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

\+ CS (OS) No. 2221/2012

Date of Decision: 16.04.2013

HAVELS INDIA LTD. .....Plaintiff

Through: Mr. Neeraj Kishan Kaul, Sr. Adv with Ms. Ferida Satarawala, Mr. Raghavendra M. Bajaj, Advs.

Versus

ELECTRIUM SALES LTD. .....Defendant

Through: Mr. Arvind Nigam, Sr. Adv, with Mr. Atul Sharma, Mr. Milanka Chaudhury, Mr. Abhishek Sharma, Advs.

CORAM:
HON'BLE MR. JUSTICE M.L. MEHTA

M.L. MEHTA, J.

I.A. 16236/2012 (Under Order 7 Rule 11 CPC read with Section 9 of CPC) and IA No.21237/2012 (Section 8 of Arbitration and Conciliation Act, 1996)

1. Both these applications are filed by the defendants. The background facts leading to the filing of these applications by the defendant are thus:

2. The plaintiff and Electrium (U.K.) had been having business dealings in terms of a Supply Agreement executed between them on September 30, 2002. The said agreement is still subsisting. The defendant, which is a co-subsidiary of Electrium (U.K.), has filed a Request for Arbitration (RFA), being Claim No. 18774/ARB, instituted before the International Chambers of Commerce (ICC), seeking reference of dispute that has arisen between itself and the plaintiff. The plaintiff has filed the instant suit seeking declaration to the effect that there is no agreement containing an arbitration agreement between itself and the defendant. Prayer is also made regarding restraining the defendant from pursuing the said claim before the ICC. It is during the pendency of the said suit that the defendant has filed the instant applications under Section 8 of Arbitration and Conciliation Act, 1996 (Act) as well as under Order VII Rule 11 CPC on various grounds.

3. The defendant contends that Delhi Court has no jurisdiction as neither the cause of action or a part thereof arose in Delhi, nor the defendant has any business activity or office in India, much less in Delhi. The defendant also contends that it is a co-subsidiary of Electrium (U.K.) and thus, a 'Related Person' of Electrium (U.K.) as defined under the Supply Agreement; and that the Arbitration Clause contained in the Supply Agreement, was equally applicable to the transaction between itself and the plaintiff. The defendant while referring to various clauses of the Supply Agreement, particularly, Clauses 1.1, 2, 4, 14 and 15, contends that, from the reading of these

clauses it would evidence that it was a Related Person of the signatory of the Supply Agreement, namely Electrium (U.K.) and that all the transactions taking place between itself and the plaintiff were subject to the terms and conditions of this umbrella agreement. The defendant proceeds to refer to the correspondence and communication taken place between itself and the plaintiff and while referring to Clause 14 relating to Mediation and Clause 15 relating to Arbitration in the Supply Agreement, submits that the plaintiff itself has been throughout taking the Supply Agreement to be the umbrella agreement and the transaction with the defendant covered therein. The submissions of the plaintiff to the mediation followed by managing committee meeting and then arbitration in terms of Clauses 14 and 15, would clearly evidence that the plaintiff has submitted to the dispute resolution mechanism as provided in the Supply Agreement, in respect of disputes which have arisen in the transaction. It is also submitted that the Purchase Order, which the plaintiff contends to be an independent transaction, was subject to the Supply Agreement inasmuch as the defendant had dealt with the plaintiff by placing order in terms of authority derived from Clause 2 of the Supply Agreement. It is submitted that the Purchase Order nowhere intended to abrogate the dispute resolution mechanism that was stipulated in Clauses 14 and 15 of the Supply Agreement. Based on all this, it is submitted that although the main Supply Agreement was signed by the Electrium (U.K.), but by virtue of being a Related Person, the defendant is privy

to the terms of the Supply Agreement, including the dispute resolution mechanism.

