

A No.2515 of 2019 in Civil Suit No.154 of 2014

Reserved on : 06.11.2019

Pronounced on : 22.11.2019

IN THE HIGH COURT OF JUDICATURE AT MADRAS

CORAM

THE HONOURABLE MR.JUSTICE N.SATHISH KUMAR

Application No.2515 of 2019

in

Civil Suit No.154 of 2014

1. Welch Allyn International Ventures Inc,
4341 State Street Road,
Skaneateles Falls,
New York 13153-0220
United States of America.

2. Welch Allyn Singapore Pte Ltd.,
438B Alexandra Road,
01-03 Alexandra Technopark,
Singapore – 119 968

... applicants

Vs

Garuda Med Equipments,
5/5, Chakrapani Street Extension,
West Mambalam, Chennai – 600 033.

... Respondent

Application has been filed under Order XIV Rule 8 of O.S. Rules Read with Section 45 of the Arbitration and Conciliation Act, 1996 to refer the parties to

arbitration in terms of clause 17 of the distributor agreement dated 01.07.2011 and direct the parties herein to contest their claim before the Arbitral Tribunal to be constituted and consequently dismiss C.S.No.154 of 2014.

For Applicants : Mr.P.S.Raman (SC)
for Mr.Thriyambak J.Kannan

For Respondent : Mr.Rahul Balaji

ORDER

The application has been filed to refer the parties to arbitration in terms of clause 17 of the distributor agreement dated 01.07.2011 and direct the parties herein to contest their claim before the Arbitral Tribunal to be constituted and consequently dismiss C.S.No.154 of 2014.

2. It is the contention of the applicants that the first applicant is a subsidiary of Welch Allyn Inc. in the United States. The first applicant is not a party to 2010 agreement or 2011 Distributor Agreement. However, Welch Allyn Inc is not a party to the suit. The defendants 4 to 8 in the main suit are not part of the Welch Allyn Corporate group and have only been impleaded only in their capacity as other distributors for the Welch Allyn Corporate group in India. The subject matter of the suit is the termination of the Distributor Agreement and the

defendants 4 to 8 are not parties to the Distributor Agreement. The defendants 4 to 8 are no way connected and have any relationship under or are receiving any benefit under 2011 Distributor Agreement. Therefore, the defendants 4 to 8 are neither necessary or proper parties to the suit. The suit has been filed interlia seeking reliefs of declaration against the termination of an agreement dated 01.07.2011 and further restraining the applicants and the other defendants to the suit from marketing, importing and selling the products of the applicants within India and restraining the applicants from appointing distributors for selling its products within India. It is their further contention that on 14.06.2010 an agreement was inter alia, executed between the respondent and one Welch Allyn Inc, the first applicant. The agreement was titled "Master Distributor Agreement". In the above agreement, the respondent would act as the carrying and forwarding agent for Welch Allyn Inc. till such time as a distributor agreement was executed.

3. On 01.07.2011, a Distributor Agreement was executed between the respondent, as the distributor and Welch Allyn Inc. and the second applicant. The 2011 Distributor Agreement was intended to supersede all earlier agreements, arrangements, contracts and understandings between the parties. The parties have agreed that 2011 Distributor Agreement will prevail over all the

earlier agreements entered between the parties. Clause 17 of the Distributor Agreement provides that any disputes arising pursuant to the said agreement shall be resolved through mutual discussions and unresolved disputes, if any, shall be resolved through arbitration. Such arbitration is to be conducted in accordance with the rules of arbitration of the International Chamber of Commerce and venue for such arbitration shall be at Singapore. The above clause further provides that the 2011 Distributor Agreement shall be governed by and construed in accordance with the law of the State of New York in the United States of America. The respondent, in fact has not denied the 2011 Distributor Agreement. Hence, this application to refer the dispute between the applicants and respondent to arbitration pursuant to clause 17 of the 2011 Distributor Agreement. In support of their contentions, they relied on the following judgments :

Chloro Controls India Private Limited Vs. Severn Trent Water Purification Inc. and others reported in **2013 (1) Supreme Court Cases 641**

A.Ayyasamy Vs. A.Paramasivam and others reported in **2016 (10) Supreme Court Cases 386**

Ameet Lalchand Shah and others Vs. Rishabh Enterprises and another reported in **2018 (15) Supreme Court Cases 678**

**Prashant Hasmukh Manek and others Vs. Ramu Annamalai
Ramasamy and others in O.S.A.Nos.275 to 277 of 2018 dated 24.01.2019**

**Mayavti Trading Pvt. Ltd. Vs. Pradyuat Deb Burman reported in 2019
SCC Online SC 1164**

4. The respondent/plaintiff filed a counter stating that the application is not maintainable. This application has been filed by the first and third respondents alone after 5 years from the date of filing of this suit without any reasons for such delay. Dispute between the parties arose in the year 2013 and legal notice was issued on 03.12.2013 to which replies were received from the applicants on 02.01.2014 along with an illegal termination of the Distributor Agreement dated 01.01.2014. It is his contention that the main relief sought in the suit is a claim in tort as against the defendants 1 to 8 and not a claim under the contract. The relief claimed is premised on the fact that the respondent/plaintiff was fraudulently induced to enter into the Distributor Agreement by the fraudulent misrepresentations of the defendants 1 to 3 and thereafter the plaintiff was put to loss due to fraudulent and targeted collusion between the defendants 1 to 8. Due to fraudulent misrepresentations of the defendants 1 to 3, the continuous supply of products to the defendants 4 to 8 and other persons/entities in India in violation of the terms of the Distributor

