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

**Date of Decision: 2<sup>nd</sup> February, 2022**

+ **CS (COMM) 591/2021 & I.As. 15223-27/2021.**

SUPERON SCHWEISSTECHNIK INDIA LTD. .... Plaintiff

Through: Ms. Suparna Srivastava, Advocate.

versus

EUROPAISCHE HOLDING INTERCITO & ORS. ....Defendants

Through: Mr. Sanjeev Kapoor, Ms. Anushka Sharda, Ms. Vaishnavi Chillakuru and Ms. Smriti Nair, Advocates for D-1.

**CORAM:**

**HON'BLE MR. JUSTICE SANJEEV NARULA**

**JUDGMENT**

**[VIA VIDEO CONFERENCING]**

**SANJEEV NARULA, J. (Oral):**

**I.A. No. 17125/2021 (on behalf of Defendant No. 1 u/S. 45 of the Arbitration and Conciliation Act, 1996, seeking dismissal of the suit)**

1. In light of the arbitration agreement contained in Article 14 of the Technology License and Technical Assistance Agreement dated 14<sup>th</sup> March 2017, Defendant No. 1, by way of the instant application under Section 45 of the Arbitration and Conciliation Act, 1996 [*hereinafter*, '**the Act**'], seeks dismissal of the instant suit along with reference of disputes to arbitration seated in Zurich, Switzerland as governed by the Rules of International Chamber of Commerce [*hereinafter*, '**ICC**'].



## **BRIEF FACTS**

- 1.1. Plaintiff is a manufacturer exporting welding consumables, stainless steel welding, and non-welding wires. The Defendant No. 1 is the owner of a patent in the 'Oerlikon-Intercito process' which is used for manufacture of electrodes required for welding. The parties entered into a contract, whereunder Plaintiff, *inter alia*, acquired non-exclusive rights to use the Oerlikon-Intercito process for manufacture of coated electrodes, and in consideration thereof, the Plaintiff was to pay license fee and meet other stipulations provided under the contract.
- 1.2. Parties have executed (i) Technology License and Technical Assistance Agreement on 1<sup>st</sup> October, 2007 [*hereinafter, "the 2007 Agreement"*], (ii) agreement on 4<sup>th</sup> February, 2012 [*hereinafter, "the 2012 Agreement"*], Agreement dated 14<sup>th</sup> March, 2017 [*hereinafter, "the 2017 Agreement"*].
- 1.3. Article 14 of the 2017 Agreement provides for arbitration and reads as under:

### **"GOVERNING LAW / ARBITRATION**

14.1 **This Agreement shall be governed by and interpreted according to Swiss law.**

14.2 **All disputes arising in connection with the Agreement shall be finally settled under the Rules of Arbitration of the International Chamber of Commerce** by one or more arbitrators appointed in accordance with the said Rules. **Arbitration shall take place in Zurich / Switzerland** and shall be held in English language. The final decision of the Arbitration panel shall be final and such decision shall be reasoned and set down in writing. Judgment upon the award rendered may be entered in any court having jurisdiction thereof for sale purpose of enforcing such a final and binding arbitration decision." [Emphasis supplied]



- 1.4. There is no dispute between the parties that the afore-noted agreement would be governed by Section 44 of the Act.
- 1.5. Since disputes have arisen between the parties, Defendant No. 1 has invoked Article 14 and filed a request for arbitration dated 31<sup>st</sup> August, 2021 with ICC seeking *inter-alia* payment of USD 11,43,071/- along with interest @ 5% p.a. towards outstanding royalties payable. The Arbitral Tribunal has been constituted and Defendant No. 1 has filed its statement of claim.
- 1.6. In this background, Plaintiff has approached this Court by way of the instant suit [filed on 22<sup>nd</sup> November, 2021] seeking the following reliefs:

*“a. Decree of Declaration holding and declaring that Article 14 of the Third Agreement is null, void, inoperative and unenforceable on account of it being oppressive and vexatious;*

*b. Decree of Permanent injunction in favour of the Plaintiff and against the Defendants from initiating arbitration proceedings under Article 14 of the Third Agreement or otherwise;*

*c. Decree of recovery of a sum of Rs. 24,24,77,850 (Indian Rupees twenty Four Crore Twenty Four lakh Seventy Seven Thousand Eight Hundred and Fifty) in favour of the Plaintiff and against the Defendants along with pendente lite and future interest @8% per annum;*

*d. Costs of the Suit;”*

## **2. CONTENTIONS OF DEFENDANT NO. 1**

- 2.1. Defendant No. 1 has sought dismissal of the suit *in limine* and for referring the Plaintiff to arbitration in accordance with Article 14 of the 2017 Agreement read with the Rules of ICC. Defendant No. 1 contends that the suit as framed spells out a dispute which can only be agitated



before the Arbitral Tribunal, in terms of the Arbitration Agreement, and therefore, the suit is not maintainable.