4. The plaintiff has filed this suit seeking a decree of declaration that there is no agreement containing an arbitration agreement between itself and the defendant. And has also sought an anti-suit injunction against the arbitration proceedings instituted by the defendant before the ICC. In furtherance of its prayer, the plaintiff has raised various issues. It contends that there does not exist any arbitration agreement between the parties. And that it was only the signatory to the agreement who could place the order for purchase for itself or for related person. The Supply Agreement from where arbitration agreement is sought to be derived from was signed by Electrium (U.K.) and not by the defendant. And that it was only the signatory to the said agreement who could invoke arbitration agreement and not the 'related person'. The dispute which has arisen between the parties is not the outcome of the Supply Agreement, but an independent Purchase Order of the defendant. One of the Signatories i.e. Electrium (U.K.), having gone into liquidation and thus not being in existence, the Purchase Order of the defendant could not be said to be under the Supply Agreement, but was a transaction independent to the said Supply Agreement.

5. The plaintiff also contends that the existence of an arbitration agreement does not come within the domain of Order VII Rule 11 application. And that the considerations for applicability of Order VII

Rule 11 CPC are confined to the averments in the plaint along with the supporting documents of the plaintiff, and not beyond that. Further, the merits of the case could not be taken into consideration in an application under Order VII Rule 11. In support of these, the learned Senior Counsel for the plaintiff also submits that the Purchase Order had a clause 23, which is entirely inconsistent with the dispute resolution mechanism as under clause 14 and 15 of the Supply Agreement, in that by the Purchase Order, the parties had agreed to the jurisdiction of English Courts as against arbitration.

6. With regard to jurisdiction, the plaintiff's submissions are that these are mixed questions of law and fact which could not be summarily decided. In any case, the plaintiff submits that the agreement provided service upon the plaintiff in Delhi. The correspondence address of the plaintiff was Delhi. The letter regarding invocation of arbitration by the defendant was received by the plaintiff at Delhi. Moreover, relying upon the decision of the Apex Court in ***Bharath Aluminium Co. v. Kaiser Aluminium Technical Service, Inc.*** **Civil Appeal No. 7019/2005 (*BALCO Case*)**, the plaintiff submitted that since the seat of arbitration was at Delhi, the Delhi Courts would have jurisdiction. With regard to the correspondence and the communication regarding the submission of the plaintiff to the dispute resolution mechanism of mediation and arbitration, it is contended that the entire correspondence, which is sought to be relied upon by the defendant, is 'without prejudice' and further that the

submission of the plaintiff to the dispute resolution mechanism of medication and arbitration was also ‘without prejudice’.

7. I have heard the counsels of the parties at length and also perused through the relevant documents. At this juncture, it is imperative for this Court to determine whether it has jurisdiction to decide the controversy at hand, qua the application filed by the defendant under Order VII Rule 11 of CPC. The defendant herein has contended that the plaint should be rejected on the ground that the suit is barred by law i.e. Section 5 of the Act. Section 5 of the Act, envisages the judicial intervention in arbitrations to be limited to the extent as specified under the Act. Section 8 of the Act mandates the Court to refer the parties to arbitration, wherever there is an arbitration agreement. Furthermore, Section 16 of the Act also empowers the tribunal to rule upon its own jurisdiction including determining the existence or validity of the arbitration agreement.

8. The position of law on this matter is fairly clear. A conjoint reading of Sections 5, 8 and 16 of the Act stipulate that upon being satisfied of the prima facie existence of an arbitration agreement, it is imperative for a court to refer the parties to arbitration. However, in the instant case, the controversy before this Court is to determine the privity of the defendant to the agreement containing the arbitration clause. In other words, this Court is required to have a prima facie view of the existence of the Supply Agreement between the parties.

