

**Appl.Nos. 917 & 918 of 2019
& A.Nos.1635 & 1636 of 2019
& A.Nos.2194 & 2195 of 2019**

R.SURESH KUMAR, J.

A.No.917 of 2019:

Mr.Vijay Mohan
Sole Proprietor
M/s. Agri Tech
Mukkada Junction
Puliyathumukku,
Ayathil PO, Kollam,
Kerala State.

Applicant

-vs-

1. M/s. Real Blue International Pvt. Ltd.
171, Tras Street,
#07-177 Union Building,
Singapore 079025
rep. by its Director
Mr.Manoj Soman

2. M/s. Emem Trading
Agri Products Exporters
B.P.2262, Monquepas,
Kaloum, Conakry,
rep. of Guinee
West Africa.

3. Safmarine India Pvt. Ltd.
Prestige Palladium Bayan,
III Floor, Greames Road,
Chennai 600 006.

4. Maersk Line India Pvt. Ltd.,
10/29, Thousand Lights West,
Thousand Lights,
Chennai 600 006.

5. V.O.Chidambaranar Port
Tuticorin, Tamilnadu
rep. by its Chairman

6. Roy Cashew Products
A Proprietary concern,
rep. b its Sole Proprietor
Mr. K.Roy, Nallia P.O.,
Kollam 691 515,
Kerala State.

7.S.R.Cashew
A Partnership Firm
rep.by its Managing Partner,
Mr.S.R.Sreemurukan
Maranadu P.O. Poreekkal,
Kollam, Kerala State.

(Respondents 6 & 7
impleaded as per order
dt: 14.02.2018 in A.Nos.1222
& 1223 of 2019)

.... Respondents

A.No.918 of 2019:

Mr.Vijay Mohan
Sole Proprietor
M/s. Agri Tech
Mukkada Junction
Puliyathumukku, Ayathil PO
Kollam, Kerala State.

Applicant

WEB -vs- COPY

1. M/s. Real Blue International Pvt. Ltd.
171, Tras Street,
#07-177 Union Building,
Singapore 079025
rep. by its Director
Mr.Manoj Soman

2. M/s. Emem Trading
 Agri Products Exporters
 B.P.2262, Monquepas,
 Kaloum, Conakry,
 rep. of Guinee
 West Africa.

3. Safmarine India Pvt. Ltd.
 Prestige Palladium Bayan,
 III Floor, Greames Road,
 Chennai 600 006.

4. Maersk Line India Pvt. Ltd.,
 10/29, Thousand Lights West,
 Thousand Lights,
 Chennai 600 006.

5. V.O.Chidambaranar Port
 Tuticorin, Tamilnadu
 rep. by its Chairman

6.S.R.Cashew
 A Partnership Firm
 rep.by its Managing Partner,
 Mr.S.R.Sreemurukan
 Maranadu P.O. Poreekkal,
 Kollam, Kerala State.

7. Roy Cashew Products
 A Proprietary concern,
 rep. b its Sole Proprietor
 Mr. K.Roy, Nallia P.O.,
 Kollam 691 515,
 Kerala State

(Respondents 6 & 7
 impleaded as per order
 dt: 28.02.2018 in A.Nos.1225
 & 1226 of 2019)

... Respondents

COMMON ORDER

The main applications, i.e., Apl.Nos.917 and 918 of 2019 were filed by one Vijay Mohan, who is the Sole Proprietor of M/s. Agri Tech, hereinafter referred to as, 'Agri Tech' for the relief of interim prohibitory order, prohibiting the first respondent and garnishee/respondents 2 to 5 and their men, agents or servants from delivering the cargo of 111.472 MTs. of Raw Cashew nuts in shells packed in four containers, under two Bills of Lading, to any other person other than the applicant, pursuant to the Sales Contract dated 15.12.2018, pending initiation and completion of Arbitration between the applicant and the first respondent.

A.No.918 of 2019 also filed by that Agri Tech, seeking for a direction, directing the respondents to deliver the Cargo of 111.47 MTs. of Raw Cashew cargo in shells packed in four containers, under the two Bills of Lading, pursuant to the Sale Contract dated 15.12.2018, to the applicant.

2. Since both these main applications i.e. A.Nos.917 and 918 of 2019 have been filed with the aforesaid prayer by the Agri Tech, at the time of moving the said application on 31.01.2019, a learned Judge of this Court, granted an Interim Prohibitory Order,

prohibiting the respondents/garnishee/respondents 2 to 5 from releasing/delivering the goods shipped by the second respondent to the applicant, through the third respondent, at fifth respondent's Port at Tuticorin, India, for a period of two weeks.

3. The said interim order granted by this Court on 31.01.2019, subsequently, has been extended and it still continued.

4. Since the said interim prohibitory order was granted by this Court on 31.01.2019, the third parties by name, Roy Cashew Products and S.R.Cashew had approached this Court, by filing applications seeking to implead themselves as party respondents in the main applications i.e., A.Nos.917 and 918 of 2019 on the ground that, they entered into a contract directly with the second respondent, for importing Cashews, accordingly, the Cashews with shells had been shipped, which reached the Tuticorin Port and before taking delivery of the goods, in view of the prohibitory interim order passed by this Court, as stated above on 31.01.2019, they are not able to take delivery of the goods, therefore, they are necessary parties to be heard in the main applications accordingly, they sought for impleadment.

5. This Court, after hearing them, impleaded them as party respondents in the main applications i.e., A.Nos.917 and 918 of 2019 as R6 [Roy Cashew] and R7 [S.R.Cashew].

6. Therefore, the R6, hereinafter referred to as 'Roy Cashew' and R7, hereinafter referred to as 'SR Cashew' have filed applications. A.No.1636/2019 and A.No.2194/2019 had been filed by Roy Cashew in A.No.917 of 2019 and A.No.918 of 2019 respectively, seeking to vacate the interim exparte prohibitory order dated 31.01.2019. Like that, Roy Cashew and SR Cashew, filed two applications i.e., A.Nos.1635 and 2195 in the main Apl.No.917 and 918 of 2019 respectively, seeking to vacate the exparte interim prohibitory order passed by this Court on 31.01.2019. That is how, all these six applications came to be filed.

7. All these applications have been heard together and are being disposed of by this common order.

WEB COPY

8. Since the issue is mainly raised with the main applications i.e., A.Nos.917 and 918 of 2019, where also, facts are one and the same and all parties have made submissions on those applications, if a decision is taken in A.Nos.917 and 918 of 2019, that will cover other four applications also.

9. For the sake of convenience, the array of parties at Apl.No.917 of 2019 and the facts mentioned therein and the documents filed by each of the parties in that application are taken into account. The applicant in Apl.No.917 of 2019 is Agri Tech., the first respondent is M/s. Real Blue International Private Limited hereinafter called as 'Real Blue', the second respondent is M/s.Emem Trading, hereinafter referred to as 'Emem', the third respondent is Safmarine India Private Limited and the fourth respondent is Maersk Line India Private Limited. Since the third and fourth respondents are Carriers, they were called as 'Carriers' and the fifth respondent is V.O.Chidambaranar Port where, the goods reached for discharge, hereinafter called as 'Tuticorin Port', and the sixth respondent is 'Roy Cashew' and the 7th respondent is 'SR Cashew' and they are called in that name, as stated above.

10. The case of the applicant is that, Real Bule entered into a Sales Contract with Emem for sale of 200 MTs. of Raw Cashew nuts to be delivered from Conakry, Guinea at Tuticorin, India in December 2018.

