

**NOTICE OF MOTION NO.250 OF 2013
IN
SUIT NO.1905 OF 2012**

In the matter between

Versus

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Mr. Hemant Prabhulkar with Mr. Yogesh Bhoge I/b. M/s. Juris Peritus
for the Defendant No.1 (IOCL).

CORAM : SMT. ANUJA PRABHUDESSAI, J.

DATED: 3rd APRIL, 2019.

JUDGMENT:-

The Defendant No.2 has taken out this notice of motion under Order VII, Rule 11 of the Civil Procedure Code.

2. Mr. Kanetkar, the learned counsel for the Defendant No.2 contends that the dispute is predominantly between the Plaintiff and

the Defendant No.2. He contends that based on the same cause of action as averred in this suit, the Plaintiff has initiated arbitration proceedings and that the said arbitration proceedings between the Plaintiff and the Defendant No.2 are pending before the learned arbitrator. He contends that the reliefs sought against the Defendant No.1 are ancillary and would be covered by the arbitral award. He therefore contends that the present suit is barred by law and hence, the plaint needs to be rejected.

3. Ms Bhavana Anklesaria, the learned counsel for the Plaintiff per contra submits that the Defendant No.1 is not a party to the arbitration proceedings. She has further submitted that the Plaintiff by letter dated 10/7/2009 addressed to the Managing Director of the Defendant No.1 had invoked arbitration clause No.69 of dealership agreement and requested the Managing Director to act as a sole arbitrator and commence arbitration proceedings. The Defendant No.1, vide reply dated 8/9/2009 had categorically declined to appoint an arbitrator alleging that the dealership agreement dated 20/7/1980 was executed with Defendant No.1 as a proprietor of M/s. Shalimar Auto Service . The Defendant No.1 had claimed that it had no privity of contract with the Plaintiff and as such no arbitrator could be

appointed at the request of the Plaintiff. Relying upon the decision of the Apex Court in *Sukanya Holdings Pvt. Ltd. vs. Jayesh H. Pandya and Anr., (2003) 5 SCC 531* and the decision of this Court (Coram : R.M. Savant, J.) in *M/s. Eagle Agro-Farm Private Limited versus M/s. Eagle Soraj Townships Private Ltd., in Civil Writ Petition No.7872 of 2013*, she submits that the dispute between the Plaintiff and the Defendant No1. cannot be referred to the arbitrator. She therefore contends that the pendency of the arbitration proceedings between the Plaintiff and the Defendant No.2 would not oust the jurisdiction of this Court.

4. I have perused the records and considered the submissions advanced by the learned counsel for the respective parties.

5. The Plaintiff and the Defendant No.2 are brothers. They were the partners of M/s. Jagat Singh and Sons, which was engaged in transport business. The said partnership firm had taken on lease a plot of land admeasuring 1953.73 sq.meters bearing Plot No.C, at Dr.C. Gidwani Marg, Chembur, Mumbai-400074 (hereinafter referred to as “the suit plot”).

6. It is the case of the Plaintiff that some time in the year 1977, the partnership firm got a consumer pump installed in the suit plot through the Defendant No.1. In the year 1979, the Plaintiff and the Defendant No.2 constituted another partnership firm in the name of M/s. Shalimar Auto Service. Partnership firm M/s. Jagat Singh and Sons permitted M/s. Shalimar Auto Service to carry on business on the suit plot and to use and occupy structures standing thereon. Upon formation of M/s. Shalimar Auto Service, a consumer outlet of M/s. Jagat Singh and Sons was converted into a retail outlet. The Plaintiff claims that the Defendant No.1 had entered into a dealership agreement dated 28/7/1980 with the partnership M/s. Shalimar Auto Service.

7. The Plaintiff claims that the suit plot wherein the petrol pump being run is in possession of the partnership firm of M/s. Jagat Singh and Sons as the lessee whereas all the structures standing thereon are constructed and owned by M/s. Jagat Singh and Sons. Though the partnership firm was dissolved by deed of dissolution dated 1/4/2000, the suit plot and the structures standing thereon continued to be the assets of the partnership firm.

