. Should any dispute or non-implementation arise, this will be adjudicated solely by Mr. Samuel J. Marshall”.

(III) That in the letter dated 12th November, 2002 accepted by the parties on 21st November, 2002, the parties agreed to resolve the disputes under the following conditions:

“1. That the venue for resolution of this dispute will take place in Singapore, assuming that Mr.

- Marshall is resident there, alternatively the UK;*
2. *That the Agreement dated 18th January, 2002 is governed by India law; and*
 3. *UNCITRAL rules will apply.”*

14. It is also not in dispute that the arbitration proceedings were commenced and Mr. Samuel J. Marshall rendered an Arbitral Award in favour of the plaintiff. However, the said Award was an *ex-parte* one (the counsel for the plaintiff states that the defendants were informed but chose not to appear). It is also not in dispute that the defendants applied to the Courts at Singapore for setting aside of the said Award and the Arbitral Award was so set aside, without the order disclosing any reasons therefor. The counsels, on 7th March, 2017 and today also are *ad idem* that as per the procedure applicable in Singapore, the reasons are not to be disclosed.

15. It is also not in dispute that the plaintiff thereafter, as aforesaid, filed Arbitration Petition No.4/2007 in the Supreme Court of India for appointment of an Arbitrator but which was dismissed vide order dated 10th March, 2008 *inter alia* for the reason that the parties having mutually agreed to have the disputes referred to an Arbitrator at Singapore, the plaintiff is not entitled to turn around and say that the Supreme Court of India may appoint an Arbitrator.

16. It is also not in dispute that at the behest of the plaintiff, Mr. Samuel J. Marshall aforesaid again commenced arbitration proceedings and issued notice thereof to the defendants. The defendants however in response to the above, wrote to Mr. Samuel J. Marshall as under:

“To: Mr. Samuel J. Marshall BY FAX, POST & HAND

Countercorp International Pte Ltd.
51 Anson Road
#05-55 Anson Centre
Singapore 079904
Dear Sirs,

NOTICE OF CHALLENGE

1. We act for the estate of M/s Abdul Gaffar Abdul Rahman, Mr. Irfan Patel and Mr. Ashfaq Patel.
2. On 15 September 2008, our clients became aware of a purported order (the "Order") made by you on 11 September 2008. The Order appears to record a hearing that took place on the same day in respect of purported arbitration proceedings where you held yourself out to be the sole arbitrator. A copy of the purported Order is attached for your reference.
3. The Order records the presence of various parties, various applications being made and an alleged revival of arbitration proceedings between our clients and M/s Shivnath Rai harnarain (I) Ltd. ("M/s Shivnath").
4. Our clients are extremely surprised by these alleged proceedings and are of the view that your conduct in respect thereof is entirely improper.
5. This letter serves as a **NOTICE OF CHALLENGE** pursuant to Article 13(2) of the UNCITRAL Model Law on International Commercial Arbitration, which has force of law under the International Arbitration Act (Cap 143A). The grounds of our clients' challenge are that there are justifiable doubts as to your impartiality and/or independence for the following reasons:
 - a. As you are well aware, our clients had taken out an application in the High Court of Singapore in Originating Summons No.35 of 2005/H to set aside an award previously given by you in arbitration proceedings between the same parties (the "Award"). The Court found in favour of our clients' application and set aside the Award. The

grounds of our clients' application were that:

- i) they were not given proper notice of the arbitral proceedings and/or was unable to properly present its case. In particular, the Court was informed of your failure to address our clients' various objections and their concerns on attending the hearing.*
- ii) you, as an arbitrator, failed to give an appearance of impartiality in the conduct of the previous arbitration proceedings.*
- b. With regard to the Order and the purported revival of the arbitration proceedings, you, as the alleged sole arbitrator have:*
 - i. Failed to notify our clients of the purported hearing on 11 September 2003;*
 - ii. Failed to notify our clients of your continued involvement in alleged arbitration proceedings between themselves and M/s Shivnath;*
 - iii. Failed to ensure that the hearing is conducted in the presence of both parties;*
 - iv. Made orders for the revival of the "Claim" without having our clients present and heard at the purported hearing;*
 - v. Failed to serve the Order made on our clients. Our clients only became aware the purported Order when it was tendered in Indian Court proceedings by M/s Shivnath.*
 - vi. created an impression that our clients were represented at the hearing as the Order recorded the presence of a Mr. Majumdar as the General Manager of our clients. We are instructed that Mr. Majumdar is in fact the General Manager of M/s Shivnath, the named Claimant in the alleged arbitration*

proceedings;