Agreement and the collusion between the defendants 1 to 8 and other entities in India, the respondent has been put to substantial loss and has been rendered unable to effectively sell the products imported by it from the first defendant and conduct its business. It is further submitted that the defendants 4, 5, 7 and 8 have no contractual relationship with the respondent. The 6th defendant and the respondent/plaintiff entered into another agreement dated 01.07.2011 which did not contain any arbitration clause, nor did it make any reference to the arbitration clause in the Dealership Agreement. Hence, it is his contention that the claim is based on the tort and is not an arbitrable dispute and hence, cannot be relegated to arbitration.

5. The following allegations of fraud has been raised in the plaint :

1. Fraudulently assuring the plaintiff that one M/s.BPL would procure products from the plaintiff, with the complete knowledge that M/s.BPL would not do so, in order to induce the plaintiff to buy more products of the first defendant.

2. Fraudulently assuring the plaintiff that it would seal all cross territory sales of its products through any other distributor, without having any intention to do so, with the sole intent to deceive and defraud the plaintiff and burden the plaintiff with more

and more products of the 1st defendant and unjustly enrich itself.

3. Fraudulently inducing the plaintiff to sign the Distributor Agreement dated 01.07.2011 with the assurance that the plaintiff would be the exclusive distributor for the products of the defendant No.1 for India, and the defendant No.1 would not market or sell the products to any other entity within India, while the defendant No.1 had no intention of honoring its obligations under the said Distributor Agreement dated 01.07.2011 and the sole intent of the defendant No.1 was to defraud the plaintiff.

4. Unilaterally appointing regional distributors for the defendant No.1's products, which demonstrates that the fraud perpetrated by the defendant No.1 on the plaintiff herein, in as much as the defendant No.1 had no intention or honoring its promise to appoint the plaintiff as the exclusive distributor of its products for the entire Indian market.

5. Defendant No.1's fraudulent conduct of surreptitiously settling the products for which the plaintiff was the exclusive distributor through other entities in India, to ensure that the plaintiff was unable to attain the said minimum purchase requirements and then illegally terminate the distributor agreement

dated 01.07.2011 to cloak the illegalities and fraud perpetuated by the defendants.

The reliefs sought by the plaintiff in the suit are against the parties who both are not signatories to the Arbitration Agreement contained in the Distributor Agreement dated 01.07.2011 and admittedly, have no contractual or other relationship with this respondent/plaintiff. The defendants 4 to 8 have not signed the Distributor Agreement and also do not have any contractual relationship of any nature with the plaintiff. The defendants 4 to 8 have not filed written statement or a counter seeking that the matter may be referred to arbitration. Since there is no privity of contract or any semblance of a contractual relationship between the plaintiff and the defendants 4 to 8, they cannot be referred to arbitration. In the present case, the claim is one arising out of tortuous conduct and not out of any interlinked agreements or transactions so as to include non-signatories as parties to the arbitration. Hence, prayed for dismissal of this application.

6. In the rejoinder, it is submitted that the suit claim is not a tortuous liability. The allegation of fraud is made without any basis.

7. The learned counsel for the applicants submitted that the first applicant is not a party to 2010 agreement or 2011 Distributor Agreement. However, Welch Allyn Inc is not a party to the suit. The defendants 4 to 8 in the main suit are not part of the Welch Allyn Corporate group and have only been impleaded only in their capacity as other distributors for the Welch Allyn Corporate group in India. The subject matter of the suit is the termination of the Distributor Agreement and the defendants 4 to 8 are not parties to the Distributor Agreement. The defendants 4 to 8 are no way connected and have any relationship under or are receiving any benefit under 2011 Distributor Agreement. Therefore, the defendants 4 to 8 are neither necessary or proper parties to the suit. It is their further contention that on 14.06.2010 an agreement was executed between the respondent and one Welch Allyn Inc, the first applicant. The agreement was titled "Master Distributor Agreement". In the above agreement, the respondent would act as the carrying and forwarding agent for Welch Allyn Inc. till such time as a distributor agreement was executed. On 01.07.2011, a Distributor Agreement was executed between the respondent, as the distributor and Welch Allyn Inc. and the second applicant. The 2011 Distributor Agreement was intended to supersede all earlier agreements, arrangements, contracts and understandings between the parties. The parties have agreed that 2011 Distributor Agreement will prevail over all the earlier

agreements entered between the parties. Clause 17 of the Distributor Agreement provides that any disputes arising pursuant to the said agreement shall be resolved through mutual discussions and unresolved disputes, if any, shall be resolved through arbitration. Such arbitration is to be conducted in accordance with the rules of arbitration of the International Chamber of Commerce and venue for such arbitration shall be at Singapore. The above clause further provides that the 2011 Distributor Agreement shall be governed by and construed in accordance with the law of the State of New York in the United States of America. The respondent, in fact has not denied the 2011 Distributor Agreement. Hence, this application to refer the dispute between the applicants and respondent to arbitration pursuant to clause 17 of the 2011 Distributor Agreement.