8. The Plaintiff claimed that M/s. Shalimar Auto Service was dissolved w.e.f. 20/9/2008. The Plaintiff alleged that the Defendant No.2 continued conducting the business of partnership firm in his individual capacity. The Plaintiff claimed that Defendant No.2 has no independent right to carry on partnership business from the suit plot and the structures standing thereon. The dispute between the Plaintiff and the Defendant No.2 resulted in filing application under Section 11 of the Arbitration and Conciliation Act, 1996, being Arbitration Applications No.2168 of 2008 and 226 of 2008 and by orders dated 5/8/2010 passed in the aforesaid applications, this Court (Coram : S.J. Vazifdar, J. as he then was) appointed Mr. K.G. Munshi, an Advocate of this Court as an Arbitrator to decide the disputes between the Plaintiff and the Defendant No.2. The said arbitration proceedings are pending adjudication.

9. The Plaintiff has filed the present suit during the pendency of the said arbitration proceedings. The Plaintiff claims that vide notice dated 3/4/2008 he had called upon the Defendant No.1 to terminate the dealership agreement with M/s. Shalimar Auto Service. The Plaintiff also called upon the Defendant No.1 to remove the petrol

storage tank, dispensing pump and CNG filling station from the suit plot. Since the Defendant No.1 had failed to comply with the requisition, the Plaintiff invoked arbitration clause as per clause 69 of the Dealership Agreement dated 20/7/1990 and called upon the Defendant Nos.1 and 2 to refer the dispute to the sole arbitrator i.e. the Managing Director of the Defendant No.1. The Defendant No.1 vide letter dated 8/9/2009 once again refused to remove the storage tanks of petrol and diesel, etc. and further claimed that the Plaintiff has no right and interest to oppose to renewal of dealership agreement. The Defendant No.1 also claimed that the Plaintiff is not a party to the dealership agreement and that there being no privity of contract between the Plaintiff and the Defendant No.1, the Plaintiff could not invoke the arbitration clause for appointment of an arbitrator. The Defendant No.1 also denied that the dealership agreement was terminated by efflux of time.

10. The Plaintiff states that some time in February-2012 the Defendant No.2 illegally and unauthorisedly put up a ramp in the suit plot washing commercial vehicles, installed car lift and also demolished part of a wall of a shop in the suit plot. The Plaintiff sought interim relief in the arbitration proceedings. In the course of

the hearing, the Defendant No.2 produced a letter dated 12/1/2011 addressed by the Defendant No.1 requesting construction of canopy, approval of modernisation subsidy for drive way with paver block. The Plaintiff claims that instead of removing the paver blocks, dispensing pump, CNG filling station, the Defendant No.1 indulged in further unauthorised activity of construction of canopy and paver block on the suit plot. The Plaintiff claims that the suit plot is of the partnership firm M/s. Jagat Singh and Sons. The Plaintiff claims that the Defendant No.1 has no legal right to bring their vehicles in the suit plot to deliver petroleum products and /or to continue business with M/s. Shalimar Auto Service. The Plaintiff has therefore filed the suit for a declaration that the dealership agreement between the Defendant No.1 and the Defendant No.2 as partners of M/s. Shalimar Auto Service stood terminated by efflux of time. The Plaintiff has also sought to direct the Defendant No.1 to remove the petrol /diesel tank, dispensing pump, etc. from the suit plot and to restrain the Defendant No.1 from bringing the vehicle in the suit plot and from carrying on business activity, under the dealership agreement dated 20/7/1980. The Plaintiff has further sought mesne profit @ of Rs.10,00,000/- from 20/7/2009 till the date of removal of the petrol pump.