2.2. On Section 45 of the Act, it has been argued that when one of the parties makes a request to be referred to arbitration, the Court is only required to take a *prima facie* view as to whether the Arbitration Clause is “null and void, inoperative or incapable of being performed”. Under the said provision, the Court is obligated to refer the parties to arbitration unless, on a *prima facie* basis, the Court finds that the Arbitration Clause is null and void, inoperative or incapable of being performed. The Plaintiff has not made out any such case and therefore, the application deserves to be allowed. In support of this contention, reliance is placed upon the judgement in ***Worlds Sport Group Mauritius Ltd. v. MSM Satellite Singapore***<sup>1</sup>; and ***Jes & Ben Groupo Pvt. Ltd. & Ors. v. Hell Energy Magyarorzag Kft.***<sup>2</sup>

2.3. Mr. Sanjeev Kapoor, counsel for the Applicant/ Defendant No. 1 has referred to several documents enclosed with the plaint to demonstrate that the Plaintiff does not deny the existence of the Arbitration Agreement and has, in fact, over the years consistently, agreed to such a clause, which is also found in the Agreements of 2007 and 2012. All these Agreements were signed by Mr. Sanjay Mehra, first in the capacity of General Manager and then as Managing Director of the Plaintiff company. The Plaintiff has acted upon the agreements and

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<sup>1</sup> 2014 11 SCC 639

<sup>2</sup> 2019 SCC OnLine 10225



made payments of royalties thereunder without any demur or protest. It is only when it failed to fulfil its obligations under the 2017 Agreement, that Defendant No. 1 called upon the Plaintiff to make payment of dues under the 2017 Agreement.

- 2.4. He further submits that the allegations made in the plaint do not demonstrate a case that would fall in the category of cases, as provided under Section 45 of the Act, where the Court would decline referring the parties to arbitration.
- 2.5. Lastly, Mr. Kapoor invokes doctrine of separability, drawing support from the judgment of the Supreme Court in *Vidya Drolia & Ors. v. Durga Trading Corporation*,<sup>3</sup> to submit that an enquiry at this stage has to be of only a *prima facie* nature and all contentions on merits of the dispute have to be urged in arbitration.

### 3. CONTENTIONS OF THE PLAINTIFF

- 3.1. Ms. Suparna Srivastava, counsel for the Plaintiff, on the other hand, submits that not only is the suit maintainable, but the Plaintiff, rather has a strong *prima facie* case to demonstrate that the 2017 Agreement is null and void, inoperative, and vexatious. She submits that Section 45 cannot be read as an absolute bar for the Courts to entertain suits in matters relating to International Commercial Arbitration. She further submits that merely because parties have agreed upon an Arbitration

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<sup>3</sup> 2020 SCC OnLine SC 1018.



Agreement, does not denude the Court of its power to decline reference to arbitration. The language of the statute is clear and the Court is duty bound to investigate and examine if indeed the 2017 Agreement is null and void, inoperative and incapable of being performed, and only if the court is satisfied that such is not the case, should the parties be referred to arbitration.

3.2. She also submits that the scope of Section 45 of the Act has been examined in a catena of judgments rendered by the Supreme Court as well by of this Court, including ***Chloro Controls Pvt. Ltd. v. Severn Trent Water Purification***,<sup>4</sup> and ***Worlds Sport Group Mauritius Ltd.*** (*supra*). Referring to the observations made in the afore-noted judgments, Ms. Srivastava submits that in the instant case the arbitration clause is null and void in light of serious fraud having been played upon the Plaintiff by Defendant No. 1 through wilful misrepresentation of facts, concealment, coercion and inducement by the Defendant, and therefore, the application is liable to be dismissed and the Plaintiff is entitled to an injunction as sought in the relevant accompanying application filed by it along with the suit.