- vii. Failed to treat our clients fairly or equally;*
 - viii. Purported to act as an arbitrator despite M/s Shivnath having represented and/or taken the position in the proceedings between the Indian Courts that a new arbitrator had to be appointed in respect of the disputes between the parties; and*
 - ix. Revived the arbitration proceedings based on an erroneous interpretation of the Order of Court dated 31 July 2006 and the order of the Supreme Court of India dated 10 March 2008.*
- c. In addition, we note that you have a close business relationship with M/S Shivnath in that you act as the Group Chairman & Managing Director of the Marshall Group and M/s Shivnath is listed as one of your Group's clients.*
- 6. You have therefore acted entirely in the interest and/or at the behest of M/s Shivnath and/or without regard to our clients' rights and interests and there are more than sufficient to give rise to justifiable doubts as to your impartiality and/or independence in hearing any dispute and/or purported arbitration proceedings between our clients and M/s Shivnath.*
- 7. In the premises, kindly let us have your written confirmation by **Monday 6 October 2008** of your withdrawal as the sole arbitrator of the purported arbitration proceedings failing which our clients will have no choice but to make the necessary application to Court. Our clients reserve their right to raise further grounds of challenge at the appropriate juncture, if necessary.*
- 8. Please also note that this challenge is made without prejudice to our clients' rights, including without limitation, to assert the non-existence, nullity and/or*

invalidity of any arbitration agreement and/or to assert the termination of your appointment and/or mandate as an arbitrator. All our clients' rights in this regard are reserved.

9. *Our clients are further of the view that you are not entitled to and/or have exceeded the scope of the immunity provided to arbitrators under section 25A of the International Arbitration Act. All our clients' rights against you personally are also hereby reserved.*

Regards,

Sd.

K Murali Pany / John Sze

(Writer' DID: 6224 3645 / 6220 9388)

(Writer's E-Mail: murali@jtib.com / gracelin@jtib.com)

Encls."

17. The senior counsel for the defendants in response to the query made from him on 7th March, 2017, whether the defendants immediately on receipt of summons of the suit had applied for referring the parties to arbitration i.e. under Section 8 of the Arbitration Act, relying on ***Sasan Power Limited Vs. North American Coal Corporation (India) Private Limited*** (2016) 10 SCC 813 contends that Section 8 contained in Part I of the Arbitration Act is not applicable to international commercial arbitration.

18. I am however of the view that the need to go into the aforesaid aspect does not arise. Section 45 of the Arbitration Act is as under:

“45. Power of judicial authority to refer parties to arbitration—*Notwithstanding anything contained in Part I or in the Code of Civil Procedure, 1908 (5 of 1908), a judicial authority, when seized of an action in a matter in respect of which the parties have made an agreement referred to in Section*

44, shall, at the request of one of the parties or any person claiming through or under him, refer the parties to arbitration, unless it finds that the said agreement is null and void, inoperative or incapable of being performed.”

19. The defendants in para 8 of their letter reproduced hereinabove to the agreed Arbitrator Mr. Samuel J. Marshall having also stated that the said letter was written reserving the right to assert the non-existence, nullity and/or invalidity of the arbitration agreement, I have enquired from the senior counsel for the defendants that how can the defendants after having taken such a stand be permitted to now when the plaintiff has filed the suit, contend that the parties be referred to arbitration.

20. The senior counsel for the defendants contends that though according to the defendants there is no arbitration agreement but since according to the plaintiff there is an arbitration agreement and the plaintiff after dismissal of his petition before the Supreme Court of India having again invoked the arbitration proceeding, cannot be permitted to approach the Civil Court.

21. The aforesaid contention of the senior counsel for the defendants cannot be accepted. He has been asked to take a categorical stand.

22. The senior counsel for the defendants then states that the defendants accept the existence of the arbitration agreement as reproduced hereinabove and Mr. Samuel J. Marshall having abandoned the arbitration, the remedy of the plaintiff is to approach the Courts at Singapore for appointment of alternate Arbitrator.