9. Admittedly, the said agreement was entered into between the plaintiff and Electrium (UK), and not between the plaintiff and the defendant herein. Meanwhile, it is also admitted that the defendant herein and the Electrium (UK) are co-subsidiaries of a common parent company. At this juncture, it is pertinent to note the relevant provisions of the Supply Agreement:

10. The Recital of the Supply Agreement states:

> "*THIS AGREEMENT is made on the 30th of September 2002:*
>
> *BETWEEN*
>
> *ELECTRIUM (UK) LIMITED (No. 167171) whose registered office is at Lehfield Road, Brownhills, West Midlands, WS8 6JZ ("ELECTRIUM") which enters into this agreement in its own right and for and on behalf of each of its Related Persons; and*
>
> *HAVELL'S INDIA LTD. ("HAVELL'S) whose registered office is at 1 Raj Narain Marg, Civil Lines, Delhi 110054, India, which enters into this agreement in its own right and for and on behalf of each of its Related Persons.*" (emphasis supplied)

11. The terms 'party' and 'related persons' have been clearly defined in Clause 1.1 as under

> "*"Party" means a party to this agreement;*

> *"Related Person" means in relation to any party, its subsidiaries, <u>its holding companies (if any) and the subsidiary companies of any such holding company</u> from time to time, all of them and each of them as the context admits.*" (emphasis supplied).

12. Therefore, it is amply clear that the plaintiff and Electrium (UK) entered into the Supply Agreement not only between themselves, but also on behalf of their Related Persons, which includes holding companies as well as their subsidiary companies. In the instant case, it is not disputed, that the defendant is a co-subsidiary of Electrium (UK), wherein both Electrium (UK) as well as the defendant have a common holding/parent company. Moreover, the privity between the signatories and the Related Persons is further established by the terms regarding the subject matter of the agreement itself. Some of such provisions are as follows:

> "*2. SUBJECT:*
>
> *2.1. Havell's shall sell or shall procure that its Related Persons shall sell to Electrium or its Related Persons, and Electrium shall buy or procure that its Related Persons shall buy from Havell's or its Related Persons (as the case may be) <u>such quantities of the Products set out in Schedule 2 hereto as maybe ordered by Electrium or its Related Persons at the prices set out therein in accordance with the terms of this agreement</u>.*
>
> *2.2. If any obligation of a party set out herein cannot be performed by such party, that <u>party shall procure the performance of any such obligation by its Related Persons.</u>*" (emphasis supplied).

13. The above terms are unequivocal about the mutual rights and liabilities under the Supply Agreement not only qua the signatories to the Supply Agreement, but also qua the Related Persons. Further, I also do not find any merit in the plaintiff's argument that the dispute between the parties arose from Purchase Orders which are independent of the Supply Agreement. It is clear to me that the contractual arrangement between the parties was such that the Supply Agreement was the parent agreement containing the general terms and conditions of the entire business transactions between the parties. Whereas, the Purchase Orders were regarding specific obligations between the parties such as price, quantity or nature of products ordered for.

14. Further, Clause 4.1 of the Supply Agreement stipulates as under:

> "*4.1. All the sales of the Products between the Parties or their Related Persons, shall be subject to the terms and conditions of this agreement only*." (emphasis supplied).

15. The above mentioned provision clearly stipulates that all transactions/purchases made between the parties and Related Persons shall be governed by the Supply Agreement alone. Upon reading Clauses 2.1along with 4.1, it is amply clear to me, that the supply agreement is an umbrella agreement between the parties, wherein it was not only the signatories to the Supply Agreement who could place the Purchase Orders upon the plaintiff, but the Related Persons are equally entitled to place Purchase Orders. Conversely, the Related Persons could also be made liable for the defaults of either of the

signatories to the Supply Agreement as provided under Clause 2.2. Therefore, I find that the Purchase Orders which led to the dispute between the parties was in accordance with and under the aegis of the Supply Agreement.

16. Regarding the argument of the plaintiff, that only the signatories to the Supply Agreement could invoke the dispute resolution clause under the Supply Agreement; the multi-tier dispute resolution/escalation clause set out in the Supply Agreement is as follows:

> "*14. MEDIATION:*
>
> *In the event of any claim, dispute, controversy, or disagreement (each a "Dispute") between the parties or any related person under or related to this agreement, either of the Parties may notify the other in writing of the dispute or difference (the "Dispute Notice") together with reasonable details of such Dispute. The Parties will act in good faith and use commercially reasonable efforts to resolve promptly, the Dispute. If the Parties cannot promptly resolve the Dispute, the Dispute will be submitted to the Management Committee for resolution. For ten days, following submission of the Dispute, to the Managing Committee, the Managing Committee will have the exclusive right to resolve such Dispute.*
>
> *If the Managing Committee is unable to resolve the Dispute amicably during the ten day period set out above, the Dispute shall be settled pursuant to Clause 15.*
>
> *15. ARBITRATION*

Any dispute shall be finally settled under the Rules of Conciliation and Arbitration of the International Chamber of Commerce (ICC) by one or three arbitrators to be appointed in accordance with the said rules. The arbitration proceedings shall be conducted in the English Language and shall take place in Delhi, India."