3.3. On the aspect of fraudulent intention, Ms. Srivastava submits that the fraudulent intention/acts of the Defendants are evident from the fact(s) that:

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<sup>4</sup> 2013 1 SCC 641



- a. During the entire tenure of the 2007 and the 2012 Agreements, the Defendants never provided any viable raw material to the Plaintiff but kept on demanding licensee fee and forced the Plaintiff to continue spending on their brand building exercise;
- b. It is an undisputed position that during the period from 1<sup>st</sup> October 2010 till 1<sup>st</sup> January 2013 (i.e. for two years and two months), no formal Agreement was executed between the parties. However, Defendants No. 1 and 2 continued to demand payment of minimum license fee from the Plaintiff under the garb of mutual agreements;
- c. It is also an undisputed position that the 2012 Agreement has been terminated w.e.f. 31<sup>st</sup> December 2014 *vide* termination letter dated 20<sup>th</sup> June 2014. Yet, the Defendants have sought royalty payments from the Plaintiff for 2015 and 2016 on the pretext that execution of fresh Agreements has been delayed owing to change in ownership of Defendants No. 1;
- d. The Plaintiff, believing this misrepresentation to be true at that time, duly paid royalty in the year 2015 in lieu of left-over stock of 2014 sold by it and in the year 2017 in lieu of left-over stock of 2016 sold by it. Since the said payments have been made by the Plaintiff in back date upon repeated requests being made by the Defendants, it manifests that the Defendants induced the Plaintiff to execute an Agreement in March 2017 which was made applicable retrospectively w.e.f. 01<sup>st</sup> January 2015 to be valid till 31<sup>st</sup> December 2016;



- e. In the said Agreement, the Defendants have surreptitiously added clauses of exorbitant minimum licensee fee (Clause 9.1), which perhaps have been overlooked inadvertently by the representative of Plaintiff owing to enormous pressure of executing Agreement in order to regularize payments; and
- f. The said clause 9.1 has never been acted upon by the parties which is clear from the fact that despite execution of the Agreement in March 2017 and having received payments in May 2017, the Defendants have never raised any dispute with the Plaintiff till the issuance of the first legal notice, and only after change of ownership of Defendant No. 1.

### ANALYSIS

- 4. The Court has considered the contentions of the parties. The proposition in law, as advanced by Mr. Kapoor, cannot be disputed. In fact, on the basis of case laws cited, this Court does not find any variance amongst the counsels as far as the scope of its jurisdiction under section 45 of the Act is concerned.
- 5. The only point which Mr. Kapoor has stressed is that the scope of enquiry of under Section 45 is on a *prima facie* basis. This indeed is the correct position, as is evident from the language of the provision itself. At this stage, it must also be noted that the words “*unless it prima facie finds*” were introduced in Section 45 by replacing the words “*unless it finds*” by way of Amending Act No. 33 of 2019, made effective from



30<sup>th</sup> August, 2019. This expression is now at par with what can be seen under Section 8 of the Act, as applicable to domestic arbitration. Therefore, at this stage, although the Court will examine as to whether the Agreement sought to be enforced by way of the instant suit is null and void, inoperative or incapable of being performed, yet the test that would be applied would be of a *prima facie* basis. This means that the Court is not to conduct any detailed enquiry or minute trial at this stage, in order to discern if such is the case. Hence, if the Court *ex facie* finds that the Agreement is null and void, inoperative or incapable of being performed, the Court would decline a request on behalf of a party for reference to arbitration.

6. At this juncture, it must also be noted that the judgment in ***Chloro Controls Pvt. Ltd*** (*supra*), was rendered in the context of the unamended Section 45 of the Act. Such as also the case in ***Worlds Sport Group Mauritius Ltd.*** (*supra*). Nevertheless, the afore-noted two judgments clearly bring out the appropriate reasoning, and guide as to what should be the scope of examination of this Court, while entertaining a request for Section 45 of the Act. Conscious of the jurisdiction being exercised by this court, as well as the above-mentioned limited scope of Section 45, and in light of the judgments relied upon by the parties and the language of the Section itself, the court now proceeds to examine as to whether the Plaintiff has indeed made out a case for denial of reference to arbitration.
7. The Plaintiff does not deny the existence of the arbitration clause under



