

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

% **Date of decision: 4th April, 2019.**

+ **CS(COMM) 811/2016**

SAGA LIFESTYLE PVT LTD & ORS **Plaintiffs**

Through: Mr. Ravjyot Singh with Ms. Hiba &
Mr. Aman Tajta, Advs.

Versus

BANG & OLUFSEN A/S & ANR **Defendants**

Through: Mr. Dinesh Agnani, Sr. Adv. with
Mr. Nishant Menon, Ms. Kavita
Sarin & Mr. Deepesh, Advs. for D-1
& 2.

CORAM:

HON'BLE MR. JUSTICE RAJIV SAHAI ENDLAW

**OA No.75/2018 (of D-1 for setting aside of order dated 21.05.2018) &
IA 9291/2018 (for condonation of 7 days delay in filing thereof)**

1. The defendant no.1 has preferred this Chamber Appeal against the order dated 21st May, 2018 of the Joint Registrar of dismissal of IA No.848/2017 filed by the defendant no.1 under Order I Rule 10 (2) CPC for deletion from the array of defendants.

2. Ms. Hiba, Advocate for the plaintiffs states that Mr. Ravjyot Singh Advocate is in Tis Hazari Courts and has not reached till now and seeks a pass over.

3. Anyone seeing the Cause List of this Court would know that if the matter is passed over, it is unlikely to reach again.

4. The plaintiffs have filed this suit as a commercial suit and with respect whereto, timelines for disposal apply and the said timelines cannot be abided by the Court alone if the counsels do not cooperate in the same. There is no reason for non-appearance of the Advocate for the plaintiffs when the matter is called out.

5. The Senior Counsel for the defendants has been heard.

6. The Senior Counsel for the defendants has argued that (i) this suit was instituted by the four plaintiffs namely Saga Lifestyle Pvt. Ltd., AMS International B.V., AMS Distributors Pvt. Ltd. and Future Living B.V., initially against the defendant no.1 Bang & Olufsen A/s only; (ii) on the defendant no.1 taking a plea that the agreement on which this suit was premised, was between the plaintiff no.2 AMS International B.V. and M/s. Bang & Olufsen Middle East FZ LLC which had not been made a party, the plaintiffs impleaded the said M/s. Bang & Olufsen Middle East FZ LLC as defendant no.2 to the suit; (iii) the defendant no.1 applied for deletion from the array of defendants, being not a party to the agreement in writing on which the suit is premised; (iv) the Joint Registrar, by the impugned order has however dismissed the said application; (v) the four plaintiffs have instituted this suit *inter alia* pleading, that (a) the plaintiff no.2, being in the business of marketing, sale and distribution of audio and other consumer electronic products came to know that the defendant was planning to launch itself in India by appointing a sales agent/representative and had approached the defendant for the purpose of being engaged as a Master Dealer in India; (b) the plaintiff no.2 was appointed as a Master Dealer in India and a Master Dealer Agreement was signed on 25th January, 2005; (c)

under the said Master Dealer Agreement, various obligations were cast on the plaintiff no.2 and in discharge whereof the plaintiffs invested an amount of two Million Euros; (d) however vide letter dated 1st May, 2007, the Master Dealer Agreement was terminated by the defendant no.2; (e) the plaintiffs, having been left with no option, accepted the proposal of the defendant and a Dealer Agreement dated 4th July, 2007 was signed between the plaintiff no.3 and the defendant; (f) the defendant, in the year 2007-08 appointed many other dealers; (g) the action of the defendant was violative of the “gentlemen’s agreement”; (h) a letter dated 30th November, 2011 of non-renewal was sent by the defendant to the plaintiffs; and (i) the action of the defendant had caused damages to the tune of Rs.1,00,01,000/- to the plaintiffs.

7. The Senior Counsel for the defendants has drawn attention to the Master Dealer Agreement at pages 12 and 15 of the Part III-A File to demonstrate that the same was between the plaintiff no.2 AMS International B.V. and the present defendant no.2 Bang & Olufsen Middle East FZ LLC and the defendant no.1 was not a party thereto.

8. On enquiry about the subsequent Agreement, the Senior Counsel for the defendants states that the plaintiffs have not even filed the Dealer Agreement dated 4th July, 2007 before this Court.

9. The Senior Counsel for the defendants contends that the learned Joint Registrar in the impugnd order has reasoned that because it is the case of plaintiffs that the defendant no.1 is the holding company of the defendant no.2, it would make the defendant no.1 a necessary and proper party to the suit, notwithstanding the two defendants being separate legal entities. It is

thus argued that the Joint Registrar has erroneously refused to delete the name of the defendant no.1 from the array of defendants.