8. It is the contention of the learned counsel for the respondent that primarily the suit claim is based on the Master Distributor Agreement dated 14.06.2010 wherein the plaintiff was appointed as the Master Distributor of certain products manufactured by the first defendant for the entire territory of India. Further, it is the claim of the plaintiff that market exclusivities were not adhered to by the defendants and that due to the defendants 4 to 8 purchasing stock directly from defendant Nos.1 to 3, the stock given to the plaintiff was left

unsold which caused loss of profit for the plaintiff. It is their contention that the issue arising out of the second contract dated 01.07.2011 cannot be alone referred to arbitration since it is deeply intertwined with the other claims which are incapable of being referred to arbitration. The contract dated 14.06.2010 which is prior in point in time , admittedly had no arbitration clause. While unsold stock was still lying with the plaintiff, the plaintiff was fraudulently induced to enter into another agreement dated 01.07.2011. The plaintiff has pleaded fraud with details in the plaint. Further, the claim of the applicant that the agreement dated 01.07.2011 replaced the Master Distributor Agreement dated 14.06.2010 is erroneous in so far as both the agreements operated in separate spheres, are entered into between different parties with different obligations between the parties.

9. There is a Master Distributor Agreement dated 14.06.2010 entered between the plaintiff and the first defendant for a indefinite term. Whereas, the Distributor Agreement was entered between the plaintiff and the second defendant over the period of three years from the effective date. The products are not similar in both the agreements. Therefore, the contention of the applicant is that the subsequent agreement dated 01.07.2011 supersedes the earlier agreement dated 14.06.2010 cannot be countenanced. Even the

agreement dated 01.07.2011 does not refer to the earlier agreement dated 14.06.2010 despite the fact that both the parties are aware of the earlier agreement. The primary relief of the plaintiff sought in the plaint is arising out of the unsold stock that was lying with the plaintiff which was procured under the Master Distributor Agreement dated 14.06.2010 and a small portion of the dispute arising out of the agreement dated 01.07.2011 is against the defendants 1 to 8. The defendants 4 to 8 have not even filed the counter or written statement. They are completely independent parties. They cannot be stated to be claiming through or under the applicants especially when no evidence to support such stand is filed or pleaded. The application has been filed after 5 years from the date of filing of the suit. The relief sought by the plaintiff against the parties who both are not signatories to the Arbitration Agreements contained in the Distributor Agreement dated 01.07.2011. They do not have any contractual relationship with the respondent/plaintiff. Hence, it is the submission of the learned counsel that the dictum laid down in **Chloro Controls India Private Limited Vs. Severn Trent Water Purification Inc.** reported in **2013 (1) Supreme Court Cases 641** is not applicable to the facts of the case.

10. Further it is not case of the defendants 4 to 8 that they are claiming through or under defendants Nos.1 to 3 and that their individual agreements, if

any form part of a composite scheme. In fact, the defendants 4 to 8 neither entered appearance nor filed any application seeking reference to arbitration. The applicants have also not filed any agreement or any other evidence show that the defendants 4 to 8 are claiming through or under them. In the absence of such evidence, it is impossible to conclude that the defendants 4 to 8 were claiming through or under defendants 1 to 3. There is no mutual intention at the time of signing the arbitration agreement to bind all the parties to arbitration. At the time of Master Distributor Agreement dated 01.07.2011, the respondent/plaintiff was not even aware of the existence of the other distributors in the market, namely the defendants 4 to 8. As per the Master Distributor Agreement, the plaintiff was to be nominated as the exclusive distributor of the defendants 1 to 3. Therefore, it cannot be said that there is any mutual intention between the parties to bind all the parties to arbitration. Therefore, there is no direct commonality of subject matter between the suit and the proposed arbitration. The relief sought is in the nature of tortuous claim and the claim against the defendants 4 to 8 is one for damages, occasioned by the fact that they were liable to procure goods from the plaintiff/respondents but instead chose to procure goods from Welch Allyn Group, despite being aware of the same. Since, the claim is based on tort, the same is not an arbitrable dispute and cannot be to relegated to arbitration. The Distributor Agreement signed

between the defendant nos.1 to 3 and the plaintiff are independent and separate from any contractual relationship with the defendants nos.1 to 3 may have with the defendant nos. 4 to 8. There cannot be any bifurcation in the cause of action in the suit filed against the defendants 1 to 3 and the defendants 4 to 8 and the same will lead to multiplicity of proceedings. Hence, prayed for dismissal of this application.