11. Thereafter, on 15.12.2018, the Agri Tech. entered into a back to back sales contract with Real Blue for the purchase of

the said 200 MTs. of Cargo at U.S.\$ 2,44,000/- and the delivery to be made in December 2018 at Tuticorin Port, India.

12. Pursuant to the said contract, the Real Bule remitted US \$ 1,12,500/- covering the value of the said Cargo weighing 111.472 MTs. which is the subject matter of the Arbitration.

13. On 24.12.2018, the Agri Tech. remitted US \$ 25,000/- to Real Blue for purchase of the said Cargo Cashew under Contract dated 15.12.2018 and the balance amount to be paid within three working days from the submission of original documents.

14. On 24.12.2018, Emem appropriated 111.472 MTs. of Raw Cashew nuts Cargo to the sales contract of the Real Blue dated 13.12.2018 after payment of the full sale consideration by Real Blue towards the said 111.472 MTs. by packing the Cargo in jute bags in a 40 foot Dry containers and removing it for the purpose of loading.

15. On the same day, i.e., on 24.12.2018, the said containers [2 in Nos.] containing 111.472 MTs. of Cargo appropriated towards the Sales contract of the Real Blue and the

Emem was loaded on Board in the Vessel GH BRICKFIELDER belongs to the third and fourth respondents i.e., Carriers. Therefore, the risk of the goods passes to the buyer, namely the Agri Tech and the Real Blue as the sale is a CFR Sale. Accordingly, the carriers are the agents of the buyer, i.e., Real Blue as well as Agri Tech.

16. On 29.12.2018, the Emem sent copies of two Bills of Lading, showing the Real Blue as nominee and the Agri Tech as notified party.

17. While so, on 16.01.2019 and 17.01.2019 the Emem had issued two original Bills of Lading with the same BL No. to the SR Cashew and Roy Cashew, with the same goods appropriated already by the Emem, which act of the Emem, according to the Agri Tech, is a fraudulent act, therefore, Agri Tech approached this Court, with the main applications i.e., A.Nos.917 and 918 of 2019 and sought for the relief as stated therein.

18. In support of the aforementioned contentions made on behalf of the Agri Tech. [applicant], it has filed documents such as the contract entered into between Agri Tech. and the Real Blue dated 15.12.2018 and the Sales Contract entered into between

Emem Trading and Real Blue International dated 13.12.2018 signed on 14.12.2018.

19. Also the Agri Tech. filed some e-mail communications between the Carriers and the Real Blue and the Real Blue and the Carriers dated 29.01.2019 and 30.01.2019.

20. Also the Agri Tech. filed photocopy of the copy of the Bills of Lading with BL.No.580149840 and 711519089. It is to be noted that, these two Bills of Lading are only copies and not original, i.e., photocopy of the original had been filed by the Agri Tech.

21. By relying upon these documents, Mr.S.Vasudevan, learned counsel appearing for the applicant/Agri Tech, submitted that, there has been a contract between the Agri Tech. and Real Blue before which, there was a contract between the Real Blue and Emem and in the copy of the Bill of Lading, the shipper name has been mentioned as 'Emem Trading' on account of Real Blue International Pvt. Limited, Singapore and it has also been mentioned in the Bills of Lading, the applicant is a notified party. According to the Bills of Lading, the goods were shipped on Board on 29.12.2018 and 30.12.2018. The counsel would further submit

that, pursuant to the contract, on 24.12.2018, a US \$ 24,792/- had been paid through the Agri Tech Bank to the Real Blue. Since this amount is the 50% advance as agreed between the Emem and Real Blue, by Agreement dated 13.12.2018 and also the Agreement between Agri Tech, by Agreement dated 15.12.2018.

22. The remaining amount would be paid by the Agri Tech on handing over the documents and in the meanwhile since the Carriers are the Tuticorin Port, which is the discharging place, when the Agri Tech was ready and willing to pay the balance amount and to take delivery of the goods, it came to know that, the original Bill i.e, Bill of Lading had not been supplied either by the Emem to the Real Blue or by the Carriers to the Real Blue. Therefore, the Real Blue, in turn was not able to supply the original bill of lading to the Agri Tech. and in the meanwhile, it also come to light that, some third parties on the basis of the alleged Original Bill of Lading said to have been given by Emem, they wanted to take delivery of the Cargo, from the Carriers and only at this juncture, the Agri Tech approached this Court, seeking for the Prohibitory Order.

23. In this context, it is the further submission of the Agri Tech that, since there is an Arbitration clause between the Agri

Tech and Real Blue in the Agreement dated 15.12.2018, the Agri Tech, before referring the matter to the Arbitrator, in order to save the goods/cargo, which reached the destination and to take delivery of the same and also to prevent any third parties from taking delivery of the Cargo, for making an interim arrangement, invoked Section 9 of the Arbitration and Conciliation Act, hereinafter referred as 'Arbitration Act', has filed these applications.

24. Mr.M.B.Ragavan, learned counsel for the Real Blue has infact supported the case of the Agri Tech and would state that, there has been a contract between the Real Blue and Emem for the supply of Cashew as stated above, and the said contract was concluded between them on 13.12.2018, signed by the parties on 14.12.2018 and only pursuant to the said contract, the Real Blue had a back to back contract to the Agri Tech on 15.12.2018 and pursuant to the said contract, the Agri Tech, paid the said sum of US \$ 24,972/- through its bank and the same had been paid to the Emem, who is the seller and after having realised the said amount and after having given the copy of the Bill of Lading, where, it has been specifically mentioned that, the goods were shipped on 29.12.2018 and 30.12.2018 under two Bills of Lading referred to above and the notified party has been shown as Agri Tech and the Bills of Lading were issued to Emem on account of Real Blue.

25. Learned counsel for Real Blue has further argued that, once the goods have been shipped by the seller with appropriation and the same has been handed over to the Carriers or Bailee, then, the transaction has been completed and therefore, it became the risk of the buyer to take delivery of the goods ofcourse, after paying the remaining amount payable to the worth of the goods/cargo.

26. In this context, the learned counsel for the Real Blue has very much relied upon certain provisions of the Sale of Goods Act, 1930 especially, Section 18, Section 23, Section 25 and Section 33 as well as Section 39.

27. Though submissions have been made by the learned counsel for the Real Blue by relying upon these provisions of Sale of Goods Act, the learned counsel has very much relied upon the Section 23 of the Sale of Goods Act which reads thus:

"Sale of unascertained goods and appropriation.

23. (1) Where there is a contract for the sale of unascertained or future goods by description and goods of that description and in a deliverable state are unconditionally appropriated to the contract, either by the seller with the assent of the buyer or by the buyer with the assent of the seller, the property in the goods thereupon passes to the buyer. Such assent may be express or

implied, and may be given either before or after the appropriation is made.

(2) *Delivery to carrier*.—Where, in pursuance of the contract, the seller delivers the goods to the buyer or to a carrier or other bailee (whether named by the buyer or not) for the purpose of transmission to the buyer, and does not reserve the right of disposal, he is deemed to have unconditionally appropriated the goods to the contract."