17. The Mediation Clause is worded with a wide ambit to include any event of claim, dispute, controversy or disagreement, not only between the parties i.e. signatories to the agreement, but also between Related Persons. It would be a perverse interpretation of the provision, if it were to be considered that only the signatories to the Supply Agreement can invoke the mediation/arbitration clause, more so in a case where the clauses are worded wide enough to cover disputes even between Related Persons. Moreover, by the plaintiff's own admission, one of the signatories to the Supply Agreement i.e. Electrium (UK) was no longer in existence when the RFA was filed before the ICC, and hence there was no opportunity for the defendant herein, to invoke the arbitration clause through Electrium (UK).

18. If the intention of the parties was to confine the dispute resolution clause only to the signatories of the Supply Agreement, there was no need to mention the Related Persons within the ambit of the mediation and arbitration clauses. In fact both parties had understood and intended this clause to be as equally applicable to them as also to their Related Persons. This is evidenced from the

communications and correspondence that ensued between the parties as noted below.

19. The conduct of the plaintiff also suggests that they had ratified the invocation of the arbitration clause by the defendant. In the letter dated May 5, 2011, the counsel for the plaintiff wrote to the defendant stating:

> "*Our Client expresses their appreciation for the proposal for mediation to resolve issues within the framework of the dispute resolution mechanism as provided for under Clause 14 of the Supply Agreement. Our client is agreeable to the proposal for a mediation to be followed if necessary, by the stipulated subsequent process between the representatives of Electrium and Havell's.*" (emphasis supplied).

As is evidenced above, the plaintiff was writing specifically with reference to the Clause 14 of the Supply Agreement and also indicates to proceed with mediation in accordance with the terms of the Mediation Clause. Furthermore, in the plaintiff's letter dated May 26, 2011, the plaintiff has categorically placed reliance on the Arbitration Clause as contained in Clause 15 of the Agreement.

> "*Also, given that the parties had agreed to and contemplated arbitration proceedings seated at Delhi, we see no reason for negotiations to take place elsewhere. We therefore request you to agree to meetings at New Delhi on the dates indicated above."*

Also, reference may be placed upon plaintiff's letter dated June 3, 2011 wherein it is unequivocally stated:

> "*Our Clients are not agreeable to a meeting at Dubai. We reiterate that since the parties have agreed to Arbitration at New Delhi, there is no reason for the preceding Mediation to take place elsewhere. If the parties have agreed to New Delhi as a Seat for Arbitration, that is necessarily the logical choice for any preceding meetings contemplated under the contract.*"

Therefore, I have no doubt that by the above mentioned conduct; the plaintiff has ratified the invocation of the arbitration clause by the defendant under the Supply Agreement and now cannot claim otherwise.

20. The plaintiff has also asserted that this Court must not rely upon the communications exchanged between the parties regarding the mediation, stating that the communications were 'without prejudice' and according to the established rules of evidence under Section 23 of the Indian Evidence Act, such 'without prejudice' documents could not be looked into or considered. I find no merit in this argument of the plaintiff for the following reasons. Firstly, with respect to the 'without prejudice' communications, I find that the plaintiff's reliance upon Section 23 of the Evidence Act is misplaced. In order to arrive at this conclusion, it is relevant to re-visit the distinction drawn by the plaintiff regarding the dichotomy in the nature of the disputes between the parties herein. There is, no doubt, a dispute had arisen between the

parties regarding certain alleged defects in the MCB products sold by the plaintiff to the defendant under the Purchase Orders. Meanwhile, there is an independent cause of action regarding the invocation of the arbitration clause contained in the Supply Agreement which is the grievance sought to be remedied though the instant suit. This distinction in causes of action is relevant because, the 'without prejudice' communication between the parties is with respect to the earlier cause of action i.e. the disputed products sold by the plaintiff to the defendant, and not regarding recourse to dispute resolution mechanisms or the invocation of the arbitration clause by the defendant.