2017 Agreement or the execution thereof. It must also be noted that the 2017 Agreement was executed on 14<sup>th</sup> March, 2017, however it was operative w.e.f. 1<sup>st</sup> January, 2015. This is clearly indicative to the Court that the Agreement was made effective retrospectively. The said agreement also contains a condition prescribing the term of the Contract as found in Clause 10, which reads as under:

***“VALIDITY AND TERMINATION OF THE AGREEMENT***

*10.1 This Agreement comes into force with effect from 1<sup>st</sup> of January 2013. It shall, unless it is terminated according to this article, remain in force for a term of 2 years until 31<sup>st</sup> December 2014.*

*10.2 In case of the electrode business of one or the other party of this Agreement being sold to another person or company or entering into amalgamation or liquidation, all the rights and obligations under this Agreement are transferred to the respective successors in title and assigns. However, such transfer will be subject to INTERCITO's previous written consent. If INTERCITO refuses such consent, the Agreement will be ended at the date of sale, amalgamation or liquidation.*

*10.3 INTERCITO is in each of the following cases entitled to terminate the Agreement at any time with a three months' notice:*

- *If the LICENSEE should become insolvent or enter into a composition agreement with his creditors.*
- *ii) if the Licensee should fail to pay the License fees due*
- *iii) If the Licensee fail to purchase from Oerlikon the minimum amount of dry mix or raw materials*
- *iv) If the LICENSEE should otherwise seriously violate his contractual obligations.*

*10.4 The LICENSEE is entitled to terminate at any time the Agreement with a three months' notice if INTERCITO should seriously violate its contractual obligations, provided that provision deemed to survive to the termination, such as payment, liability ... shall continue to be valid and binding upon the LICENSEE.*

*10.5 In case that this Agreement should be terminated by INTERCITO according to the above articles 10.2 and 10.3, before the date stipulated in the above 10.1, the LICENSEE shall stop to produce the coated electrodes under Oerlikon formulae and undertakes to return immediately to INTERCITO any documentation and/or written information given to him under this Agreement. Upon such termination, the LICENSEE will*



*have the right during six (6) more months to sell the OC in the Territory in order to liquidate his OC- and raw-material stocks.*

*10.6 If the LICENSEE intends to step out of electrode production or if he is forced to go into liquidation, he shall first propose to Intercito / Oerlikon to purchase the production line, subject to applicable law.”*

8. The afore-noted clause provides for an initial term of upto 31<sup>st</sup> December, 2016, and then also prescribes that the Agreement shall be renewed automatically for a period of two years unless terminated earlier.
9. Plaintiff contends that after 31<sup>st</sup> December, 2016, the Agreement was never renewed. On the other hand, Defendant No. 1 relies upon Clause 10.1 to contend that the Agreement stood automatically renewed as it was not terminated earlier.
10. In any event, the Court does not find this divergent stand of the parties to be impinging upon the validity of the Agreement in any manner. The arbitration clause would survive, notwithstanding the term of the contract, having regard to the principle of separability of the arbitration agreement from the main contract. Therefore, the Court does not find this to be a ground to hold that Clause 14 is null and void, inoperative or incapable of being performed.
11. Further, Ms. Srivastava has also relied upon a communication to say that Defendant No. 1 had sent a draft of the Agreement(s) for the subsequent period of 2017 to 2018, which was never accepted by the Plaintiff. Even if this were to be factually correct, the Court does not find this aspect to be a sufficient ground to decline the instant



application.

12. It must also be underscored that the arbitration clause which is now sought to be avoided by the Plaintiff, is substantially the same clause which is found in the earlier Agreements of 2007 and 2012. This clearly indicates to the Court that the Plaintiff has voluntarily, without any hint of demur or protest, agreed to be governed by the said clause, as well as the rules of ICC, with seat at Switzerland. The Parties have entered into three agreements over a period of ten years. At no point of time has the Plaintiff raised any such grievance, and no communication sent by the Plaintiff to the Defendant has been shown to the court that could indicate that the said clause was found to be vexatious or oppressive by the Plaintiff. At this stage, when disputes have arisen, the Plaintiff has chosen to avoid the arbitration clause by way of the instant suit, the foundation for which, as required under Section 45, is clearly absent.
13. The Court also finds merit in the contention of Mr. Kapoor that the Plaintiff all throughout acted upon the Agreements referred above. In fact, the averments made in the plaint also clearly disclose that there was no dispute between the parties under the 2007 and 2012 Agreements, and the Plaintiff has made payment of royalties under the 2007 and 2012 Agreement, and part payment of royalties under the 2017 Agreement. It is only after the Plaintiff failed to fulfil its obligations under the 2017 Agreement and the Defendant No. 1 called upon the Plaintiff to make payment of the amounts due, that the Plaintiff has sought to raise allegations to the effect that the 2017