10. Mr. Ravjyot Singh, Advocate for the plaintiffs who has since appeared, on being given an opportunity has raised three points in support of the impugned order. Firstly it is contended that the defendant no.2, as of today is a shell company and even if the plaintiffs succeed in obtaining a decree for recovery of money against the defendant no.2, the same would merely be a paper decree. Secondly it is contended that a case for piercing the corporate veil is made out. Thirdly it is contended that the defendant no.1 played an active role in execution of the Agreement(s).

11. The counsel for the plaintiffs wants me to go through the documents in support of his aforesaid arguments. However, on being asked to show the plea if any contained in the plaint in support of the aforesaid arguments, the counsel for the plaintiffs though unable to show any pleading to the effect, states that he can always amend the plaint in pursuance to impleadment of the defendant no.2, to take the pleas on the basis of which arguments aforesaid are raised.

12. The fact remains that in spite of the defendant no.2 having been impleaded vide order dated 17th April, 2018, for the last nearly one year no steps in this regard have been taken. This Court cannot retain defendant no.1 in the array of defendants on the contention that the plaintiffs can always amend the plaint and if such amendment is allowed, the amended plaint would disclose the defendant no.1 to be a necessary and proper party. The counsel for plaintiffs is seeking to put the cart before the horse. Contentions before the Court are to be in support of pleadings. The counsel

for plaintiffs is first making contentions / arguments and on being asked to show pleadings on which such contentions are made, wants to now make pleadings. The entire procedure prescribed by law is sought to be turned on its head.

13. On the pleadings as existing today, the defendant no.1 is neither a necessary nor a proper party. The Master Dealer Agreement dated 25th January, 2005 is admittedly between the plaintiff no.2 and the defendant no.2 only and the claim for recovery of damages thereunder can only be against defendant no.2. The argument of the counsel for the plaintiffs, that because a money decree if awarded in favour of the plaintiffs cannot be executed against the defendant no.2, would not in law entitle the plaintiffs to sue and recover the monies from the defendant no.1, even if a 100% shareholder of the defendant no.2, without a plea for piercing of corporate veil being made in the plaint and being proved. Moreover, as and when the plaintiffs amend the plaint and are found entitled to impleadment of defendant no.1, the said aspect can be considered and as of today, on what the plaintiffs may do in future, decisions cannot be taken.

14. The impugned order is indeed found to have not considered the matter in this light and to have decided on the basis of the arguments rather than on the basis of pleadings.

15. The delay of seven days in filing the Chamber Appeal is thus condoned for the reasons pleaded and the Chamber Appeal is allowed. The order dated 21st May, 2018 of the Joint Registrar of dismissal of IA No.848/2017 is set aside and IA No.848/2017 is allowed, deleting the name of the defendant no.1 from the array of defendants.

16. The Chamber Appeal and the application for condonation of delay are disposed of.

IA No.9976/2018 (of D-2 u/S-8 of the Arbitration and Conciliation Act) & IA No.11659/2018 (for condonation of delay in filing the reply to IA No.9976/2018)

17. IA No.11659/2018 of the plaintiffs for condonation of 11 days' delay in filing the reply to IA No.9976/2018 is allowed and disposed of.

18. The Senior Counsel for the defendant no.2 M/s. Bang & Olufsen Middle East FZ LLC and the counsel for the plaintiffs have been heard.

19. The Senior Counsel for the defendant no.2 M/s. Bang & Olufsen Middle East FZ LLC, which is now the sole defendant, has drawn attention to the Master Dealer Agreement aforesaid between plaintiff no.2 AMS International B.V. and the defendant no.2, which in Clause 7.10 and 7.11 thereof provides as under:

“7.10. Applicable Law

7.10.1 This Agreement shall be governed by and construed in accordance with the laws of the Kingdom of Denmark.

7.11 Dispute Settlement

7.11.1 In the event that either party gives notice as to any dispute relating to this Agreement to the other party, such dispute being between AMS and B&O, then B&O and AMS agree that the matter in dispute shall be referred to arbitration in Denmark in accordance with the arbitration rules of the International Chamber of Commerce. The arbitrators' decision shall be final and binding. The language of the arbitration shall be English. A copy of these rules is attached to this Agreement as Appendix O.”

and has argued that the parties, in accordance therewith are liable to be referred to Arbitration.