11. This application is filed to refer the parties to Arbitration as per the clause contained in the Distributor Agreement dated 01.07.2011. The applicant claimed to be subsidiary of Welch Allyn Inc. in the United States. The suit has been mainly filed on the premise that the first defendant had entered into a Master Distributor Agreement dated 14.06.2010 whereby the plaintiff was to be distributor of Welch Allyn Inc. within the territory of India and the said agreement was entered for a indefinite period. Based on the above agreement, the plaintiff purchased products worth to the tune of US\$ 828,954.01 [approximately 4,10,00,000/- including duty from the first defendant between October and December 2010. It is his further contention that to deceive the plaintiff, after the defendants 1 and 3 executed the Distributor Agreement dated 01.07.2011 whereby the plaintiff was appointed as a distributor of the first defendant till 30.06.2010. It is the contention of the plaintiff that by the Distributor Agreement

dated 01.07.2011, the defendants 4 to 8 were marketing and selling certain products of the first defendant. The defendants had agreed to manufacture or import in any entity in India. Contrary to the above Distributor Agreement, the plaintiff has discovered that the defendants 4 to 8 were selling the products of the first defendant for which the plaintiff was the distributor in India. The defendants 1 to 3 have concealed and induced the plaintiff to execute new Distributor Agreement dated 01.07.2011. It is therefore, his contention that on the contrary to the above agreement, the first defendant had supplied their products to the defendants 4 to 8 and other entities in India. The plaintiff has been put into substantial loss. Hence, the suit filed for declaration to declare that the termination of the Distributor Agreement dated 07.11.2011 dated 07.11.2011 is illegal and inoperative.

10. From the plaint pleadings, it can be gathered that the main grievance of the plaintiff is that despite the Master Distributor Agreement entered on 14.06.2010, the goods sought to be sold to the plaintiff were sold to other distributors in India and the plaintiff was induced to enter into another agreement dated 01.07.2011, Distributor Agreement. It is contended that the plaintiff was induced by collusion and fraudulent activities of the defendants 1 to 3 thereby sought to declare the termination of the Distributor Agreement dated 01.07.2011

and also rendition of the accounts by defendants 4 to 8. The plaint pleadings itself clearly indicate that there is no dispute with regard to the execution of Master Distributor agreement between the parties. Particularly, the defendants entered into a Master Distributor Agreement dated 14.06.2010. Similarly it is pleaded in the plaint that the defendants 1 and 2 by the agreement 01.07.2011 conferred exclusive right on the plaintiff to market all the products of the first defendant.

11. The first applicant in the present application is not a party to 2010 Master Distributor agreement or 2011 Distributor Agreement. Infact, the Distributor Agreement was entered between the plaintiff, Welch Allyn Inc. and the second applicant. The first applicant claims to be subsidiary of Welch Allyn Inc. The nature of the agreement entered into between the parties particularly the plaintiff and the defendants 1 and 3 is not disputed by the plaintiff. It is the specific case of the plaintiff that the Master Distributor Agreement dated 14.06.2010 was entered between the plaintiff and the first defendant in the suit. Similarly, it is the specific case of the plaintiff in the Distributor Agreement dated 01.07.2011 is that the defendants 1 and 2 have conferred exclusive right on the plaintiff to market and sell the products of the first defendant.

12. In the above line of the specific case of the plaintiff with regard to the execution of the two documents, Master Distributor Agreement dated 14.06.2010 and Distributor Agreement dated 01.07.2011, this Court has to look at the nature of the agreement between the parties. It is also relevant to note that the defendants 4 to 8 are said to be distributors and certain goods have sold to them by the first defendant contrary to the agreement. The relief sought against the defendants 4 to 8 is in the nature of alternative remedy. The main relief sought in the plaint is for declaration that the termination of the Distributor Agreement dated 01.07.2011 is illegal and inoperative. Whereas only in the alternative, relief has been sought against the defendants 4 to 8 for rendition of accounts and also to pay the amounts said to have been realized by them by the sale of the products of the first defendant, for which the plaintiff was the exclusive distributor.

13. On a perusal of the Master Distributor Agreement dated 14.06.2010, the plaintiff was appointed as a distributor for the products in the schedule. The agreement shall be for an indefinite term. It is also subject to the termination as contained in clause 15. Clause 15 of the Agreement deals with termination of the agreement. The same provides that the agreement can be terminated

without any notice to the other party, if the party fails to satisfy any of the conditions in the agreement. Similarly, if the other party files or has filed against it, a petition seeking relief under any bankruptcy, insolvency, reorganization, moratorium, liquidation or other similar law affecting creditors right. The Clause 20 of the agreement deals with jurisdiction and governing law. The same clearly indicate that the agreement shall be solely governed by and interpreted in accordance with the laws of India and in India without regard to principles of conflicts of laws and all legal actions and proceedings in connection with this agreement shall be exclusively subject to the jurisdiction of the appropriate Indian Court.