Agreement was entered into by the Plaintiff on account of misrepresentation by the Defendants. It is surprising that the Plaintiff has not alleged that the 2007 or 2012 Agreement were entered into under coercion, but has chosen to raise these allegations with respect to the 2017 Agreement, albeit belatedly. Clearly, this is being raised with the sole intent of circumventing the arbitration agreement and avoiding payment obligations under the Agreement(s).

14. Further attention of the Court has also been drawn to a document at page nos. 726-727 of the plaint, as relied upon by the Plaintiff, to demonstrate that the royalties were duly paid to the Defendant. This certificate indicates that the Plaintiff had last made part payment of royalties on 30<sup>th</sup> May, 2017. Having thus made payments during the term of and under the obligations arising out of the 2017 Agreement, the Plaintiff cannot now make belated and frivolous allegations claiming the arbitration clause contained therein to be null and void, inoperable, or incapable of being performed.
15. It is also well settled in law that the averments made in the plaint have to be read meaningfully. It is the duty of the Court to ascertain the real cause of action while reading the plaint holistically. Upon undertaking such an exercise, the court finds that Plaintiff's allegations do not make out a case of fraud, much less a serious fraud, and the issues raised by the Plaintiff fall squarely within the jurisdiction of the Arbitral Tribunal. The allegations of fraud/coercion levelled by the Plaintiff do not *ipso facto* render the arbitration clause void. These are issues that ought to be decided by the arbitral tribunal.



16. Admittedly, Plaintiff is a commercial entity which has entered into the Agreements with eyes wide open. It is *prima facie* inconceivable that the Plaintiff, with the standing it claims to have, could be coerced into making payments under the various Agreements over a tenure of ten years, and be further coerced to execute the 2017 Agreement under an alleged threat of harm to its reputation. It is also strange to note that, on one hand the Plaintiff has claimed that it was coerced into executing the 2017 Agreement by the Defendants' threats to ruin its reputation, while on the other hand it claims that it entered into the 2017 Agreement in light of the Defendant's alleged fraud/misrepresentation of providing new and upgraded technology from Romania which would benefit the Plaintiff (*See*: Paras 20 and 21 of the Plaint). Mere allegation of fraud in the pleadings by one party against the other cannot be a ground to hold that the matter is incapable of settlement by arbitration. The contradictory stands taken by the Plaintiff makes it apparent that its case is completely frivolous and is being raised only to avoid its obligations under the 2017 Agreement. No ground whatsoever is made out to hold that the 2017 Agreement, falls within the exceptions stated in Section 45 of the Act.
17. The allegations of fraud/coercion alleged by the Plaintiff can and ought to be considered and decided by an arbitral tribunal constituted in accordance with the arbitration agreement between the parties. Clearly, the Plaintiff has failed to make out a *prima facie* case that clause 14 of the 2017 Agreement is null, void, inoperative or incapable of being performed. In view of the above, the Court finds merit in the arguments



of the Defendants.

18. Accordingly, the present application is allowed.
19. The Court has been informed that the Arbitral Tribunal is already in place and the first case management hearing has been held on 20<sup>th</sup> December 2021. By its procedural order dated 22<sup>nd</sup> December 2021, the schedule for filing of pleadings including submissions on jurisdiction has been fixed by the Arbitral Tribunal. The Plaintiff is represented through their counsel in the arbitration proceedings. Therefore, the plea for referring the parties to arbitration is rendered infructuous and no further directions in this regard are required to be issued.

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20. In view of the foregoing, the plaint is rejected. Nothing survives before the court. All other pending applications are dismissed.

**SANJEEV NARULA, J**

**FEBRUARY 2, 2022**

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*(corrected and released on 03<sup>rd</sup> March, 2022)*