A.No.5041 of 2022
in
C.S.(Comm Div) No.70 of 2022

ORDERS RESERVED ON: 02.08.2023

ORDERS PRONOUNCED ON: 29.09.2023

P.T.ASHA.J,

The above application has been filed by the applicant/defendant under Section 8 of the Arbitration and Conciliation Act seeking dismissal of the suit and to refer the parties to arbitration in the light of the following agreements:

(1) Master Technical License and Distribution Agreement dated 22.12.1999 between FGL, FGA and defendant.

(2) Shareholders Agreement dated 30.10.2000 between FGL, FGA and defendant.

(3) Share Purchase Agreement dated 05.08.2020 entered into between the plaintiff's associate Company Fujitsu General (Asia) Pte. Ltd(FGA) and the defendant.

2. The applicant/defendant would contend that the above agreements entered into between the defendant and the plaintiff's parent and subsidiary companies which contains an arbitration clause are inter linked with the business arrangement under which the suit invoices are allegedly raised by the plaintiff. It is the contention of the defendant that the parties are therefore to be referred to arbitration.

3.Before proceeding to set out the contents of the application in question and the counter and re-joinder there to, it is necessary to briefly touch upon the basis on which the respondent / plaintiff has filed the suit in question for recovery of US dollars 19,005,310.00 (USD Nineteen million five thousand three hundred and ten only).

4. The parties are referred to in the same array as in the suit for ease of reference. It is the case of the plaintiff that it was

incorporated in the year 1991 and are engaged in the business of supplying Air Conditioners under the brand name "General". In the year 1999, the defendant company had been incorporated. The defendant company had placed orders for the supply of Air Conditioners with the plaintiff on the following dates, 29.01.2019, 07.02.2019, 14.02.2019 and 27.02.2019. On the basis of the above purchase orders the plaintiff had also supplied the products in the month of March 2019 and the products were also received without demur by the defendant. Between 01.03.2019 to 26.03.2019, the plaintiff had raised 31 invoices upon the defendant all of which remained unpaid. It is the contention of the plaintiff that they had made several requests which were not responded to and thereafter they had sent a letter seeking confirmation of balance as of 20.03.2020. By an e-mail dated 17.04.2020 the said outstanding was acknowledged by the defendant. It is the plaintiff's case that they had sent over 13 reminder letters between 28.04.2020 and 08.11.2021. Ultimately, by letter dated 04.02.2022, which was in response to a letter dated 08.10.2021, the defendant had sent a reply which was a purported balance confirmation letter which ran contrary to their earlier stand and existing records. The defendant had included two debit notes in this balance confirmation letter which according to the plaintiff was without basis.

5.The plaintiff would submit that the plaintiff had accepted the outstanding to the tune of a sum of US dollars 19,005,310.00 under the confirmation letter issued by the defendant to the plaintiff vide e-mail dated 17.04.2020. The have also made some payments towards outstanding invoices after receiving the reminder letters and the last of such payment was a sum of USD 250,800.090 and USD 269,700.00 on 07.12.2021 which has been duly credited to the defendant's outstanding. In the light of the above, the defendant's letter dated 04.02.2022 was without any basis.

6.By swift transactions evidenced by receipt dated 03.12.2021, the defendant had made payment towards invoices 00976 and 0124 dated 15.03.2019 and 26.03.2019 respectively. That apart, the plaintiff has acknowledged its liability to the plaintiff vide its confirmation letter. The confirmation letter has been sent in February 2022 and therefore, the period of limitation starts from that date. Further, even if it is calculated from the date of last payment, i.e., 07.12.2021 the suit is well within time.