28. He further submitted that, if there is a contract for sale of unascertained or future goods and it is unconditionally appropriated to the contract, either by the seller with the assent of the buyer or by the buyer with the assent of the seller, then the goods thereupon passes to the buyer and such assent, may be expressed or implied. Therefore, by issuance of Bill of Lading, after shipment of the goods on 29th and 30th December 2018, and unconditional appropriation to the contract, since it has been established on account of Real Blue International, where, the notified party also has been mentioned as Agri Tech, then, the goods passes to the buyer i.e., either Real Blue or Agri Tech and therefore, the Real Blue has got every right to get discharge of the goods or take delivery of the goods from the Carriers.

29. Per contra, Mr.K.Chandrasekaran, learned counsel appearing for the Emem has raised the preliminary objection that, the present main applications i.e., A.Nos.917 and 918 of 2019 are

<http://www.judis.nic.in> not maintainable before this Court, on two grounds.

30. According to him, the first ground was that, there has been a contract between Emem and Real Blue dated 13.12.2018 and the said contract, does not contain any Arbitration clause and if at all, any contract between the Real Blue and Agri Tech, as claimed by them on 15.12.2018, and the said contract between them is having an Arbitration clause, on the strength of the Arbitration Clause available in the contract between the Agri Tech and Real Blue, the Emem cannot be brought in the dispute and on that strength, no Arbitration Proceedings could be initiated either at the instance of Agri Tech or at the instance of the Real Blue and when there is no scope for any Arbitration Proceedings, absolutely, there is no scope for invocation of Section 9 of the Arbitration Act.

31. The second ground raised by the learned counsel as a preliminary objection is that, even the contract between the Real Blue and Agri Tech dated 15.12.2018, though having an Arbitration clause, the place of Arbitration is restricted at Singapore, that to, at Singapore International Arbitration Center, i.e., SIAC. In this context, he relied upon the clause 18 of the Contract between Agri Tech and Real Blue which reads thus:

" 18.Arbitration: Any dispute arising out or in connection with this contract, including any question regarding its existence, validity, or termination, shall be

referred to and finally resolved by arbitration in Singapore in accordance with the Arbitration Rules of the Singapore International Arbitration Centre ('SIAC Rules') for the time being in force which rules are deemed to be incorporated by reference into this clause."

32. Assuming without admitting that, there has been an Arbitration Agreement between the Agri Tech and Real Blue and if at all, any dispute arises out of the said Agreement, parties can refer the matter to the International Arbitration Centre i.e., SIAC that too by following SIAC Rules framed thereunder. When that being the position, in both ways, the Agri Tech cannot maintain an application before this Court, under Section 9 of the Arbitration Act therefore, for want of jurisdiction, in the absence of any agreement between the parties and in the absence of any expiry, Arbitration Agreement empowers the Courts of India and confer the jurisdiction before this Court, these applications could not have been entertained by this Court, he contended.

33. That apart, the learned counsel for the Emem also submitted on merits of the case that, the Emem and Real Blue has entered into a Sales Contract on 13.12.2018 accordingly, 50% of advance amount against shipped on Board, Bill of Lading should have been paid by Real Blue for the purchase of Raw Cashew with

<http://www.judis.nic.in> shell, which is originated from Conakry, Guinea for 200 MTs. He

would further submit that, as per the said contract one Baiju Ganesh had been acting as the agent of the Real Blue and it is he, who brought about the contract between the Emem and Real Blue and as an agent of Real Blue, that Baiju Ganesh owed a sum of US \$ 99,750/- and after issuance of several emails, that Baiju Ganesh admitted the outstanding and agreed to pay the same on or before 10.11.2018, i.e., US \$ 40,000/- and on or before 17.11.2018 US \$ 30,000/- and US \$ 29750/-before the first week of December. That Baiju Ganesh also agreed that, until two payments are cleared, Emem can hold the documents, since the Real Blue has not cleared the outstanding as admitted by his agent, the original bill of lading and other documents were given to the first respondent and accordingly, an independent contract had been entered into between Emem and the Roy Cashew and SR Cashew. Accordingly, the original Bills of Lading had been issued to them, therefore, based on the copy of the Bill of Lading, without complying with their contractual obligation on the part of the Real Blue, as has been agreed upon through their agent i.e., Baiju Ganesh, neither the Real Blue nor the Agri Tech, can claim the Cargo.

34. In this regard, the learned counsel relied upon the paragraphs 10 of the Counter affidavit filed by Emem which reads thus:

"It is often repeated in the affidavit that the Applicant will be put to great loss this is false. He has to work out his remedy against the 1st respondent if the goods belonged to him but it is not so. One Mr. Baiju Ganesh has been acting as an agent of the 1st respondent. It is he who brought about the contract between me and 1st respondent. As an agent of 1st respondent he owned a sum of US \$ 99,750/-. After issuance of several emails, Mr. Baiju Ganesh replied that he admits the outstanding and agreed to pay the same at US \$ 40,000/- on or before 10.11.2018, US \$ 30,000/- on or before 17.11.2018 and US \$ 29,750/- first week of December. He has also agreed that until two payments are cleared I can hold the documents. Since the 1st respondent has not cleared the outstanding as admitted by his agent the original bill of lading and other documents were not given to the 1st respondent. The Bill of Lading split into two, the two invoices, the Certificates of Origin and packing list etc. were issued in favour Roy Cashew Products and SR Cashews, who have filed Bill of Entry and necessary documents for clearance and the Customs has also cleared the Cargo and but for the order of an injunction by this Hon'ble Court, the delivery would have been effected in favour of the concerns."

35. The Roy Cashews and SR Cashews, i.e., R6 and R7 filed the other four applications as stated above, seeking to vacate the exparte interim prohibitory order, passed by this Court, on 31.01.2019. In support of their applications, they have filed a documents set, by way of typed set of papers, where, the Roy and SR Cashews, filed a Proforma Invoice dated 22.11.2018 and it was

entered into between the Emem Trading and SR Cashew for purchase of Raw Cashew nuts with Shell of 100 MTs. and the price fixed was US \$ 1,225/- per MT. total value is US \$ 1,22,500/-. The payment details was 15% advance and the 85% CAD i.e, Cash Against Documents. Accordingly, on 28.11.2018, an amount of US \$ 13,000 had been paid to Emem through Bank of SR Cashews i.e., Catholic Syrian bank, Cochin. Thereafter, on 16.01.2019, Bill of lading dated 16.01.2019, was issued by carrier on behalf of Emem Trading where, the consignee name had been mentioned as SR Cashew and the notified party name also has been shown as SR Cashew. The date of shipment on Board was mentioned as 30.12.2018. Like that, yet another Proforma Invoice dated 03.12.2018 was filed, where, it was between Emem Trading and Roy Cashew for the purchase of Raw Cashew nuts with shell of 110 MTs. and the rate as well as payment details etc., are one and the same, as that of SR Cashews. Payment accordingly, was made by Roy Cashew on 10.12.2018 for a sum of US \$ 13475/- to and in favour of Emem Trading. Accordingly, Bill of lading No.580149840 was issued on 17.01.2019 and the date of shipment on Board was 29.12.2018. In respect of both SR Cashew and Roy Cashew, the Emem Trading issued commercial invoice on 31.12.2018 and those documents have been filed in the typed set of papers filed by SR Cashews and Roy Cashews.

36. By relying upon these documents, the learned counsel for SR Cashew and Roy Cashew submitted that, there had been an independent contract both by SR Cashews and Roy Cashews, with Emem, by way of Proforma Invoice or Purchase contract. In so far as SR Cashew is concerned, the contract claimed to have been entered between them on 22.11.2018 and for Roy Cashew, the contract was entered into on 03.12.2018. Thereafter, as per the payment terms as agreed, the amount has been paid to Emem pursuant to which, Commercial Invoices were also issued ofcourse Original Bills of Lading also had been issued where, in respect of SR Cashews, the Bill of Lading was issued on 16.01.2019 with BL No.711519089 and in respect of Roy Cashew Bill of Lading was issued on 17.01.2019 with BL.No.580149840.