The List of products in Schedule -1 is as follows :

Exclusive Products
(except as noted)

Non-Exclusive Products

1. Front Line Diagnostics Products

1. OEM and ODM Products

2. Cardio Pulmonary Products

2. 3rd Party Software

3. Low End Vitals : SPOT, SPOT LXi,

Continuous Monitoring Products:

Propaq, WA1500 monitor

CVSM, VSM 5300

Thermometry Products

14. From the above, the agreement makes it clear that the plaintiff was originally appointed as a distributor for the products shown in the schedule – 1. The Distributor agreement dated 01.07.2011 was entered between the plaintiff and Welch Allyn Inc and the first defendant in the suit and the term of the agreement is for a period of three years. The above agreement also provides for termination of the agreement at any time without any written notice to the other party and such termination will become effective six months after the notice of termination is sent. Clause 17 of the Distributor Agreement is as follows :

“Jurisdiction and Governing Law : Any dispute between the parties shall be resolved by mutual discussions. Unresolved disputes, if any, shall be subject to resolution by arbitration in accordance with rules of arbitration of the International Chamber of Commerce. The Venue of Arbitration shall be in Singapore.”

Clause 19 reads as follows :

Entire Agreement : This agreement is the entire understanding between the parties. It supersedes any prior written or oral agreements or understandings and can only be amended by written agreement of the parties. Each Schedule referenced in this

Agreement is incorporated as part of the Agreement as if set forth in the body of the Agreement.

15. Clause 19 makes it clear that the Distributor agreement supersedes any written or oral agreement or understanding and can only be amended by written agreement of the parties. The agreement was executed in respect of the list of products mentioned in schedule -1 of the agreement. The important clause in two agreements are very relevant to find out whether there is a commanality of the parties to find out whether the agreement dated 01.07.2011 supersedes the agreement dated 14.06.2010. The Master Distributor agreement was executed between the plaintiff and the defendants 1 and 2. The Distributor agreement was executed between the plaintiff and the defendants 2 and 3. The period of Master Distributor Agreement is for indefinite period. Distributor Agreement is executed for three years from the effective date provided under clause 2.

16. It is the contention of the plaintiff that in the Distributor Agreement there is no mention about the Master Distributor Agreement dated 14.06.2010. Clause 19 of the Distributor Agreement or in the recitals of the agreement referred to early agreement dated 14.06.2010. Without specific reference to the

earlier agreement, it cannot be said that the agreement dated 01.07.2011 supersedes the earlier agreement. It is relevant to note that the communication dated 29.04.2011 between the parties reads as follows :

“As discussed and agreed Garuda will submit your business plan for our review and approval within 90 days Upon agreement and finalisation of the plan. Welch Allyn Inc. and Garuda Med Equipments will sign a new Distributor Agreement which will supersede all existing agreements.”

The above communication clearly indicate that the parties were infact intended to enter into a new Distributor Agreement by superseding all the existing agreements. The intention of the parties can be seen from the above email communication between the parties on 29.04.2011. In the above communications read with specific clauses in the subsequent agreement in clause 19 makes it clear that the parties were infact intended to supersede all the earlier agreement and fresh agreement has been entered into on 01.07.2011.

17. Now the main dispute seems to be termination of the Distributor Agreement and supply of products to other distributors other than the plaintiff contrary to the two agreements. The main relief sought by the plaintiff itself for

declaration of the termination of the distribution agreement as illegal and inoperative and permit the plaintiff as the exclusive distributor of the products of the first defendant. When the main grievance of the plaintiff is with regard to the termination of the Distributor Agreement, the parties are certainly governed by the terms agreed in the agreement. Clause 17 of the Distributor Agreement makes it clear that any dispute between the parties shall be resolved by mutual discussions and unresolved dispute shall be subject to resolution by arbitration in accordance with rules of arbitration of the International Chamber of Commerce. The Venue of Arbitration shall be in Singapore. This agreement shall be governed by and construed in accordance with the laws of the State of New York, US. The parties agreed to refer the matter to the Arbitration of the International Chamber of Commerce at Singapore and agreed to be governed by the laws of State of New York, USA.

18. It is also the contention of the plaintiff that the suit is not only against the defendant 1 to 3 but also other defendants who are not signatories to the Arbitration Agreement and they have no privity of contract or any other relationship with the plaintiff. The defendants 4 to 8 have not signed the Distributor Agreement. Hence, it is his contention that onus lies on the party to show that any non signatories who are claiming through or under the signatories

party when mutual intention of the parties was to bind both the signatories and non signatories. The Court has to examine direct relationship to the party signatory to the arbitration agreement, direct commonality of the subject matter and the agreement between the parties being a composite transaction. Hence, it is his contention that plaintiff the judgment in **Chloro Controls India Private Limited Vs. Severn Trent Water Purification Inc. and others reported in 2013 (1) Supreme Court Cases 641** cannot be applicable to this case. Further, it is his contention that the defendants 4 to 8 are claiming under the defendants 1 to 3. It is to be noted that it is the case of the plaintiff that the defendants 4 to 8 are distributors of the defendants 1 to 3. Contrary to the Master Distributor Agreement and Distributor Agreement, products have been sold to them. Therefore, when the plaintiff himself submits that the defendants are dealers, this Court is of the view that the defendants 4 to 8 though not filed statement and not party to the agreement, dispute revolve around the plaintiff and the defendants 1 to 3 certainly bind the defendants 4 to 8, as far as distribution of the products of the defendants 1 to 3 which is more fully mentioned in the agreement.