21. 'Without prejudice' communications are commonplace in business correspondences, especially those involving a dispute or a difference. When a party tries to settle a matter amicably, he/she would make certain concessions on his claim in order to arrive at a middle ground with his adversary, and impress upon him a settlement of the dispute. However, in the event the said mediation/conciliation proceedings do not fructify, the concessions and admissions made by one of the parties regarding the merits of the dispute are not to be used prejudicially against the party making such concession/admission. In the instant case, the plaintiff at best can claim that his statements in the communication with the defendant were made 'without prejudice' to the merits of the dispute regarding the MCBs. One cannot stretch the 'without prejudice' statement to the dispute resolution mechanism or

regarding the invocation of the arbitration. If that were the case, all multi-tier dispute resolution clauses, also known as escalation clauses can be frustrated by one party claiming that its participation in the preceding mediation proceedings cannot be used to trigger the arbitration clause, merely because it used the term 'without prejudice' in the communications.

22. The plaintiff has also contended that this Court has to determine the existence of a valid arbitration clause between the parties in accordance with the law laid down by the Apex Court in the Case of ***SBP & Co. v. Patel Engineering*** **(2005) 8 SCC 618 (*SBP Case)***. In furtherance of this argument the plaintiff has urged that there is inconsonance between the Supply Agreement and the Purchase Orders regarding the dispute resolution mechanism. The plaintiff has contended the Supply Agreement envisages disputes to be resolved by an arbitration proceeding under the ICC Rules. On the contrary, as per Clause 23 of the Purchase Orders, parties have mutually agreed to submit to the exclusive jurisdiction of the English Courts. Therefore, the plaintiff contends, that even if it were to be considered that the defendant is privy to the Supply Agreement, the Clause 23 contained in the Purchase Orders, vitiates the arbitration clause contained in Clause 15 of the Supply Agreement.

23. At this juncture it is pertinent to take note of the relevant clauses within the Supply Agreement as well as the Purchase Orders.

Clause 13 of the Supply Agreement stipulates the applicable law:

> "*This agreement (and any dispute controversy, proceedings or claim of whatever nature, arising out of or in anyway relating this agreement or its formation) shall be governed by and construed in accordance with English Law. The Convention of The Hague regarding the Unification of Law Governing the International Sale of Goods, 1964 and the Convention of Vienna regarding the International Sales Contracts of Goods, 1980 shall not apply.*" (emphasis supplied).

Clause 23 of the Purchase Order stipulates:

> "*The formation, construction, performance, validity, and all aspects of the Contract, are governed by English Law and the parties submit to the exclusive jurisdiction of the English Courts.*" (emphasis supplied).

24. I find that there is no inconsistency between Clause 23 of the Purchase Order and the dispute resolution mechanism contained in clauses 14 and 15 of the Supply Agreement. It cannot be said that by merely agreeing to the exclusive jurisdiction of the English Courts the parties have waived the dispute resolution mechanism as laid out in the Supply Agreement. It is amply clear to me that the parties mutually agreed that the Supply Agreement would be governed and construed in accordance with English Laws, as provided in Clause 13 of the Supply Agreement. It is also the intent of the parties to resolve all disputes arising between them as well as related Persons by way of mediation

and arbitration. By agreeing upon the jurisdiction of English Courts, the parties have merely agreed upon a convenient judicial forum, where they can raise issues concerning resolution of disputes between them; i.e. through arbitration.