37. The learned counsel therefore, submitted that, when there has been a clear contract between the Emem and these Cashews separately, pursuant to which, amount as agreed between the parties had been paid in advance and the remaining amount would be paid at the time of production of document i.e., CAD [Cash against documents] and the goods have been shipped on 29th and 30th of December 2018 and the Original Bills of Lading had been issued on 16.01.2019 and 17.01.2019 respectively, therefore, with

the strength of all these documents, when the Roy Cashew and SR Cashews were about to make the remaining payment and to take delivery of the goods, from the carrier, which reached at the Tuticorin Port, they came to know that, a Prohibitory Injunction order has been passed by this Court, in the main applications filed by Agri Tech and therefore, they approached this Court, for getting impleaded themselves and after getting impleaded, have filed these applications, to vacate the Prohibitory Order passed by this Court on 31.01.2019, in the main applications.

38. Also Mr.P.Giridharan, learned counsel for the third and fourth respondents/Carriers has filed documents and made submissions that, the third and fourth respondents have issued Booking confirmation Note, where, the Bill number corresponding to the Bill of Lading has been given on 27.12.2018 where, it has been mentioned that, the booking party is Emem Trading and the Price Owner is Emem Trading. The original Bill of Lading dated 16.01.2019 and 17.01.2019 has been issued only in favour of Roy Cashew and SR Cashew as consignee/notified party and once the goods reached the discharging port at Tuticorin, the carriers cannot retain the goods, when the consignee seek of delivery of the same on production of Original documents, either it will hand over the goods to the Carrier with penalty as well as demurrage and those

amounts are being charged by the Port, will mount burden on the Carrier and therefore, the Prohibitory order passed by this Court on 31.01.2019 has to be vacated and the carrier shall be permitted to deliver the goods to the consignee, which is having valid document.

39. In this regard, the learned counsel further submitted that, on 26.01.2019 cargo arrived, notices have been issued, despite the same, Roy Cashew or SR Cashew could not take delivery of the goods because of the Prohibitory Order passed by this Court, therefore, the said order may be vacated at the earliest.

40. I have heard the learned counsel appearing for the parties, who made a detailed submissions supporting their respective cases.

41. Since three issues were raised legally in these applications, which are to be decided by this Court in the given facts and circumstances of the case, ofcourse, by taking the judicial prudence sought for, by the learned respective counsel.

42. The first issue raised by the learned counsel for the parties except Agri Tech and Roy Cashew was that, these applications are not maintainable before this Court, as Section 9

cannot be invoked by the Agri Tech in the absence of any Arbitration Agreement between the parties.

43. In order to dwell into these issues, let me take first, as to whether this Court has got jurisdiction, to entertain Section 9 application or not.

44. As per the document filed by the parties, there has been a Sales Contract/Agreement between Emem and Real Blue dated 13.12.2018. However, the said Sales Contract does not have any Arbitration Clause.

45. However, in the agreement between Agri Tech and Real Blue dated 15.12.2018 under Clause 18 there is an Arbitration Clause under which, any dispute arisen in connection with the contract, it shall be referred to and to be finally resolved by Arbitration in Singapore in accordance with the Singapore International Arbitration Center Rules.

46. Therefore, it is quiet clear that, there has been no Arbitration Agreement between Agri Tech, with any other party herein except the Real Blue, even in the said Arbitration clause containing in the contract between them, the place of Arbitration is

restricted at Singapore and the Rules to be followed in the Arbitration Proceedings is SIAC Rules.

47. In this context, learned counsel made submissions stating that, under Section 2(2) of the Arbitration Act, where, the first part will apply in respect of the Arbitration to be conducted outside India. In this context, they relied upon very much Section 2(2) of the Arbitration Act, which reads thus:

" (2) This part shall apply where the place of arbitration is in India:

[Provided that subject to an agreement to the contrary, the provisions of Sections 9, 27 and clause (a) of sub-section (1) and sub-section (3) of section 37 shall also apply to international commercial arbitration, even if the place of arbitration is outside India, and an arbitral award made or to be made in such place is enforceable and recognised under the provisions of Part II of this Act."

48. Section 9 of the Arbitration Act provides that, any party before or during the Arbitration Proceedings or at any rate, after making of the Arbitral Award, before it is enforced in accordance with Section 36, that too, a Court, by making interim arrangement, which includes a interim injunction or appointment of receiver under Section 9(1) (ii)(d) of the Act.

49. Learned counsel for Emem has very much relied upon SIAC Rules 2016, especially Rule 30, which reads thus:

"Rule 30: Interim and Emergency Relief:

30.1 The Tribunal may, at the request of a party, issue an order or an Award granting an injunction or any other interim relief it deems appropriate. The Tribunal may order the party requesting interim relief to provide appropriate security in connection with the relief sought.

30.2 A party that wishes to seek emergency interim relief prior to the constitution of the Tribunal may apply for such relief pursuant to the procedures set forth in Schedule 1.

30.3 A request for interim relief made by a party to a judicial authority prior to the constitution of the Tribunal, or in exceptional circumstances thereafter, is not incompatible with these Rules."

50. By relying upon Rule 30 of the SIAC Rules, the learned counsel for Emem submits that, if at all any interim arrangement to be made or sought for, the same shall be made before the International Arbitration Center at Singapore and not before this Court, invoking Section 9 of the Act. He would also submit that, in the absence of any contract between the Emem and Agri Tech, the Agri Tech cannot invoke Section 9 of the Arbitration Act, as the Agri Tech cannot also refer the matter for Arbitration in order to resolve the dispute between Agri Tech and other roping the

Emem. In this context, the learned counsel for the Emem also submit that, it is not a Garshinee as claimed by the Agri Tech and it is the seller which had independently entered into a contract with Real Blue and also entered into separate contract with Roy Cashew and SR Cashew and therefore, in order to vary the terms of said contract only, parties entered into between the said contract to entertain the same, as admittedly, there is no privity of contract between Agri Tech and Emem. In support of this contention, the learned counsel for Emem, relied upon the judgment of the Honourable Supreme Court reported in 1966 (2) SCR 845 where, the learned counsel relied upon the paragraphs 3 and 4 of the said judgments.