19. In this regard, it is useful to refer the Apex Court judgment in **Chloro Controls India Private Limited Vs. Severn Trent Water Purification Inc. and others reported in 2013 (1) Supreme Court Cases 641** it has been held as

follows :

“69. We have already noticed that the language of [Section 45](#) is at a substantial variance to the language of [Section 8](#) in this regard. In [Section 45](#), the expression ‘any person’ clearly refers to the legislative intent of enlarging the scope of the words beyond ‘the parties’ who are signatory to the arbitration agreement. Of course, such applicant should claim through or under the signatory party. Once this link is established, then the Court shall refer them to arbitration. The use of the word ‘shall’ would have to be given its proper meaning and cannot be equated with the word ‘may’, as liberally understood in its common parlance. The expression ‘shall’ in the language of the [Section 45](#) is intended to require the Court to necessarily make a reference to arbitration, if the conditions of this provision are satisfied. To that extent, we find merit in the submission that there is a greater obligation upon the judicial authority to make such reference, than it was in comparison to the 1940 Act. However, the right to reference cannot be construed strictly as an indefeasible right. One can claim the reference only upon satisfaction of the pre-requisites stated under [Sections 44](#) and [45](#) read with Schedule I of the 1996 Act. Thus, it is a legal right which has its own contours and is not an absolute right, free of any obligations/limitations.

70. Normally, arbitration takes place between the persons who have, from the outset, been parties to both the arbitration agreement as well as the substantive contract underlining that agreement. But, it does occasionally happen that the claim is made against or by someone who is not originally named as a party.

These may create some difficult situations, but certainly, they are not absolute obstructions to law/the arbitration agreement. Arbitration, thus, could be possible between a signatory to an arbitration agreement and a third party. Of course, heavy onus lies on that party to show that, in fact and in law, it is claiming 'through' or 'under' the signatory party as contemplated under [Section 45](#) of the 1996 Act. Just to deal with such situations illustratively, reference can be made to the following examples in Law and Practice of Commercial Arbitration in England (Second Edn.) by Sir Michael J. Mustill:

- “1. The claimant was in reality always a party to the contract, although not named in it.
2. The claimant has succeeded by operation of law to the rights of the named party.
3. The claimant has become a part to the contract in substitution for the named party by virtue of a statutory or consensual novation.
4. The original party has assigned to the claimant either the underlying contract, together with the agreement to arbitrate which it incorporates, or the benefit of a claim which has already come into existence.”

71. Though the scope of an arbitration agreement is limited to the parties who entered into it and those claiming under or through them, the Courts under the English Law have, in certain cases, also applied the “Group of Companies Doctrine”. This doctrine has developed in the international context, whereby an arbitration agreement entered into by a company, being one within

a group of companies, can bind its non- signatory affiliates or sister or parent concerns, if the circumstances demonstrate that the mutual intention of all the parties was to bind both the signatories and the non-signatory affiliates. This theory has been applied in a number of arbitrations so as to justify a tribunal taking jurisdiction over a party who is not a signatory to the contract containing the arbitration agreement. ['Russell on Arbitration' (Twenty Third Edition)].

73. A non-signatory or third party could be subjected to arbitration without their prior consent, but this would only be in exceptional cases. The Court will examine these exceptions from the touchstone of direct relationship to the party signatory to the arbitration agreement, direct commonality of the subject matter and the agreement between the parties being a composite transaction. The transaction should be of a composite nature where performance of mother agreement may not be feasible without aid, execution and performance of the supplementary or ancillary agreements, for achieving the common object and collectively having bearing on the dispute. Besides all this, the Court would have to examine whether a composite reference of such parties would serve the ends of justice. Once this exercise is completed and the Court answers the same in the affirmative, the reference of even non-signatory parties would fall within the exception afore-discussed."

20. From the above dictum, it is well settled that non signatories or third party could be subjected to arbitration without their prior consent, but this would only be in exceptional cases. The Court has to examine the direct relationship between the parties signatory to the Arbitration Agreement, direct commonality of the subject matter and the agreement between the parties being a composite transaction. Admittedly, in this case, it is the case of the plaintiff that the defendants 4 to 8 are only distributors of defendants 1 to 3 and the defendants 1 to 3 contrary to the agreement have sold their products to the defendants 4 to 8 and the dispute revolves between the defendants 1 to 3 and the plaintiff. As far as the Distributor Agreement is concerned, the same will bound the defendants 4 to 8. Merely because they are non signatories to the agreement, it cannot be said that the dispute is not arbitrable.

21. The contention of the plaintiff that the suit claim is tortious liability is wholly incorrect. Infact, the main relief sought in the plaint itself is for declaration to declare that the termination of the Distributor Agreement dated 01.07.2011 is illegal and inoperative. Only in the alternative, plaintiff sought to seek the relief of rendition of accounts of 4 to 8 with regard to the sale of products of the first defendant, when the plaintiff was the exclusive distributor of the first defendant. Since the main relief is with regard to the sale of the products to the defendants

4 to 8 contrary to the terms of the agreement, this Court is of the view that such a dispute is certainly arbitrable and infact the parties to the contract have agreed to refer the dispute to arbitration governed by the laws of USA. Even in such reference, the plaintiff is at liberty to raise the nature of the products sold to the defendants 4 to 8 . Therefore, it cannot be said that the suit is only tortuous liability.