11. The Defendant No.2 has sought rejection of the plaint mainly on the ground of pendency of arbitration proceedings between the Plaintiff and the Defendant No.2. It is not in dispute that the Defendant No.1 is not a party to the said arbitration proceedings and consequently the Plaintiff cannot seek any relief against the Defendant No.1 in the said arbitration proceedings.

12. The records further indicate that the Defendant No.1 had rejected the request of the Plaintiff to refer the dispute to the arbitrator on the ground that there was no privity of contract between the Plaintiff and the Defendant No.1. It is also pertinent to note that the Defendant No.1 had not filed an application under Section 8 of the Arbitration and Conciliation Act, 1996 applying for referring the parties to arbitration. On the contrary, the Defendant No.1 has filed the written statement and has submitted to the jurisdiction of this Court.

13. In *Sukanya Holdings Pvt. Ltd.* (supra), the Apex Court while interpreting Section 5 and Section 8 of the Arbitration and Conciliation Act, 1996 has observed thus:-

“12. For interpretation of [Section 8](#), [Section 5](#) would have no bearing because it only contemplates that in the matters governed by Part-I of the Act, Judicial authority shall not

intervene except where so provided in the Act. Except [Section 8](#), there is no other provision in the Act that in a pending suit, the dispute is required to be referred to the arbitrator. Further, the matter is not required to be referred to the arbitral Tribunal, if (1) the parties to the arbitration agreement have not filed any such application for referring the dispute to the arbitrator; (2) in a pending suit, such application is not filed before submitting first statement on the substance of the dispute; or (3) such application is not accompanied by the original arbitration agreement or duly certified copy thereof. This would, therefore, mean that [Arbitration Act](#) does not oust the jurisdiction of the Civil Court to decide the dispute in a case where parties to the Arbitration Agreement do not take appropriate steps as contemplated under sub- sections (1) & (2) of [Section 8](#) of the Act.

13. Secondly, there is no provision in the Act that when the subject matter of the suit includes subject matter of the arbitration agreement as well as other disputes, the matter is required to be referred to arbitration. There is also no provision for splitting the cause or parties and referring the subject matter of the suit to the arbitrators.

14. Thirdly, there is no provision as to what is required to be done in a case where some parties to the suit are not parties to the arbitration agreement. As against this, under [Section 24](#) of the Arbitration Act, 1940, some of the parties to a suit could apply that the matters in difference between them be referred to arbitration and the Court may refer the same to arbitration provided that the same can be separated from the rest of the subject matter of the suit. Section also provided that the suit would continue so far as it related to parties who have not joined in such application.

15. The relevant language used in [Section 8](#) is "in a matter which is the subject matter of an arbitration agreement", Court is required to refer the parties to arbitration. Therefore, the suit should be in respect of 'a matter' which the parties have agreed to refer and which comes within the ambit of arbitration agreement. Where, however, a suit is commenced - "as to a matter" which lies outside the arbitration agreement and is also between some of the

parties who are not parties to the arbitration agreement, there is no question of application of [Section 8](#). The words 'a matter' indicates entire subject matter of the suit should be subject to arbitration agreement."

14. In the instant case, as stated earlier, the Defendant No.1 is not a party to the arbitration proceedings and as such the Plaintiff cannot seek any relief against the Defendant No.1 in the said proceedings. The Defendant No.1 has not made a specific prayer before the Court for referring the dispute to the arbitration but has submitted to the jurisdiction of this Court.

15. Considering the above facts and in the light of the principles laid down by the Apex Court in Sukanya Holdings Pvt. Ltd. (supra), the plaint cannot be rejected on the ground of pendency of arbitration proceedings between the Plaintiff and the Defendant No.2 and /or on the ground of existence of an arbitration agreement between the Plaintiff and the Defendant No.1.

16. Under the circumstances and for the reasons stated hereinabove, the notice of motion is devoid of any merits and is accordingly dismissed.

(SMT. ANUJA PRABHUDESSAI, J.)