51. However, in order to meet the said contention, the learned counsel for Emem, the learned counsel for Agri Tech relied upon the following decisions:

1) Wheels India Limited having its Registered Officer at 37, Mount Road, Madras-6 vs. Khemchand Rajkumar and another [C.S.No.219 of 1966] reported in 1970 MLJ 648;

2) Bhatia International vs. Bulk Trading S.A. and Another reported in 2002 (4) SCC 105;

3) Raffles Design International India Pvt. Ltd. and another vs. Educomp Professional Education Limited & Others reported in 2016 SCC Online Del. 5521;

52. In the first judgment i.e., 1970 MLJ 648, the learned counsel has relied upon the following passage:

"Issue No. 7.--The point for consideration is whether this Court has jurisdiction to try the suit. The second defendant is admittedly a foreign company carrying on business and having its office in the United States of America and is not in the usual course liable to the jurisdiction of the Madras High Court : but it is well-settled international law that, where a foreign company had chosen to appear before the Court of another Country and also to plead on the merits of the case, the foreign company must be deemed to have voluntarily submitted to the jurisdiction of this Court, though the company had also raised a plea that the Court had no jurisdiction to entertain the suit against it. Venkataraman, J., has, in Anant Narayan v. Massey Ferguson Ltd. (1965) 1 Comp. L.J. 269 : (1965) 1 M.L.J. : 550, had affirmed the said principle and had elaborately set out the relevant passages from the text books Private International Law by Cheshire and Dicey's Conflict of Laws and the various decisions both English and Indian on this aspect. Dicey has stated at page 171 of his book that the Court has jurisdiction in an action where any person who has by his conduct precluded himself from objecting to the

jurisdiction of the Court and the rule is based on the principle of submission. This rule is recognised as stated above by the decision of Venkataraman, J., in *Anant Narayan v. Massey Ferguson Ltd.* (1965) 1 Comp. L.J. 269 : (1965) 1 M.L.J. : 550, as well as in the two earlier decisions of this Court : *Ramanathan Chettiar v. Kalimuthu Pillai* (1914) I.L.R. 37 Mad. 163, and *Rama Ayyar v. Krishna Pattar* (1916) 30 M.L.J. 148 : I.L.R. 39 Mad. 733. Admittedly, in the present instance, the second defendant had appeared before this Court and pleaded on the merits and there is therefore no substance in the issue that this Court has no jurisdiction to entertain the suit. The issue is answered accordingly."

53. In *Bhatia International's case*, the learned counsel relied upon the following paragraphs:

"31. If a party cannot secure, before or during the pendency of the arbitral proceedings, an interim order in respects of items provided in *Section 9(i) & (ii)* the result may be that the arbitration proceedings may themselves get frustrated e.g. by non appointment of a guardian for a minor or person of unsound mind or the subject matter of the arbitration agreement not being preserved. This could never have been the intention of the Legislature.

32. To conclude we hold that the provisions of Part I would apply to all arbitrations and to all

proceedings relating thereto. Where such arbitration is held in India the provisions of Part I would compulsory apply and parties are free to deviate only to the extent permitted by the derogable provisions of Part I. In cases of international commercial arbitrations held out of India provisions of Part I would apply unless the parties by agreement, express or implied, exclude all or any of its provisions. In that case the laws or rules chosen by the parties would prevail. Any provision, in Part I, which is contrary to or excluded by that law or rules will not apply."

54. In 2016 SCC Online Del. 5521, the learned counsel relied upon the paragraphs 100 which reads thus:

"The SIAC Rules are clearly in conformity with the UNCITRAL Model Law and permit the parties to approach the Court for interim relief. As pointed out earlier, UNCITRAL Model Law expressly provides for courts to grant interim orders in aid to proceedings held outside the State. And, the proviso to [Section 2](#) (2) of the Act also enables a party to have recourse to [Section 9](#) of the Act notwithstanding that the seat of arbitration is outside India. Thus, the inescapable conclusion is that since the parties had agreed that the arbitration be conducted as per SIAC Rules, they had impliedly agreed that it would not be incompatible for them to approach the Courts for interim relief. This would also include the Courts other than Singapore. It is relevant to mention that IAA is based on UNCITRAL

Model Law and SIAC Rules are also complimentary to IAA/UNCITRAL Model law."

55. On perusal of these decisions, two things are clear. One is that, as per Section 2 (ii) of the Arbitration Act part (i) of the Act would apply to all Arbitrations and all Proceedings. If such Arbitration is held in India, the provisions of part one would completely apply and in case of International Commercial Arbitration held outside India, provisions of part (ii) would apply unless, the purpose of agreement exclude all or any of the provisions.

56. Secondly, when there is SIAC Rules and Clause 18 of the Agreement between the Agri Tech and Real Blue restricts that the place of Arbitration is only Singapore and the SIAC Rules would apply and in the SIAC Rules, especially, under Rule 30, no interim arrangement has to be made, parties can approach only the Tribunal at Singapore where under Schedule-I, by appointing Emergency Arbitrator, interim arrangement can be made even before the matter is referred to Arbitrator, where such an interim arrangement can be sought for before this Court by invoking Section 9 of the Act.

57. The answer is very simple because, Clause iii of

Rule 30 of SIAC Rules, makes it very clear that, a request for interim relief made by any party to judicial authority even prior to the constitution of the Tribunal or in exceptional circumstances thereafter, such an interim relief sought for by the party is not in compatible with the SIAC Rules.

58. Therefore, it makes unambiguously clear that, even though SIAC Rules is very exhaustive where, any party can approach the SIAC for interim Arbitrator, even for making interim order/interim arrangements, notwithstanding the same, if any party with a request of the interim relief approach the judicial authority even prior to the constitution of the Tribunal or even thereafter, in case of the exceptional circumstances, such approach, cannot be considered to be in compatible with the Rules.

59. Here in the case in hand there is an Arbitration Agreement between the Agri Tech and Real Blue and as per Clause 18 of the Agreement, issues can be referred to International Arbitration Center at Singapore and the SIAC Rules alone, will be applicable. However, before constitution of the Arbitral Tribunal at Singapore, the party can approach Judicial Authority means, Law Courts, such approach, cannot be treated as incompatible with the Rules. There is no embargo or prohibition under the SIAC Rules

against any party of the Arbitration Agreement to approach Courts of Law/ Judicial Authority, seek for interim relief, even prior to the constitution of the Tribunal.

60. Therefore, the SIAC Rules does not prohibited the Agri Tech to approach this Court, by filing Section 9 Application. This in fact has been made very clear by the Delhi High Court in Raffles Design International India Pvt. Limited's case vide paragraphs 10 and 11, which has already been extracted herein above.

61. The other objection raised by Emem was that, since there has been no Arbitration Agreement between Emem and Agri Tech, whether the Agri Tech is right to invoke Section 9 and file these applications seeking Prohibitory Order against Emem also.

62. In this context, it is to be noted that, Section 9 especially under Section 9(1)(ii)(d) interim injunction can be sought for, by the party as an interim measure, before the Court of Law. Here in the case in hand, the Cargo is being claimed by two parties, one is Agri Tech another is SR Cashew in respect of one set of Cargo and Roy Cashew in respect of another set of Cargo and in that circumstances, Agri Tech approached this Court, seeking for

Prohibitory Injunction under Section 9(1)(ii)(d) and this kind of interim measure can be asked by any of the party, by approaching the judicial forum/Court of Law, strictly by invoking Section 18 of the Arbitration Agreement between the Agri Tech and Real Blue. Therefore, such a invocation of Section 9 of Agri Tech against Real Blue, cannot be termed to be outside the scope of Arbitration and therefore, this Court, prima facie finds that, invocation of Section 9 of the Agri Tech is sustainable.

63. At the same time, since there is no privity of contract between Agri Tech and Emem and even the contract between the Real Blue and Emem does not contain any Arbitration Clause, whether Emem can be roped in these proceedings, is yet another question.

64. In this context, it is the case of the Agri Tech that, Emem has been shown only as guarantor and since the goods have already been appropriated in the name of the Agri Tech as per the Bill of Lading [Copy of Bill of Lading], the Agri Tech claimed right over the Cargo for taking delivery, where the Emem has only been shown as Garnishee along with Carriers. Therefore, these applications can be maintained before this Court and in view of the aforesaid judgments, especially, in the context of Section 2(ii) of

the Arbitration and Conciliation Act, this Court has got jurisdiction to entertain this application for making interim arrangement strictly within Section 9, especially, under Section 9(1)(ii)(d) of the Arbitration Act and therefore, this Court finds the issue of jurisdiction of this Court, for entertaining these applications in favour of the applicant i.e., Agri Tech.