7.Despite receiving products from the plaintiff and having taken delivery of the same and acknowledging the balance confirmation on 17.04.2010, the defendant has failed to make payment and is therefore in violation of the terms of the contract. Therefore, the plaintiff has come forward with the suit in question

8.After entering appearance in the suit, the defendant has come forward with the subject application. It is their case that the plaintiff company is a wholly owned subsidiary company of its parent company, namely, Fujitsu General Limited, hereinafter referred to as " FGL". This company is registered under the relevant laws of Japan. Fujitsu General (Asia) PTE limited (FGA) organised and administered by the relevant laws of Singapore is a subsidiary of FGL. Similarly FGL had also floated a company Fujitsu General (India). Private Limited hereinafter referred to as FGI. This company is incorporated and administered under the Companies Act, 2013 (India).

9.These companies are collectively referred to as the FGL group. The plaintiff, FGA and FGI are the associate / subsidiary of the parent company at Japan, FGL. The plaintiff and its group companies are engaged in the business of manufacture and sales of Chillers, Air Conditioners, refrigerators etc., under the brand name “O General”. FGL, and FGA with an intention to expand their business in India had entered into a Master Technical Licence and Distribution

Agreement dated 22.12.1999 with the defendant. This agreement contains an arbitration clause. Pursuant to this agreement, the defendant has been manufacturing, marketing and supplying Air Conditioners in India. On instructions of FGL, the defendant had closed down their manufacturing unit at Pondicherry since FGL was unable to supply engineers. However, the plaintiff continued to supply Air Conditioners to the defendant who have been distributing, marketing and selling "O General" brand Air Conditioners in India. The defendant would submit that they have been constantly settling the accounts of the plaintiff and its associate Companies without any delay for the last 21 years. On 30.10.2000, FGI and FGA together with FGL group entered into a Shareholders Agreement dated 30.10.2000, which was subsequently amended by an Amended Shareholders Agreement dated 31.10.2010. The Shareholders Agreement also contains an arbitration clause.

10.FGL had created its subsidiary in India, namely, FGI in and around December 2018. Subsequently, in the month of October / November 2019 FGL decided to terminate the Master Technical and Licence agreement dated 22.12.1999 as they had decided to carry on business on its own through its subsidiary FGI. As mandated under clause 20 of the Master Technical Agreement no notice of termination has been issued to the defendant by the plaintiff's parent company FGL.

11.The defendant would submit that at the time of termination, FGL had agreed to perform certain acts which has been extracted in detail in paragraph no.6 (g) of the affidavit filed in support of the application. However, though the agreement had been terminated on 22.12.2019, the plaintiff had failed to honour its commitments as discussed through several e-mails / Board meetings even after taking over the entire business from the defendant for a consideration of USD 13 million which was to be paid through an escrow account. At the time of taking over the business in December 2019 the plaintiff's parent company FGL had stated that an escrow account will be opened and that the USD 13 million will be deposited into this account.

12. Though the intention to terminate the contract was with effect from December 2019, FGL group had requested the defendant to continue the business till June 2020 as their newly opened subsidiary company FGI was yet to get their licenses. Therefore, the defendant continued business till June 2020. It was also agreed in June 2020 that FGL Group would take back the entire stocks of the defendant which they had supplied as it was their intention to only sell through their dealers so as to give effect to the transfer agreement dated 30.06.2020 executed between defendant and FGI. This agreement also contained an arbitration clause. Pursuant to this business transfer proposal, the defendant and FGI had entered into an escrow agreement dated 18.12.2020 to open an escrow account with

the Jammu and Kashmir Bank Limited in which the plaintiff is beneficiary. It is also stated that FGI had started depositing amounts in an escrow account from January 2020 against the stocks lifted by them from different warehouses of the defendant. All these agreements contained an arbitration clause. Therefore, it is the contention of the defendant that the suit is not maintainable and the parties have to be referred to arbitration.

13.A counter has been filed by the plaintiff inter alia contending that the defendant has not made out any case whatsoever for the dismissal of the suit. It is also the case of the plaintiff that the present application is not maintainable as an application under Section 8 of the Arbitration and Conciliation Act, 1996 has to be made not later than the date of submitting the first statement on the substance of the dispute.