23. It was enquired from the senior counsel for the defendants, whether the UNCITRAL rule to which the parties refers provide for such a procedure

to be followed.

24. The senior counsel for the defendants on passover has handed over copies of “Appendix 6 UNCITRAL Model Law on International Commercial Arbitration” and has drawn attention to Article 11 thereof which is as under:

“Article 11. Appointment of arbitrators

- (1) No person shall be precluded by reason of his nationality from acting as an arbitrator, unless otherwise agreed by the parties.*
- (2) The parties are free to agree on a procedure of appointing the arbitrator or arbitrators, subject to the provisions of paragraphs (4) and (5) of this article.*
- (3) Failing such agreement,*
 - (a) in an arbitration with three arbitrators, each party shall appoint one arbitrator, and the two arbitrators thus appointed shall appoint the third arbitrator; if a party fails to appoint the arbitrator within thirty days of receipt of a request to do so from the other party, or if the two arbitrators fail to agree on the third arbitrator within thirty days of their appointment, the appointment shall be made, upon request of a party, by the court or other authority specified in article 6;*
 - (b) in an arbitration with a sole arbitrator, if the parties are unable to agree on the arbitrator, he shall be appointed, upon request of a party, by the court or other authority specified in article 6.*
- (4) Where, under an appointment procedure agreed upon by the parties,*
 - (a) a party fails to act as required under such procedure, or*
 - (b) the parties, or two arbitrators, are unable to reach*

an agreement expected of them under such procedure, or

- (c) a third party, including an institution, fails to perform any function entrusted to it under such procedure.*

any party may request the court or other authority specified in article 6 to take the necessary measure, unless the agreement on the appointment procedure provides other means for securing the appointment.

- (5) A decision on a matter entrusted by paragraph (3) or (4) of this article to the court or other authority specified in article 6 shall be subject to no appeal. The court or other authority, in appointing an arbitrator, shall have due regard to any qualifications required of the arbitrator by the agreement of the parties and to such considerations as are likely to secure the appointment of an independent and impartial arbitrator and, in the case of a sole or third arbitrator, shall take into account as well the advisability of appointing an arbitrator of a nationality other than those of the parties.”*

25. The senior counsel for the defendants has also handed over “Appendix 16 UNCITRAL Arbitration Rules” and has drawn attention to Article 14 thereof as under:

“Replacement of an arbitrator

Article 14—1. *Subject to paragraph 2, in any event where an arbitrator has to be replaced during the course of the arbitral proceedings, a substitute arbitrator shall be appointed or chosen pursuant to the procedure provided for in articles 8 to 11 that was applicable to the appointment or choice of the arbitrator being replaced. This procedure shall apply even if during the process of appointing the arbitrator to be replaced, a party had failed to exercise its right to appoint or to participate in the appointment.*

2. *If, at the request of a party, the appointing authority determines that, in view of the exceptional circumstances of the case, it would be justified for a party to be deprived of its right to appoint a substitute arbitrator, the appointing authority may, after giving an opportunity to the parties and the remaining arbitrators to express their views: (a) appoint the substitute arbitrator; or (b) after the closure of the hearings, authorize the other arbitrators to proceed with the arbitration and make any decision or award.”*

26. On the basis of the aforesaid, it is contended that once according to the plaintiff, there is an arbitration agreement within the meaning of Section 44 of the Arbitration Act and the defendants are also requesting this Court to refer the parties to arbitration, Section 45 would be attracted.

27. The counsel for the plaintiff in response contends that the defendants cannot be permitted to blow hot and cold. Reliance in this regard is placed on ***Rajasthan State Industrial Development and Investment Corporation Vs. Diamond & Gem Development Corporation Limited*** (2013) 5 SCC 470 and ***Nagubai Ammal Vs. B. Shama Rao*** (1956) SCR 451.

28. It is further argued that the stand of the defendants before this Court today, admitting the existence of the arbitration agreement is of no avail, in view of the letter aforesaid written by the defendants to Mr. Samuel J. Marshall denying the arbitration agreement.