65. On the side of the merits of the case is concerned, though the learned counsel for the Agri Tech as well as Real Blue made a unified submissions that, once the agreement had been entered into between the Real Blue and Emem, pursuant to which, further agreement had been entered into between the Real Blue and Agri Tech and both these agreements had been made only to purchase the Cashews i.e., Raw Cashews from the seller i.e., Emem by the buyer i.e., Real Blue in turn, from the buyer Agri Tech and these factors have been reflected in these two agreements between the parties dated 13.12.2018 and 15.12.2018 and also, the same have been reflected in the two Bills of Lading where, it has been specifically mentioned on account of Real Blue, the Bill of Lading was issued, where, the Agri Tech has been shown as notified party, the Agri Tech is entitled to get delivery of the Cargo, whether the said exercise was possible, that to, by way of an interim arrangement by this Court, is yet another question on merits to be

decided, in these applications.

66. In support of their case, i.e., the case of the Agri Tech and Real Blue, the learned counsel relied upon Section 23 of the Sale of Goods Act, 1930, which has already been extracted herein above.

67. In this context, the learned counsel relied upon the decision in Carona Sahu Co., Pvt. Ltd., vs State of Maharashtra reported in 1966 (2) SCR 845: AIR 1966 SC 1153 where, they very much relied upon the paragraphs 3 and 4 which reads thus:

"3. The first question that arises for determination in this case is, whether, on the facts and circumstances of the case, the property in the rubber consignments passed to the appellant in Cochin i.e. outside the territorial limits of the State of Bombay. In this connection the facts found by the Sales Tax Tribunal are that the Cochin sellers had their agents in Bombay who received the orders of the appellant and arranged for the shipping of the goods. In accordance with these orders the goods were shipped by the Cochin sellers from Cochin to Bombay. The Bills of Lading were in the name of the sellers as consignors and consignees. The invoices however showed that the goods were shipped at the "risk and on account of M/s Carona Shau and Company (P) Ltd." The insurance charges were borne by the appellant who also paid freight and other charges. The Bills of Lading were sent by the sellers

through the bank to be delivered to the buyers in Bombay on payment of the price of the goods. In view of these facts, the High Court held that the property was intended by the parties to pass in Bombay and the endorsement in the invoice that the goods were being shipped "on account of and at the risk of the buyers" did not mean anything more than that the insurance charges were to be paid by the buyers. On behalf of the appellant, Mr Donde submitted that the property in the rubber consignments had passed to the appellants in Cochin. In our opinion, there is no warrant for this submission and the view taken by the High Court is correct.

4. The law is well established that in the case of contract for sale of unascertained goods the property does not pass to the purchaser unless there is unconditional appropriation, of the goods in a deliverable state to the contract. In the case of such a contract, delivery of the goods by the vendor to the common carrier is an appropriation sufficient to pass the property. But there is a difference in the legal effect of delivering goods to a common carrier on the one hand and shipment on board a ship under a bill of lading on the other hand, where goods are delivered on board of a vessel to be carried, and a bill of lading is taken, the delivery by the seller is not delivery to the buyer, but to the captain as bailee for delivery to the person indicated by the bill of lading. The seller may therefore take the bill of lading to his own order. The effect of this transaction is to control the possession of the captain and make the captain accountable to deliver the goods to the seller as the holder of the bill of lading. The bill of lading is the symbol of property,

and by so taking the bill of lading the seller keeps to himself the right of dealing with property shipped and also the right of demanding possession from the captain, and this is consistent even with a special term that the goods are shipped on account of and at the risk of the buyer. In *Gabarron v. Kreeft* [(1875) LR 10 Ex 274] Lord Parker laid down the principle as follows:

"The English cases, however, on which the Sale of Goods Act was founded seem to show that the appropriation would not be such as to pass the property if it appears or can be inferred that there was no actual intention to pass it. If the seller takes the bill of lading to his own order and parts with it to a third person, not the buyer, and that third person, by possession of the bill of lading, gets the goods, the buyer is held not to have the property so as to enable him to recover from the third party, notwithstanding that the act of the seller was a clear breach of the contract."

Sections 23 and 25 of the Indian Sale of Goods Act are identical in language to the corresponding provisions of the English Sale of Goods Act. Section 25 states as follows:

"(1) Where there is a contract for the sale of specific goods or where goods are subsequently appropriated to the contract, the seller may, by the terms of the contract or appropriation, reserve the right of disposal of the goods until certain conditions are fulfilled. In such case, notwithstanding the delivery of the goods to a buyer, or to a carrier or other bailee for the purpose of transmission to the buyer, the property in the goods does not pass to the buyer until the conditions imposed by the seller are fulfilled.

(2) Where goods are shipped and by the bill of lading the goods are deliverable to the order of the seller or his agent, the seller is prima facie deemed to reserve the right of disposal."

68. They also relied upon the Division Bench Judgement of Allahabad High Court, in the case of **Hindustan Lever Ltd., and another vs. State of U.P. and Others** reported in **1999 SCC Online Allahabad 191**, paragraphs 27 to 29 of the said judgement reads thus:

" 27. A perusal of [Section 4\(3\)](#) clearly indicates that for a sale to take place, there must be a transfer of property. As to when the transfer of property takes, we have to go to Chapter III of the Sale of Goods Act. [Section 18](#), which is contained in Chapter III, states "where there is a contract for the sale of unascertained goods, no property in the goods is transferred to the buyer unless and until the goods are ascertained". [Section 19](#) of the Sale of Goods Act states "(1) Where there is a contract for the sale of specific or ascertained goods, the property in them is transferred to the buyer at such time as the parties to the contract intend it to be transferred. (2) For the purpose of ascertaining the intention of the parties regard shall be had to the terms of the contract, the conduct of the parties and the circumstances of the case. (3) Unless a different intention appears, the rules contained in [Sections 20 to 24](#) are rules for ascertaining the intention of the parties as to the time at which the property in goods is to pass to the buyer". [Section](#)

20 of the Sale of Goods Act states "where there is an unconditional contract for the sale of specific goods in a deliverable state, the property in the goods passes to the buyer when the contract is made and it is immaterial whether the time of payment of the price or the time of delivery of goods, or both, is postponed." Section 23 of the Sale of Goods Act states "(1) Where there is a contract for the sale of unascertained or future goods by description and goods of that description and in a deliverable state are unconditionally appropriated to the contract, either by the seller with the assent of the buyer or by the buyer with the assent of the seller, the property in the goods thereupon passed to the buyer. Such assent may be express or implied, may be given either before or after the appropriation is made, (2) where, in pursuance of the contract, the seller delivers goods to the buyer or to a carrier or other bailee (whether by the buyer or not) for the purpose of transmission to the buyer, and does not reserve the right of disposal, he is deemed to have unconditionally appropriated the goods to the contract.

28. The expression specific goods has been defined in Section 2(14) of Sale of Goods Act to mean "goods identified and agreed upon at the time a contract of sale is made".