14.Admittedly, the defendant had entered appearance on 17.08.2022 and served notice of appearance on the plaintiff on 22.08.2022. Application for condoning the delay in filing the application seeking leave to defend was filed on 28.09.2022 and again on 28.09.2022 and 19.10.2022. It is the case of the plaintiff that in a summary suit leave to defend is the first statement of defense. Further, from the statement contained in the leave to defend application would itself clearly show that the defense lacks merits. The defendant had served notice of appearance on 22.08.2022 and the application to condone the delay has been filed on 28 September 2022 and once again on 19.10.2022. The application under Section 8 ought to have been filed prior to these applications but the same has not been so filed. Apart from this technical defense the plaintiff had also contended that the suit invoices which have been filed are not the subject matter of any of the agreements referred supra and consequently the Arbitration Clause contained in these agreements will not bind the defendant as the agreement between the plaintiff and the defendant is independent and outside these agreements.

15.Further, the subject matter of the suit is not directly or indirectly the subject matter of any of the agreements referred above. The plaintiff had set out the salient features of each of these agreements to highlight the fact that the plaintiff is not a party to any of the agreements referred and the suit invoices do not form part of these agreements. Each of these agreements were executed by different parties and executed at different times. The transactions are not inter linked and the only common link is FGL and the defendant. Therefore, the invocation of Section 8 is totally misconceived. That apart, the plaintiff is not claiming through or under any of the parties to this arbitration agreement. The plaintiff would further submit that group company theory would not apply in the instant case. The defendant through their conduct has waived the arbitration clause, in as much as they have taken out application for condoning the delay in the leave to defend application. It is the contention of the defendant that the plaintiff owes them over USD 13 million under the Master Technical Licence agreement dated 22.12.1999. Shareholders Agreement dated 31.03.2000 and Transfer Agreement dated 30.06.2020.

16.It is also pleaded that the defendant had also initiated pre suit mediation proceedings for the claim of USD 13 Million before the Tamil Nadu State Legal Services Authority. The mediation proceedings have been initiated in respect of claims arising under Master Technical License and Distribution Agreement dated 22.12.1999, Shareholders agreement dated 31.10.2000, Transfer agreement dated 30.06.2020. The suit claim does not come under any of these agreements and therefore, the defendant cannot seek reference to arbitration on the strength of the arbitration clause in these agreements. The defendant by way of conduct has waived arbitration agreement. The plaintiff has countered each of the allegations made in an affidavit filed in support of the said application.

17.The applicant / defendant has filed a re-joinder reiterating the contents of the affidavit filed in support of the Section 8 application and contending that the plaintiff is only a subsidiary of the main company FGL with which the defendant has entered into various agreements. The agreements have been executed between the defendant and the plaintiff companies and subsidiary companies. Therefore, they had once again reiterated the contentions that the suit has to be dismissed and the parties referred to arbitration.