25. Such an arrangement is common place in international commercial contracts which are executed between parties belonging to different jurisdictions, and in cases where the performance of such contracts, transcends national boundaries and territorial jurisdiction of the Courts. In such cases, parties mutually agree upon a forum which is convenient and such clauses are known as Forum Selection Clauses. In the case of ***Rajasthan State Electricity Board v. M/s. Universal Petro Chemical Ltd.*** **(2009)3 SCC 107**; the Apex Court has made some pertinent observation regarding Forum Selection Clauses under the Sections 20 and 34 of the erstwhile Arbitration Act, 1940:

> "*An analytical look at the provisions of sub-Sections (3) and (4)* [of Section 30] *will make it explicitly clear that any application in any reference, meaning thereby even an application under Section 20 of the Act could or should be filed in a court competent to entertain such proceeding and having jurisdiction to decide the subject of the reference. Such jurisdiction would or could be restricted by the agreements entered into by and between the parties. The parties have clearly stipulated and agreed that no other court, but only the court at Jaipur will have jurisdiction to try and decide the proceedings arising out of the said agreements, and therefore, it is the Civil Court at Jaipur which would alone have jurisdiction to try and decide such issue and that is the court which is competent to entertain such proceedings.*

> *The said court being competent to entertain such proceedings, the said Court at Jaipur alone would have jurisdiction over the arbitration proceedings and all subsequent applications arising out of the reference. The arbitration proceedings have to be made at Jaipur Court and in no other court.*" (emphasis supplied).

Therefore, a forum selection by the parties cannot be interpreted to abrogate the dispute resolution mechanism as agreed between the parties. It only shows the intent of the parties to choose a convenient Court, which would have jurisdiction over the arbitration proceedings and all subsequent applications arising out of reference.

26. The issue regarding the jurisdiction of this Court to judicially determine the existence and validity of the arbitration agreement is no longer *res integra*. A three judge bench of the Apex Court has settled this issue in the case of ***Kvaerner Cementation India Ltd. v. Bajranglal Agarwal & Anr.*** **2001 (3) RAJ 414 (SC)** (***Kvaerner Case***). The Court in the ***Kvaerner Case*** was faced with special leave applications against an order of the learned Single Judge of the Bombay High Court refusing to interfere with an order of the Civil Court vacating an interim order of an injunction granted by it earlier. The suit in question had been filed for a declaration, that there does not exist any arbitration clause and as such the arbitral proceedings are without jurisdiction.

27. The Apex Court held:

> "*There cannot be any dispute that in absence of any arbitration clause in the agreement, no dispute could be referred for arbitration to an arbitral tribunal. But, baring in mind the very object with which, the Arbitration and Conciliation Act, 1996 has been enacted and the provisions thereof, contained in Section 16 conferring the power on the Arbitral Tribunal to rule on its own jurisdiction including ruling on any objection with respect to the existence or validity of the arbitration agreement, we have no doubt in our mind that the Civil Court cannot have jurisdiction to go into that question…. In this view of the matter, we see no infirmity in the impugned order so as to be interfered with by this Court. The petitioner who is a party to the arbitral proceedings may raise the question of jurisdiction of the Arbitrator as well as the objection on the ground of non-existence any arbitration agreement in the so called dispute in question and such an objection being raised, the Arbitrator would do well in disposing of the same as a preliminary issue, so that it may not be necessary to go into the entire gamut of arbitration proceedings.*"

28. This proposition as laid down by the Apex Court has been consistently followed by this Court. In deciding upon a similar issue regarding the enforceability of an agreement containing an arbitration clause, this Court in the case of ***Bhushan Steel Ltd. v. Singapore International Arbitration Centre & Anr.*** **(2010) ILR 6 Del. 295** (***Bhushan Steel Case***) held that such a suit would not be maintainable and is barred by Section 5 of the Act. In another similar case ***The Handicrafts and Handlooms Exports Corporation of India Ltd. v. Ashok Metal Corporation & Anr.*** **RFA 219/2009** (***Handicrafts Case***) this Court observed:

> *"Thus, simply because while interpreting Sections 8 and 11 of the Act, it has been held by the Supreme Court that the Court before referring the parties to arbitration, must satisfy itself of the existence and validity of the arbitration agreement, is not reason enough to hold that a suit for the declaration of the same relief would also be maintainable. There is no provision in the Act enabling the filing of such a suit. It also cannot be lost sight of that an application under Section 8 is filed in a case where a suit is already before the Court; while an application under Section 11 is envisaged by the Act merely for the reference of the disputes to arbitration by appointment of the Arbitrator. Thus, in my considered opinion, merely because the Court must satisfy itself about the existence and validity of an arbitration agreement when faced with an application under Section 11 of the Act or one under Section 8 of the Act, is not good enough reason to hold that it would be open to a party to the arbitration agreement to file a suit challenging the validity or existence of the arbitration agreement."*

29. It is also pertinent to note that the reasoning of this Court in the ***Handicrafts Case*** was maintained by the Division Bench of this Court in the case of ***Devender Kumar Gupta v. Realogy Corporation*** **2011 (125) DRJ 129**. In the case of ***National Insurance Company Ltd. v. Boghara Polyfab Pvt. Ltd.*** **(2009) 1 SCC 267 (*Boghara Polyfabs Case)***, the Court observed:

> "*Where the intervention of the Court is sought for appointment of an Arbitral Tribunal under Sec. 11, the duty of the Chief justice or his designate is defined in SBP & Co. This Court identified and segregated the preliminary issues that may arise for consideration in an application under Sec. 11 of the Act, into three categories*

i.e. (i) issues which the Chief justice or his designate is bound to decide;(ii) issues which he can also decide, i.e. issues which he may choose to decide; (ii) issues which should be left to the Arbitral Tribunal to decide."

30. The Apex Court in the ***SBP Case*** clearly held the circumstances in which the Court should leave the issues to the Arbitral Tribunal to decide:

"*(ix) In a case where an arbitral tribunal has been constituted by the parties without having recourse to Section 11(6) of the Act, the arbitral tribunal will have the jurisdiction to decide all matters as contemplated by Section 16 of the Act*."

31. It may be noted that in the instant case, the Arbitral Tribunal has already been duly constituted as on December 26, 2012, when the President of the Arbitral Tribunal wrote to both the parties informing them about the constitution of the Tribunal. Moreover, it is not for this Court to strictly scrutinize the validity of the arbitration agreement in accordance with the provisions of Section 11(6). More so in the cases where the arbitral tribunal has already been constituted, the appropriate forum to impute the validity of the arbitration agreement is the arbitral tribunal.

32. There is a pertinent observation in the ***Handicrafts Case***,

"*The Courts are meant to carry out and implement the mandate of the legislature. The Legislature's explicit mandate is that judicial intervention be not allowed to circumvent dispute resolution through arbitration. The*

respondents, according to the appellant itself, have already set the arbitral process in motion and an Arbitrator has been appointed, who has called upon the appellant to file its statement of claim. In such circumstances, to state that the Civil Court must await the filing of an application under Section 8 of the Act by the party who has already set the arbitral machinery in motion would be hyper-technical to say the least."

33. Therefore, I find that prima facie, there is an agreement between the parties containing an arbitration agreement. I also find that the appropriate forum to raise any jurisdictional objection on merits, regarding the existence of the arbitration agreement, would be the arbitral tribunal. Borrowing the words of the learned judge in the ***Handicrafts Case***,

> "*Civil Courts would, therefore be well advised to steer clear of the arbitral process, leaving only their door ajar to the aggrieved party for the purpose of interim orders, appeals, etc. Any other view, would open the flood gates of pre-arbitral litigation, and in each and every case, the party interested in delaying the arbitral proceedings, would effectively resort to a civil suit, as an adjudicatory mechanism for adjudging the existence and validity of the arbitration agreement and the jurisdiction of the Arbitral Tribunal*."

34. In view of above, having seen that there exists a prima facie arbitration agreement between the parties, the suit was apparently barred under Section 5 read with Section 16 of the Act. Consequently,

the plaint is liable to be rejected under Order 7 Rule 11 and thus stands rejected. Both the applications as also the suit are disposed accordingly.

M.L. MEHTA, J.

APRIL 16, 2013
kk/rmm