29. I have considered the controversy.

30. The defendants, in the letter reproduced hereinabove, objected to Mr. Samuel J. Marshall entering upon reference inspite of his earlier Arbitral Award having been set aside, according to the defendants on the grounds of

his impartiality. The defendants in para 8 of the letter aforesaid also stated that the challenge to the impartiality of Mr. Samuel J. Marshall was being made without prejudice to the defendants' right to assert the non-existence, nullity and / or invalidity of any arbitration agreement. However such conduct of the defendants in my opinion would not allow this Court to refuse to refer the parties to arbitration. It cannot be lost sight of that Section 45 of the Arbitration Act is mandatory. The same does not contain a condition that the defendant requesting the judicial authority for arbitration should not have in the past objected to arbitration. Here the plaintiff admits the Arbitration Agreement referred to in Section 44 of the Arbitration Act. The plaintiff notwithstanding the same, instead of pursuing remedy of arbitration has filed the suit. Now that the defendants, though on being asked to take a categorical stand, have also accepted the existence of the Arbitration Agreement and are objecting to the maintainability of this suit on the ground of the said Arbitration Agreement and are requesting the Court to refer the parties to arbitration, this Court has no option but to refer the parties to arbitration.

31. No other argument has been urged.

32. The application thus succeeds on the ground of the parties being liable to be referred under Section 45 of the Arbitration Act to arbitration.

33. The application is disposed of.

CS(OS) No.2554/2008

34. In accordance with the aforesaid, the suit is disposed of by referring the parties to arbitration.

IA No.8552/2010 in OMP No.300/2011 (u/S 151 CPC)

35. The respondent seeks release of the monies deposited in this Court during the pendency of the petition aforesaid under Section 9 of the Arbitration Act.

36. The counsel for the petitioner states that the petitioner would be taking appropriate remedies in accordance with the today's order.

37. The application is disposed of by directing that unless there is an order binding on this Court for retention of the monies deposited by the respondent, the said monies together with interest, if any accrued thereon be refunded to the respondent after 31st May, 2017.

38. Needless to state that all pleas not inconsistent with the stand before this Court shall remain open to the parties.

RAJIV SAHAI ENDLAW, J.

MARCH 16, 2017

39. The order aforesaid was dictated in open Court. The senior counsel for the defendants / respondents, at the time of commencement of the dictation had left for another engagement. The senior counsel in the morning of 17th March, 2017, before the order has been signed, mentioned the matter and stated that the defendants are not requesting for an arbitration within the meaning of Section 45 of the Arbitration Act. He states that the defendants are only seeking rejection of the plaint on the ground of existence of the Arbitration Agreement referred to in Section 44 of the Arbitration Act.

40. I have enquired from the senior counsel for the defendants as to how the defendants can on the one hand not seek reference to arbitration and on the other hand seek rejection of the plaint on the ground of existence of the Arbitration Agreement.

41. The senior counsel for the defendants contends that since the plaintiff claims an Arbitration Agreement, it is not entitled to maintain the suit.

42. Such stand of the defendants is like a dog in the manger.

43. An Arbitration Agreement referred to in Section 44 of the Arbitration Act is not a bar per se to the maintainability of a civil suit. The Arbitration Agreement referred to in Section 44 of the Arbitration Act becomes a bar to the maintainability of the civil suit in respect of a matter covered by the said Arbitration Agreement only when the defendant requests for an arbitration. Though the senior counsel for the defendants / respondents on being asked to take a categorical stand had accepted the existence of the Arbitration Agreement and stated that the remedy of the plaintiff is to approach the Courts at Singapore for appointment of alternate Arbitrator but is now changing the stand.

44. However since there is no formal application under Section 45 of the Arbitration Act and since the plaintiff also is agreeable to the continuation of the suit, the defendants are permitted to so change their stand.

45. Resultantly, the plea for rejection of the plaint on the ground of existence of the Arbitration Agreement fails.

46. That revives the application for rejection of the plaint on the ground of the claim therein being barred by time.

47. List for further hearing for the said purpose on 20th April, 2017.

48. The counsel for the plaintiff, on the next date, besides coming prepared with the aspects on which he was found wanting, to also satisfy this Court as to how according to him ingredient of Section 14 of the Limitation Act of the Court in which the proceedings were being perused from defect of jurisdiction or other cause of like nature being unable to entertain it is fulfilled. It appears that the option of arbitration was / is available to the plaintiff on the date of institution of the suit also.

RAJIV SAHAI ENDLAW, J.

MARCH 16, 2017

‘bs/gsr’

[Corrected & released on 12th April, 2017]