18.Mr.P.S.Raman, learned senior counsel appearing on behalf of Mr.Kumarpal Chopra, learned counsel for the defendant would submit that the plaintiff is a Japanese Company incorporated in the business of manufacturing “O General” brand air Conditioners in India. From the year 1999, the defendant, who is the defendant herein, has been doing business with the plaintiff's group. It is also his further contention that the defendant had entered into an agreement with the Japanese Company and its subsidiary "FGA". They had entered into a Master Technical License and Distribution Agreement which contains an arbitration Clause in Clause No.21. He would further submit that the defendant was directed to manufacture air conditioners on behalf of "FGL". It is his further contention that after India and Thailand had entered into a Trade Agreement in the year 2010, marketing was being done through Thailand. Till the year 2020, there was no issues between the parties. Between 2019-2020, FGL had decided to set up a manufacturing unit in India and as a result, FGI came to be formed. He would further contend that the FGL, FGA, Emirates Trading Agency, L.L.C (ETA) and Electromechanical Technical Associates (P) Ltd, Mauritius (ETAM) had entered into a Share Holders Agreement dated 31.10.2000, under which FGL and FGA were inducted as shareholders of the defendant-Company. There was an amendment to this Share Holders Agreement on 31.10.2000. As per the Share Holders Agreement, FGL and FGA were to participate in the running of the Company, namely, the defendant. The agreement further stipulated that the major decisions could be taken only with the approval of FGL. The learned senior counsel would further submit that, as per the Share Holders Agreement, the parties had agreed at a consideration of 13 million US dollars for the take over of the business, which was to be paid through an escrow account. 30.55% of the shares of the plaintiff's company were sold to FGL. Since FGL had commenced its business exclusively in India through FGI, the parties (the defendant and FGI) had entered into a Transfer Agreement dated 30.06.2000. Under this agreement, FGI had agreed to purchase all the products of FGL, Stock of the Products as well as the desktop equipments like laptop, PC, etc., Under this agreement, the payment for the products/ spare parts / accessories were to be made within 180 days from the date of the GST invoice by the purchasers with the payment being made on delivery and physical verification of assets. The payments for the products were to be made into an escrow account, which was opened in the Jammu and Kashmir Bank. This amount was payable to the plaintiff. Therefore, it is his contention of the learned senior counsel that since the payments to the plaintiff were to be made through the account opened in the Jammu and Kashmir Bank pursuant to the agreement between the defendant, FGL and FGA, the plaintiff is bound by the terms of these agreements, which contain an arbitration clause, and being a group company, the plaintiff was bound by the same. He would rely upon the Escrow Agreement entered into between the defendant, FGI and the Jammu and Kashmir Bank Ltd. As per the terms and conditions of this Escrow Agreement, the account was opened to permit the FGI to deposit the funds from time to time and these funds were to be released. As per the terms of this agreement, the accrual in the form of interest and dividend on a quarterly basis was payable to the plaintiff-Company, which was to be adjusted towards the amounts payable by the defendant to the plaintiff. It is therefore his contention that since the parties have clearly and categorically admitted that the payments from the escrow account were to be made to the plaintiff, there is a tacit acceptance by the plaintiff of the fact that the transactions were all intrinsically connected with one another. This Escrow Agreement also contains an arbitration clause. Therefore, it is his argument that the parties have to definitely be referred to arbitration to enable the parties to settle the disputes through arbitration. He would rely upon the following judgments in support of his contentions:

Sl.No.	***Citation***
1	Olympic Cards Limited Vs.Standard Chartered Bank [2013 (1) CTC 38
2	Price Water Coopers Vs.Mohan Kumar Thakur [2020 SCC Online Kar 3434]
3	G.T.L.Infrastructure Limited Vs.Amaladoss [C.R.P.(MD)No.145 of 2023
4	Extramarks Education India Private Limited Vs.MES Central School 2022: DHC:1834
5	ONGC Limited Vs.Discovery Enterprises Private Limited [2022 (8) SCC 42

19.Mr.Satish Parasaran, learned senior counsel appearing for Ms.Arva Merchant, counsel for the plaintiff would submit that there is no group concept as alleged by the defendant. He would submit that the plea for referring the parties to arbitration has not been taken at the first instance. He would also draw the attention of the Court to the distinction between the language in Section 8 and Section 45 of the Arbitration and Conciliation Act. Though Section 45 does not contain the term first statement of defense, this is provided in Section 8 and it is sina qua non that the application under Section 8 has to be made before the first statement of defense. In this regard, the learned senior counsel would submit that after receiving the summons, the defendant had filed an application for leave to defend with the delay and that apart, they had also participated in the pre-suit mediation before the Tamil Nadu Legal Services Authority. Further, the pre-suit mediation had been instituted by the defendant as a prelude for instituting another suit. The said suit has been filed by the defendant in the month of August. He would further submit that the suit in question relates to invoices that have been raised by the plaintiff.

20.In this suit, the defendant, on entering appearance, has filed an application for condoning the delay in filing the application for seeking leave to defend. This application has been filed on 28.09.2022 and it is only a month later that the application in question has been filed. Therefore, it is the contention of the learned senior counsel appearing for the plaintiff that even assuming without admitting that the plaintiff is bound by the agreements between their group companies and the defendant, the fact that they have submitted their first statement of defense automatically disentitles them to have the suit referred to mediation.