29. The facts of the present case reveal that what is transferred from the factory to the Company Depots (where the C and F Agents are located) are unascertained goods and not ascertained goods. The goods becomes ascertained only after out of A.W.C. 108 the stock lying with the C and F Agent at the depot certain specifications out of the stock are

separated for being sold. To give illustration, suppose there are 10,000 tins of ghee lying at the depot with the C and F Agents. If an order of 100 tins of ghee are received, then it is only when out of this stock of 10,000 tins of ghee (which are unascertained goods). 100 specific tins are taken out of the stock. Under [Section 23\(1\)](#) of the Sale of Goods Act. it is only when these specific 100 tins are appropriated to the contract that the sale takes place. Under [Section 23\(2\)](#). it is when the C and F Agents delivers these 100 specific tins to the carrier (which may be a truck or otherwise), goods can be said to be unconditionally appropriated to the contract. These provisions clearly show, that the exact point of time when the sale takes place is when the C and F Agents deliver certain specific tins of ghee to the carrier (truck or otherwise) which is meant for carrying the goods to the purchaser. Thus sales take place at the depot of the C and F Agents because it is at the moment of handing over the goods to the carrier for transportation to the buyer that the appropriation of the goods to the contract (i.e., the sale) takes place. It may be noted that [Section 18](#) to the [Sale of Goods Act](#) makes it clear that there is no question of transfer of unascertained goods. The transfer can only be of ascertained goods. In the present case, the goods which are transported from the factory are unascertained goods because out of the total stock being carried in the truck from the factory, it is not clear which particular tins are being sold to which particular buyer. The facts of the present case clearly show that in fact unascertained goods are carried from the factory to the depots, and it is only at the depot that out of the stock certain specific tins are separated on,

receiving order from the redistribution stockist for sale of those specific tins."

69. They also relied upon, 2009(6) SCC 52 in the matter of Commissioner of Central Exercise, Noida vs Accurate Meters Limited. The relevant paragraph, they relied upon is para 16, which reads thus:

"**16.** In *Associated Strips Ltd. v. CCE* [*Associated Strips Ltd. v. CCE*, (2002) 143 ELT 131 (Tri) : (2002) 49 RLT 506] the Tribunal distinguishing its earlier decision in *CCE v. Prabhat Zarda Factory Ltd.* [(2000) 119 ELT 191 (Tri)] , held: (*Associated Strips Ltd. case* [*Associated Strips Ltd. v. CCE*, (2002) 143 ELT 131 (Tri) : (2002) 49 RLT 506] , ELT pp. 138-39, paras 18-19)

"**18.** In the case of *Associated Strips Ltd.* the goods manufactured are inspected by the representative of the buyer (Electricity Board) and thereafter the manufacturer had to mark the name of the buyer on the poles before they are handed over to the transporter. So also in the case of *Mauria Udyog Ltd.* the LPG cylinders manufactured by the appellant are inspected by the representatives of the oil companies. After getting test certificate from the Bureau of Indian Standards cylinders are to be marked with the name of the oil companies before they are handed over to the transporter for the purpose of transmission to the buyer. In the light of the provisions contained in Section 23, it has to be taken that the goods are unconditionally appropriated to the contract when the above procedure was followed and goods handed over to the carrier thus passing on the property in the goods to the buyer.

19. We may also refer to the provisions contained under Section 39 of the Sale of Goods Act which refers to the legal effect of delivery of the goods to a carrier by the seller. It is provided that where, in pursuance of a contract of sale, the seller is authorised or required to send the goods to the buyer, delivery of the goods to a carrier, whether named by the buyer or not, for the purpose of transmission to the buyer, is prima facie deemed to be a delivery of the goods to the buyer (*Bibhuti Bhusan*

Bose v. National Coal Trading Co. [AIR 1966 Pat 346]). Admittedly, in the present cases after appropriation of the goods to the contract they were delivered to the carrier as per terms of the contract. Therefore, delivery to the carrier has to be taken as delivery to buyer. Revenue has no case that the goods are not sent to the buyer through carrier. On the other hand, as mentioned earlier, the only contention raised is that since the insurance of the goods in transit has been taken by the seller, the seller is deemed to hold the title to the goods in transit. At this juncture we may point out that in the case of Mauria Udyog Ltd. there is no insurance taken by the seller."

70. By relying upon these decisions, in the context of Section 23 of the Sale of Goods Act, the learned counsel for the Agri Tech and Real Blue submitted that, once the goods were appropriated unconditionally by the seller, with the consent of buyer, then the right of the goods have been passed by the buyer, who shall be at liberty to take delivery of the goods, at the discharging point.

71. This Court, on perusal of these decisions referred to above is of the considered view that, absolutely there can be no quarrel on the Principles enunciated in this context, especially, in the context of Section 23 of the Sale of Goods Act.

72. However, the fact remains here that, the appropriation as claimed by Real Blue as well as Agri Tech from

Emem was, whether unconditionally or not is the subject matter to be decided only by the Arbitrator or by the competent Court.

73. The reason being that, though the Agri Tech and Real Blue submitted a copy of the Bill of Lading, the very same Bill of Lading with original had been issued only in the name of Roy Cashew and SR Cashew. It is also claimed by Emem that, no doubt there had been an Agreement between the Real Blue and Emem and at the same time, there had been a separate agreement between the Roy Cashew as well as SR Cashew, it is the further case of the Emem that, as agreed by Real Blue through its agent, the amount as agreed had not been passed on. Therefore, the Emem claimed that, they retained the right of issuance of original document till the amount is realised, therefore, in this context, it is the case of the Emem that, they have not realised the original document, authorising either the Real Blue or Agri Tech, to take delivery of the goods, even though it has been shipped as early as on 29th and 30th of December 2018. Thereafter, the original Bill of Lading was issued in favour of SR Cashew and Roy Cashew on 16.01.2019 and 17.01.2019 and the copy of the Bill of Lading, filed by the Agri Tech as well as the Roy Cashew does disclose any date of issue, neither the said copy of the Bill of Lading does contain signature of the Emem or the Carriers. Therefore, it cannot be said

that the seller i.e, Emem unconditionally appropriated the goods to and in favour of the buyer i.e., Real Blue or Agri Tech.

74. Only in the context, whether the goods are unconditionally appropriated to the contractor either by the seller with the assent or with the buyer with the assent of the Seller, the appropriation of the goods thereupon passes to the buyer. Here in the case in hand, based on the document available before this Court, it cannot be given a conclusive finding that, the goods have been unconditionally appropriated to the contractor either by the seller with the assent of the buyer or by the buyer with the assent of the seller. Moreover, there is no direct contract between the Agri Tech and Emem whereas, there has been a direct contract both between Roy Cashew as well as SR Cashew with Emem pursuant to which, original Bill of Lading had been issued in their name and they have been shown as notified party and they have also paid the agreed amount as per the contract with Emem and the goods have also been reached the Port where, it is ready for delivery or discharge on payment of the remaining amount or production of documents. Here in the case in hand, since the Original Bill of Lading is available only with the SR Cashew and Roy Cashew, the principle enunciated under Section 23 of Sale of Goods Act, in the opinion of this Court, has been complied with are in favour of only

SR Cashew or Roy Cashew atleast prima facie and not in favour of either for Agri Tech or for Real Blue.

75. In that circumstances, what has to be done has also been considered in a similar circumstance by a Division Bench of this Court, in the matter of **Glints Global PTE Ltd., and another vs. EISA Trading Inc., and others** reported in **2014 SCC Online Madras 381**, where, in a similar circumstance, the Division Bench has made the following observation;

"9. Thus, the controversy narrows down to the question - who is to have the proprietary right over the cargo - whether the holder of the draft bill of lading or the holder of the original bill of lading.