22. In this regard, the Division Bench of this Court in **O.S.A.No.275 to 277 of 2018** has referred to the judgment reported in **Tarapore and Cochin Shipyard Ltd. Cochin and another** reported in **1994 (2) SCC 680**, wherein the Apex Court has held as follows :

“36. From the commencement i.e, from the stage of inviting tenders and through the negotiations and the finalisation of the contract, at every stage, the respondent assured that foreign exchange would be made available from 11th Yen Credit. As the equipment was not available from Japan, the availability of Yen Credit become otiose from the contractor's point of view. At the instance of and with the active participation of the respondent the contractor made enquiries in various countries and ultimately procured the necessary equipment and technical know-how which was approved by the respondent and imported the same. In the time lag, the price as well as the foreign exchange rates in relation to rupee underwent an upward change, with the result that the

contractor had to invest, as made out by it and not seriously controverted before the arbitrator in all Rs. 275.40 lakhs for imported pile driving equipment and spares and Rs. 18,64, 337.61 on technical services-cum-know- how fees and a further sum for higher custom duty. Details of the claim have been set out in Annexures 1 and 2 respectively to the statement of claim submitted by the appellant to the arbitrator. The respondent in its counter statement did not controvert the details of the claim and the expenditure involved under the two heads. The whole of the counterclaim was concerned with the denial of its liability to compensate the contractor coupled with the contention that the claim would not be covered by the arbitration agreement and therefore, the arbitrator had no jurisdiction to entertain and adjudicate the claim. It may also be mentioned that at no time since the award, the respondent ever disputed or questioned the amount awarded by the arbitrator. It is thus satisfactorily established that the contractor had to invest something far in excess of Rs. 2 crores which it was expected to invest in foreign exchange for imported pile driving equipment and technical know-how fees. The whole contract was concluded on this understanding. Being aware of the fluctuating position in this behalf, the contractor had tendered two alternative rates for completion of the work as pointed earlier; one based on equipment being imported by the respondent and leased to the appellant and alternatively rates on the basis that the contractor would import pile driving equipment and technical know-how. In respect of the second alternative, which was ultimately agreed to between the

parties, it was clearly and unmistakably understood between the parties had the contractor would have to invest Rs. 2 crores and the rates were co-related to this investment with the knowledge of the fact that when work was completed, the equipment would depreciate to the tune of 75% of its capability and would be hardly of any use to the contractor. The estimated expenditure having far exceeded, a claim for compensation would certainly be tenable at the instance of the contractor.

37. The High Court quoted clauses 16, 26 and 31 in its judgment but did not dilate upon the provisions of the clauses so as to correlate them with its decision. Clause 16 envisaged a situation where since the formation of the contract any fresh law is enacted which has the bearing on the price of materials incorporated in the works and/or wages of labour, the terms of contract shall accordingly be varied. Clause 26 provided for supply of materials, plants, tools, appliances etc. by the contractor. Clause 2 provides for the liability of the contractor to supply construction, plant and machinery including the items to be imported and a further obligation is cast on the contractor to furnish inventory of the same. Clause 31 amongst others, provided that the pile driving equipment shall be procured by the contractor, and the selection of equipment shall be done by the contractor, in consultation with the respondent. These clauses were presumably referred to in the context of an argument that the price escalation clause does not cover the claim for compensation for additional expenditure on imported plant and machinery and technical know-how because the contract substantially provides for the same to be supplied by

the contractor. In our opinion, this over- simplification of the clauses of the contract involving works of such magnitude is impermissible. The whole gamut of discussions, negotiations and correspondence must be taken into consideration to arrive at a true meaning of what was agreed to between the parties. And in this case there is no room for doubt that the parties agreed that the investment of the contractor under this head would be Rs. 2 crores and the tendered rates were predicated upon and co-related to this understanding. When an agreement is predicated upon an agreed fact situation, if the latter ceases to exist the agreement to that extent becomes irrelevant or otiose. The rates payable to the contractor were related to the investment of Rs 2 crores under this head by the contractor. Once the rates became irrelevant on account of circumstances beyond the control of the contractor, it was open to the contractor to make a claim for compensation. Therefore, it appears satisfactorily established that the claim arose while implementing the contract and in relation to the contract.

42. In *Astro Vencedor Compania Naviera S. A. of Panama v. Mabanft G. M. B. H. The Diamianos* a question arose whether a claim in tort would be covered by the arbitration clause? It was admitted that the claim for wrongful arrest is a claim in tort. And it was contended that a claim in tort cannot come within the arbitration clause. The Court of Appeal speaking through Lord Denning held that the claim in tort would be covered by the arbitration clause, if the claim or the issue has a sufficiently close connection with the claim under the contract.