21.The learned senior counsel would further submit that the plaintiff is not a party to any of the agreements that have been referred to supra. That apart, each agreement is independent of the other. Even in the Shareholders Agreement, the reference to "FGL" group is only FGL and FGA. Therefore, the contents of paragraphs 6 and 7 filed in support of the instant application are totally contrary to the true facts. The transaction between the plaintiff and the defendant is simplicitor a purchase and sale based on purchase orders. The purchase orders do not rely upon any of the agreements. Further, he would repulse the arguments of the defendant that the payment which was being made from the escrow account was being paid to the plaintiff and therefore, the plaintiff is bound by the terms of these agreements. He would contend that this argument is absolutely fallacious, considering the fact that two payments have been made directly by the defendant to the plaintiff and not through the Escrow account. He would further submit that by letter dated 20.03.2020, the plaintiff had called upon the defendant to acknowledge their outstanding of US Dollars 51,800,365,00 as on 29.02.2020, the same had been acknowledged by the defendant. The learned senior counsel further submitted that the defendant had confirmed the balance as on 29.02.2020. However, in response to the letter of the plaintiff dated 08.10.2021 calling upon the defendant to confirm their balance, a reply was sent on 04.02.2022 for the first time disputing the outstanding and also forwarding the debit notes, which had not been pleaded earlier. In fact, between 20.03.2020 and 04.02.2022. several letters from the plaintiff asking for confirmation of balance have remained unanswered. The learned senior counsel would further submit that in response to the reply of the defendant dated 04.02.2022, the plaintiff has sent a legal notice dated 09.02.2022 calling upon the defendant to pay US dollars 19,005,310,00. This notice, which was sent to the office of the defendant at Chennai, has been returned with an endorsement "left". This is the address which was shown as the address for business users as recorded in the Ministry of Corporate Affairs. The learned senior counsel would rely upon the following judgments:

Sl.No.	***Citation***
1	Ramasamy Athappan Vs. Secretariat of the Court, International Chamber of Commerce [2008 SCC Online Mad 789
2	Bottero S.P.A Vs. Euro Glass Ltd [2017 SCC Online Bom 9250]
3	R.Samudra Vuijayam Chettiar Vs. Srinivasa Alwar [1995 SCC Online Mad 186]
4	Tamil Nadu Road Sector Project II Vs. IRCON

Sl.No.	Citation
	International Ltd [2021 SCC Online Mad 181].
5	Padam Chand Kothar Vs.Shriram Transport Finance Co.Ltd [2020 SCC Online Mad 138]
6	Alaska Export USA Inc. Vs. Alaska Exports [2016 SCC Online Mad 5961]

22. He would further submit that the transactions between the plaintiff and the defendant are totally independent of the defendant's agreements with the plaintiff's group companies. In the judgment reported in ***2008 SCC Online Mad 789 [Ramasamy Athappan Vs. Secretariat of the Court, International Chamber of Commerce],*** it has been held in paragraph 42 as follows:-

> ***"42.*** *Abandonment may also arise when the contract is followed by a long period of delay or inactivity. But the party seeking to establish abandonment must show that the other party so conducted himself as to entitle him to assume and that he did assume, that the contract was agreed to be abandoned sub silentio. The abandonment of a right may arise by virtue of a party making an election. Some times this is also called waiver by election. It would arise when*

a person is entitled to alternative rights inconsistent with one another and that person acts in a manner which is consistent only with his having chosen to rely on one of them. Such cases do not require detriment to the other party as foundation for their application {R. Samudra Vijayam Chettiar v. Srinivasa Alwar and Others AIR 1956 Madras 301 = (1956) 69 L.W. 62}. A second type of waiver is waiver by estoppel. It arises when the innocent party so conducts himself as to lead the party in default to believe that he will not exercise that right. This type of waiver is actually an application of the principle of equitable estoppel.

23.Heard the learned counsels on either side and perused the materials available on record.