20. The counsel for the plaintiffs has argued, (i) that the defendant has along with the application not filed the agreement containing the Arbitration Clause and the application is thus liable to be dismissed only on the ground of non-compliance with Section 8(2) of the Arbitration and Conciliation Act 1996; (ii) that the claim in the suit is of four plaintiffs and not only under the Master Dealer Agreement but also under the Dealer Agreement between the plaintiff no.3 AMS Distributors Private Limited and the defendant and though the plaintiffs have not filed a copy of the said agreement but the defendant also along with the application has not filed any copy of the said agreement to show existence of any Arbitration Clause therein and thus the parties cannot be referred to Arbitration.

21. As far as the first of the aforesaid contentions is concerned, I have enquired from the counsel for the plaintiffs, that the plaintiffs having produced the Master Dealer Agreement, whether the defendant, along with an application under Section 8, was still required to file another copy of the said agreement.

22. The counsel for the plaintiffs has handed over a copy of order dated 22nd June, 2018 of the High Court of Madhya Pradesh in Civil Revision No.547/2017 titled ***Union of India & Ors. vs. M/s. K. Kapoor and P. R. Mahant Khandwa*** and states that it has been held therein that even if the plaintiff has filed a copy of the agreement containing the Arbitration Clause, the defendant seeking reference to Arbitration is still required to file another copy of the agreement. However, the counsel for the plaintiffs

upon being asked to show the paragraph holding so, has drawn attention to the following paragraph of the order:-

“In the aforesaid judgment, the Supreme Court has observed that on filing a photocopy of the lease agreement which contained Arbitration Clause is sufficient compliance of Section 8 of Act of 1996. However, I am not convinced with the argument of Shri Ruprah for the reason that in the same case as has been relied upon by him, it has been observed by the Apex Court that the case of the parties before the Court below was that the original copy of the agreement was not in their possession whereas in the present case Shri Ruprah has contended that the copy of original agreement is in possession of the defendants though it was in tatter condition. Further, even after observing and rejecting the application under Section 8 of Act, 1996 on the ground that original agreement was not produced before the Court below, the applicants have not shown the original agreement even to this Court. Therefore, the said case does not provide any help to the defendants/applicants herein.”

which does not lay down as is contended by the counsel for the plaintiffs.

23. The senior counsel for the defendant on the contrary has drawn attention to ***AEZ Infratech Pvt. Ltd. Vs. SNG Developers Ltd.*** 2014 (211) DLT 215 holding that the objective of filing certified copy is to ensure that there is no dispute apropos existence of the arbitration clause; however it would be pedantic to insist upon compliance of the said provision in a situation where the agreement containing the arbitration clause itself forms the basis of the suit and the said clause itself is clearly admitted by the party

applying for arbitration and referring to a host of judgments on the said proposition.

24. Reference in this regard may also be made to ***Ananthesh Bhakta Vs. Nayana S. Bhakta*** AIR 2016 SC 5359 rejecting the argument of non-compliance of Section 8(2) reasoning that since the plaintiffs in that case had themselves filed Retirement Deed and Partnership Deed containing arbitration clause, the argument that application under Section 8 was not accompanied with original deeds could not be accepted.

25. The senior counsel for the defendant has also contended that since the clause in the Master Dealer Agreement between the plaintiff no.2 and the defendant is of arbitration in Denmark, in accordance with the Arbitration Rules of the International Chamber of Commerce, it is not Section 8 but Section 45 of the Arbitration Act which will be applicable and which does not even have any requirement as in Section 8(2) of the Act. Reliance in this regard is placed on ***Shakti Bhog Foods Limited Vs. Kola Shipping Limited*** JT 2008 (10) SC 694.

26. The counsel for the plaintiffs has no response.

27. There is thus no merit in the contention, that the application under Section 8 of the Arbitration Act is liable to be rejected.

28. As far as the second argument of the counsel for the plaintiffs is concerned, though the plaintiffs in the plaint, besides referring to the Master Dealer Agreement dated 25th January, 2005 (which was terminated on 1st May, 2007) have also referred to a Dealer Agreement dated 4th July, 2007 between the plaintiff no.3 i.e. AMS Distributors Private Limited and which

as per the plaint continued to be in force till 31st May, 2012, but the plaintiffs while suing the defendant for damages, have sued for lumpsum damages in the sum of Rs.1,00,01,000/-, without giving any particulars thereof and without specifying what loss has been suffered by which of the plaintiffs. The figure of 1,00,01,000/- though appears to have been chosen, to bring the suit within the pecuniary jurisdiction of this Court and avoid filing thereof in the Subordinate Courts. There are no particulars at all in the plaint, of the damages claimed.