43. In *Gunter Henck v. Andre & CIE. S. A.3* the Court (Queen's Bench Division (Commercial Court)) held that the words 'arising out of' clearly extend the meaning than would otherwise be applied to the clause were it limited to 'all disputes arising under the contract.'

44. In the facts before us, the respondent in para 4 of its counter-statement filed before the arbitrator specifically referred to clause 16 of the General Conditions of Contract and to the Additional Terms and Conditions Modifications forming part of the contract document. In paragraph 11, it was stated that the claim of the appellant was completely outside the purview of the contract and the same does not fall within the purview of the first paragraph of Clause 40 it was further stated in paragraph 13 that contract provides for escalation in certain respects and that is the only escalation which is admissible in terms of the contract and the claim made by the appellant does not come within the escalation clause nor in the agreed formula relating to such escalation. The contractor relied upon Clause 13 of the Additional Terms and Conditions Modifications which form part of the contract document to sustain its claim. From the pleadings, it clearly transpires that both the parties had recourse to the contract which is admittedly entered into in support of the rival contentions and therefore, the claim made by the appellant would be covered by the arbitration clause, which is of the widest amplitude, It is thus satisfactorily established that the claim made by the contractor would be covered by the arbitration clause."

23. The above dictum makes it very clear that even the claim is tort it would be covered by the arbitration clause, if the claim or the issue has sufficiently close connection with the claim under the contract. The relief sought against the defendants 4 to 8 for rendition of accounts and for direction to pay the sums realised by them by selling the products sold by the first defendant. The main dispute itself is with regard to the selling of the products to other people other than the plaintiff. Such being the position, even assuming that the plaintiff claim is tortious claim, such claim is highly connected with the dispute in the agreement. This has close nexus to the agreement. The very nature of the agreement indicate that other than the plaintiff no other distributor to be appointed. Such being the position, even the claim against the defendants 4 to 8 is also arbitrable since the entire dispute is arising out of the contract.

24. Another contention of the plaintiff that the cause of action cannot be bifurcated, also has no legs to stand since the very relief against the defendants 4 to 8 itself is subject to the dispute between the plaintiff and the defendants 1 to 3 as per the agreement. The other contention of the learned counsel for the respondent/plaintiff that he was induced to enter into the Distributor Agreement by fraudulent representation and since the allegation of fraud is pleaded, the matter is not arbitrable. The allegations contained in para nos.19, 21, 27 and 47

of the plaint is vague in nature. Except contending that the plaintiff is induced to enter into a contract, no serious allegation has been made. Mere allegation of alleged fraud, by bald allegations of fraud, it cannot be said that the matter cannot be referred to arbitration. In **A.Ayyasamy Vs. A.Paramasivam and others** reported in **2016 (10) Supreme Court Cases 386** it has been held that when the court finds serious allegation of fraud which make a virtual case of criminal offence or where allegations of fraud are so complicated that it becomes absolutely essential that such issues can be decided only by the Civil Court on the appreciation of the voluminous evidence that needs to be produced. But in the present case only bald allegation of fraud has been pleaded by the plaintiff.

25. Yet another contention of the learned counsel that the application filed to refer the dispute to arbitration is belatedly filed and the suit has been filed in the year 2014 and this application is filed after much delay despite raising the contention in the written statement as to the arbitration agreement. That itself clearly indicate that the defendants 1 to 3 did not have any intention, which is sine qua non to refer the matter to arbitration. It is to be noted that Section 8 of the Arbitration and Conciliation Act makes it mandatory to the parties to seek reference before submitting its first statement on the subsistence of the dispute. Whereas, Section 45 of the Arbitration and Conciliation Act does not contain any

time limit when the application for referring the dispute to arbitration. What is relevant for reference under section 45 is when there is a valid agreement between the parties which contain arbitration clause in the agreement, the request of one of the parties or any or under whom parties to arbitration, it may be referred. It is not the case of the plaintiff that the agreement dated 01.07.2011 is null and void and inoperative or incapable of being performed. In fact, the main relief in the suit itself is to declare the termination letter issued by the first defendant terminating the Distributor Agreement dated 01.07.2011 is illegal and inoperative. Therefore, as long as the agreement is valid and binding on the parties, the parties are bound by the specific clause to refer to the dispute to arbitration and bound by the laws of USA to resolve the dispute. This Court is of the view that this is a fit case where the parties are to be referred to arbitration.

26. Accordingly, this application is allowed and the parties are directed to go for arbitration of the Chamber of Commerce at Singapore. Consequently, the suit filed by the plaintiff before this Court is not maintainable and the suit and connected applications are closed. The Court Fee paid by the plaintiff shall be

refunded as per law particularly keeping in mind section 69A of the Tamilnadu Court Fees and Suit Valuation Act.

22.11.2019

vrc

Index : Yes/ No

Internet : Yes

Speaking/Non-speaking Order



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A No.2515 of 2019 in Civil Suit No.154 of 2014

N.SATHISH KUMAR, J.

VRC



Order in

Application No.2515 of 2019 in

Civil Suit No.154 of 2014

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