24.The defendant has come forward with the application for referring the parties to arbitration on the ground that the plaintiff is a subsidiary of FGL, who has agreements with the defendant along with other subsidiaries. The defendant is a group company of M/s. Fujitsu

General Limited (FGL), the Japanese Company. This company and two of its subsidiaries, Fujitsu General (Asia) Pte.Ltd (FGA) and Fujitsu General (India) Pvt. Ltd (FGI) have entered into agreements with the defendant, all of which contain arbitration clauses. It is also their case that the agreement between the plaintiff and the defendant is only a sequel to these agreements and therefore, the plaintiff is bound by the terms of the other agreements, particularly the term relating to arbitration. In order to appreciate this argument, it is necessary to briefly set out the purport / terms of the agreements that have been entered into between the defendant and other group companies of the plaintiff.

(i) **Master Technical License and Distribution Agreement dated 22.12.1999,** which has been entered into between the defendant, FGL and FGA, i.e, FGL Asia. This agreement has been entered into for the purpose of the defendant acquiring technology for manufacturing air conditioner products and FGL and FGA, who are interested in increasing their presence in the air conditioner market, have entered into this agreement. Under this agreement, FGL is under an obligation to deliver technical documents to the defendant and also dispatch their technical personnel to the factory of the defendant for imparting this technical know-how. The agreement also states that FGL should provide training to the defendant's technical personnel at the facility of the FGL subsidiary, namely, the plaintiff herein, for which the defendant was liable to pay the training fee to FGL. Therefore, it is very clear that this agreement relates to the technical know-how, training being imparted between the FGL and the defendant and training that is to be share between the FGL and the defendant.

(ii) **Share Holders Agreement dated 31.10.2000.** This agreement has been entered into between the defendant, FGL, FGA, and ETAM. Under this agreement, FGL and FGA were to be inducted as shareholders of the defendant company, and they were also to take part in the operation and management of the company. The agreement further provided that no major policy decisions could be taken without the approval of FGL.

(iii) **Amended Shareholders Agreement dated 31.10.2010.** This agreement had only effected an amendment in Clause 7.1 of the Share Holders agreement dated 31.10.2010 which relates to the term of the agreement.

(iv) **Transfer Agreement dated 30.06.2020.** This agreement was entered into between the defendant and FGI, and the agreement between the parties was for the transfer of the intended stock of products and fixed assets. The subject matter of the agreement was the intended stock of products and fixed assets. The agreement contemplated the transfer of the above to FGI. The products included room air conditioner, packaged air conditioner, VRF, spare parts / accessories for the above products. Stock of products included the spares. Fixed assets included desktop, Laptop PC. The agreement contemplated that the products had to be supplied within 180 days of the date of the GST invoice by the purchaser. Payments were made on delivery after physical verification of the assets. It is also made clear that the payments for the new products were to be made into an escrow account to be opened in the Jammu and Kashmir bank (to be paid to Fujitsu General Thailand). The agreements in Serial Nos.1, 2 and 4 contain an arbitration clause and it is these arbitration clauses that are sought to be pressed into service by the defendant. Admittedly, the plaintiff is not a party to any of these agreements.

25.The contract between the defendant and the plaintiff is simplicitor based on purchase orders. Purchase orders have been filed as documents Nos. 1 to 13 along with the plaint. A perusal of the purchase orders (all of which have taken place in the year 2019) would show that they were raised much after the Master Technical Licence and Distribution Agreement, the Shareholders Agreement, and the amended Shareholders Agreement. The purchase orders would indicate that for the products in respect of which the defendant placed an order with the plaintiff, payment was to be made within 180 days. Nowhere in the purchase order is there any reference to any of the agreements that have been referred to above. The purchase orders only refer to the demand of the defendant. Subsequent to the issue of the purchase orders, the plaintiff has also raised invoices, which have also been filed along with the plaint as documents Nos. 14 to 31. Even these documents do not refer to the agreements set out supra. It is therefore very clear that the agreement between the plaintiff and the defendant is simplicitor one for purchase and sale.