10. The learned Single Judge had gone into this moot question and referring to Section 30 of the Sale of Goods Act, concluded that unless the goods are appropriated by the seller with the consent of the buyer or the buyer with the consent of the seller, the proprietary rights over the goods will not pass. In the present case, since such a situation is not in favour of the appellants, the learned Single Judge taking note of the prima facie evidence produced by the fourth respondent in the form of original bill of lading, held that there is no prima facie case in favour of the appellants, namely, the title over the goods, and thus refused injunction and also directed the fourth respondent to take delivery of the cargo in pursuance of the original bill of lading, however, after spaying the detention charges.

11. A suit itself shall not be tried in an injunction application itself. The issues relating to the proprietary rights based on the draft bill of lading or the original bill of

lading is to be decided by the trial Court. It is needless to say that the appellants will always have their claim with the first respondent or the original seller. It is pertinent to note that there is no privity of contract as between the appellants and the fourth respondent. The issue whether the fourth respondent is a bona fide purchaser for value or is there any collusion or fraud practiced upon, and jurisdiction question are matters to be decided by the trial Court.

12. The learned Senior Counsel appearing for the fourth respondent fairly submits that taking delivery of the cargo in pursuance of the interim order passed by the learned Single Judge is always subject to the result of the suit.

13. In view of the foregoing, recording the said submission of the learned Senior Counsel, this Original Side Appeal is disposed of. Consequently, the order of the learned Single Judge is confirmed and the fourth respondent is entitled to take delivery of the containers after payment of necessary charges. No costs. Consequently, M.P. No. 1 of 2014 is closed."

76. There also only interim relief sought for by a buyer claimed to have been only prior to Bill of Lading and such interim relief was lapsed and the 4th respondent in that case, who was having the original Bill of Lading was given permission to take delivery of the goods and when the same was appealed to the Division Bench, the Division Bench after having taken note of the factual matrix had observed that, the interim relief granted by the

learned Judge in favour of the fourth respondent, who is having the original Bill of Lading, was to be justified and the appellant, who had only the draft Bill of Lading, was not entitled to get the relief. Ofcourse, the interim relief granted was subject to the decision to be finally made in the suit.

77. Here in the case in hand, whatever order to be passed by this Court, in these applications by way of interim arrangement, ofcourse, under Section 9 of the Arbitration Act is subject to the outcome of the decision or whether to be made or passed by the Arbitral Tribunal i.e., International Arbitration Center at Singapore and till such award is passed, no conclusive decision can be taken by this Court.

78. Therefore, taking clue from the said Division Bench Judgement in Glints Globle case referred to above, this Court is of the considered view that, those who are having the original document i.e., original Bill of Lading would be prima facie entitled to take delivery of the goods. However, such permission granted to the holder of the Original document would definitely be subject to the outcome of the decision to be made by the Arbitral Tribunal at Singapore before whom, the issue can very well be referred for final adjudication.

79. In view of the afore stated discussions and taking into account the factual matrix of the case and further taking into account that the goods in question is Raw Cashews nuts with Shells which are eatable items, therefore perishable, in order to make the interim arrangement, this Court is inclined to accept the case of the Roy Cashew and SR Cashew, by rejecting the case of the Agri Tech supported by Real Blue. At the same time, the action on the part of the Emem having entered into two separate contract and having appropriated money paid by them, whether it is justifiable on the part of the Emem to reject or deny the loyal claim of Real Blue on behalf of the Agri Tech is a moot question to be answered by the Arbitrator and in that context, this Court wanted to make an observation that from the clutches of law no privity of contract apply as there is no Arbitration Claus between Emem and Agri Tech and if at all, any Arbitration proceedings is initiated at the instance of either Agri Tech or Real Blue, whether the issue to rope in Emem and to take a decision at the conduct of execution of Emem in respect of these contractors can also be decided as one of the Arbitral issue.

80. In the result, these applications are disposed of, with the following orders:

(i) That the Roy Cashew and SR Cashew are entitled to take delivery of the cargo in question from the Carriers i.e., R3 and R4 which reached the Tuticorin Port i.e., R5.

(ii) The Agri Tech and Real Blue would be at liberty to agitate the issue before the appropriate Arbitral Tribunal in terms of the contract between the Agri Tech and Real Blue where, the Emem can also be roped in.

(iii) In view of the Class 1 and 2 of the above direction, the interim order granted by this Court on 31.01.2019 extended from time to time is hereby vacated.

Resultantly, Appl.No.917 and 918 of 2019 are dismissed and all other applications are allowed.

सत्यमेव जयते

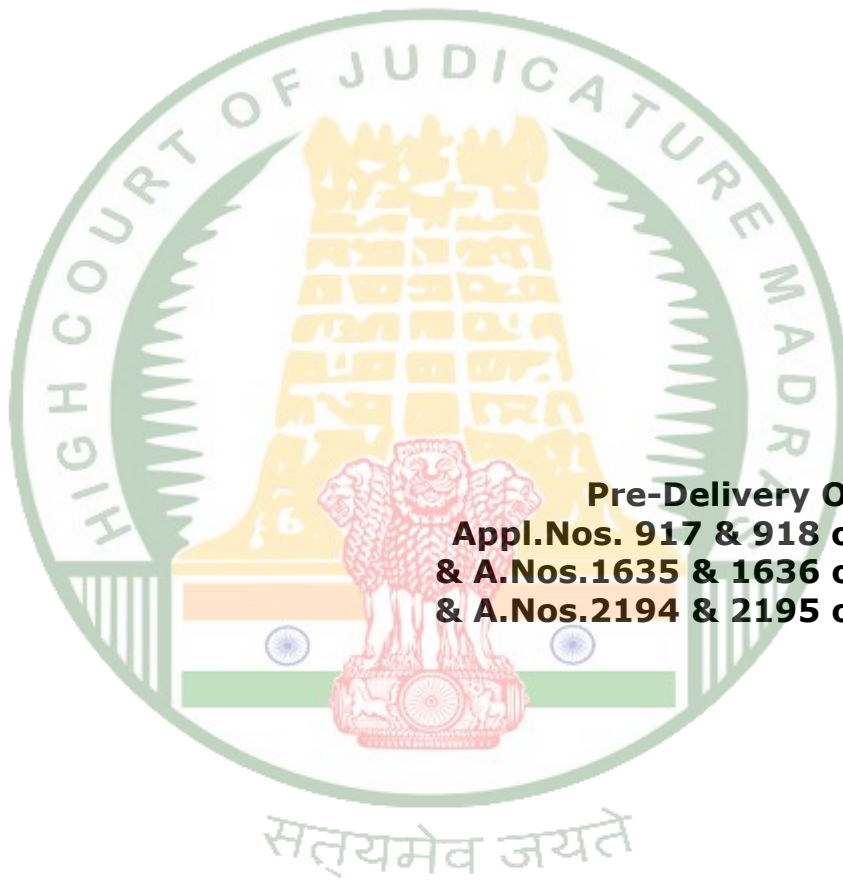
30.04.2019

Index : Yes/No
Speaking Order/
Non-speaking Order
smi

WEB COPY

R.SURESH KUMAR, J.

smi



**Pre-Delivery Order in
Appl.Nos. 917 & 918 of 2019
& A.Nos.1635 & 1636 of 2019
& A.Nos.2194 & 2195 of 2019**

WEB COPY

30.04.2019