29. I have again perused the plaint. While the plaintiffs no.1&3 i.e. Saga Lifestyle Pvt. Ltd. and AMS Distributors Pvt. Ltd. are Indian entities, plaintiffs no.2&4 i.e. AMS International B.V. and Future Living B.V., as per description in the memorandum of parties, are foreign entities incorporated in Netherlands. The plaintiffs in the plaint, after pleading the Master Dealer Agreement between plaintiff no.2 and the defendant and after making detailed pleadings with respect thereto and the actions taken by plaintiff no.2 qua its obligations thereunder, at a huge investment of Rs.7.65 crores, has pleaded termination thereof by the defendant, without any reason. The plaintiffs thereafter have pleaded that “the plaintiff no.2 through plaintiff no.3 signed a Dealer Agreement dated 4th July, 2007”, conveying continuity of the transaction which commenced with the extension of the Master Dealer Agreement containing the arbitration clause. The plaintiffs have pleaded having made investments also in pursuance to the Master Dealer Agreement and have not pleaded any investments under the Dealer Agreement dated 4th July, 2007. The plaintiffs have made a lumpsum claim for Rs.1,00,01,000/-, without specifying separately the

claim of each of the plaintiff or specifying how much claim is with respect to Master Dealer Agreement and how much with respect to Dealer Agreement.

30. Moreover the plaintiffs, as aforesaid, have not filed the Dealer Agreement dated 4th July, 2007 and not made any pleadings with respect thereto. The only assumption is that the money claimed in the present suit is on account of allegations of breach of Master Dealer Agreement and which contained arbitration clause. In fact, as aforesaid it is the plea of the plaintiffs in paragraph 13 of the plaint, that the Dealer Agreement dated 4th July, 2007 was entered into by the plaintiff no.2 (who had entered into Master Dealer Agreement) through the plaintiff no.3. The said plea unequivocally shows that the plaintiff is treating the entire transaction with respect to which damages / compensation is claimed as one only, emanating from the Master Dealer Agreement and which contains the arbitration clause.

31. I have drawn the attention of the counsel for the plaintiffs to ***Ameet Lalchand Shah Vs. Rishabh Enterprises*** 2018 (6) SCALE 621 holding that when there are four agreements involving several parties but all the four for same purpose / commercial project and the averments in the plaint indicate that all four agreements are interconnected, the arbitration clause in the principal / main agreement would cover ancillary agreements and parties thereto also even though the ancillary agreements do not provide for arbitration. It was reasoned that in such eventuality disputes between the parties to various agreements could be resolved only by referring all parties to arbitration. Though the said judgment is in the

context of Section 8 of the Arbitration Act but in my view would apply to Section 45 too and to the facts of present case. I have enquired from counsel for plaintiffs, why in accordance therewith, the entire dispute not arbitrable.

32. The senior counsel for the defendant in this context has drawn attention to ***Ministry of Sound International Ltd. Vs. Indus Renaissance Partners Entertainment Pvt. Ltd.*** 2009 (1) Arb. LR 566 (Delhi) and ***Virender Yadav Vs. Aerosvit Airlines*** 2008 (3) Arb. LR 445 (Delhi) holding that where there is unison of cause of action and when arbitration agreement is with respect to one of the parties only but the other parties are not sued in their independent capacity and the actions alleged are closely interrelated, the application for reference of the parties to arbitration cannot be dismissed.

33. The counsel for the plaintiffs has drawn attention to ***Sukanya Holdings (P) Ltd. Vs. Jayesh H. Pandya*** (2003) 5 SCC 531, ***Atul Singh Vs. Sunil Kumar Singh*** (2008) 2 SCC 602 and ***Yogi Agarwal Vs. Inspiration Clothes & U.*** (2009) 1 SCC 372.

34. I have perused the said judgments. However, they are found to be on their own facts. The facts of the present case are more akin to those of ***Ameet Lalchand Shah*** supra and the judgments cited by the senior counsel for the defendant.

35. I am thus satisfied that the subject matter brought by the plaintiffs by way of the present suit is subject matter of an agreement referred to in Section 44 of the Arbitration Act.

36. The defendant having made a request to refer the parties to arbitration, the parties are referred to arbitration and the suit is disposed of.

RAJIV SAHAI ENDLAW, J.

APRIL 04, 2019

ak/bs

(corrected & released on 1st May, 2019)