The agreements between the defendant, FGL and FGA do not refer this purchase and sale between the plaintiff and defendant. The Master Licence Distribution agreement is an agreement under which the FGL is required to provide technical training to the defendant's personnel for which the defendant was liable to pay the technical authorities. The Share Purchase Agreement pertains to the purchase of the shares of the defendant- Company by FGL and FGA, and the Transfer Agreement is between FGL and FGI, and it is only these agreements that have an arbitration clause. Neither the purchase orders nor the invoice contain an arbitration clause. Therefore, the contention of the defendant that the parties have to be referred to arbitration in the light of the arbitration agreements contained in the Master Technical Licence and Distribution Agreement, Share Purchase Agreement and Transfer Agreement cannot be countenanced.

25.From the arguments and the documents produced, it appears that even as on 08.12.2022, the defendant has accepted and acquiesced to the jurisdiction of the Commercial Court by initiating a pre-suit mediation on 08.12.2022. This is a proceedure that is contemplated under Section 12-A of the Commercial Courts Act. Therefore, even at that point in time, the defendant had submitted themselves to the jurisdiction of this Court, Commercial Division. This application has been filed after the defendant has moved this application under Section 8 of the Arbitration and Conciliation Act. Further, on receiving the notice in the suit, the defendant has filed an application for condoning the delay in filing the application seeking leave to defend. Therefore, there is a clear case of waiver on the part of the defendant.

26.In the case on hand, three instances set out the fact that the present application is nothing, but an afterthought.

(i) After the defendant had received the summons in this summary suit, they have taken out an application seeking leave to defend, and that too with the delay and therefore, the condone delay application was filed.

(ii) A perusal of the application under Section 8 of the Arbitration and Conciliation Act would indicate that an application under Section 8 should be moved before the first statement of defense is submitted. The application for condoning the delay in filing the petition for leave to defend is admittedly the first statement of defense as it sets out the triable issue between the parties and which gives him the right to defend the suit.

(iii) After filing the petition for condoning the delay in filing the application to defend the suit, the defendant has presented a pre-suit mediation before the Tamil Nadu State Legal Services Authority in respect of the disputes arising in the Master Technical

Licence and Distribution Agreement and Transfer Agreement. The averments contained in this pre-suit mediation notice issued by the Legal Services Authority would clearly highlight the erroneous contentions now pleaded by the defendant. The defendant has therein pleaded that the plaintiff has been supplying the air conditioners to the defendant despite closing down the defendant's manufacturing unit at Pondicherry and further the plaintiff along with the defendant and FGA had entered into a Share Holders Agreement dated 31.10.2000, which was amended by the Share Holders Agreement dated 31.10.2010. This statement is absolutely incorrect since the plaintiff, who has been arrayed, as the opposite party in the application, has not executed these two agreements. That apart, the pre-mediation notice is issued in respect of the sum of USD 13 million payable under the Transfer Agreement, which has no bearing to the transaction between the defendant and the plaintiff.

27.In view of the above, it is clear that the defendant has fully understood the fact that the transaction between the defendant and the plaintiff is totally independent of the agreements between the defendant, FGL, FGI, and FGA. There is no arbitration agreement either in the purchase orders or in the invoices entered into between the defendant and the plaintiff, and the plaintiff is not a party to the Master Technical Licence and Distribution Agreement, Share Holders Agreement, and Transfer Agreement. The question of group concept cannot be brought into the instant case, particularly when transactions that are contemplated under these agreements and the purchase orders between the defendant and the plaintiff stand on two independent and distinct contracts. Therefore, the application filed for referring the parties to arbitration is without merit and is therefore dismissed.

28. It is informed that the defendant has filed the leave to defend application. For bringing up the application, post the matter on 12.10.2023.

29.09.2023

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P.T.ASHA.J,

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Pre-delivery order in
A.No.5041 of 2022
in
C.S.(Comm Div) No.70 of 2022

29.09.2023