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

\+ **CS(OS) No.2222/1998**

% **1st October, 2012**

EMMSONS INTERNATIONAL LTD. ..... Plaintiff
Through: Mr. Rohit Puri, Adv.

VERSUS

M/S. METAL DISTRIBUTORS (UK) LTD. & ANR.
.....defendants
Through: Mr. Atul Sharma with
Mr.Sarojanand Jha, Adv. for D-1.

CORAM:
HON'BLE MR. JUSTICE VALMIKI J.MEHTA

To be referred to the Reporter or not? **YES**

VALMIKI J. MEHTA, J (ORAL)

IA No.6833/1999

1. This is an application filed on behalf of the defendant no.1 under Section 8 of the Arbitration and Conciliation Act, 1996 of India to dismiss the suit and to refer the parties to arbitration in accordance with Clause 13 of the agreement between the parties. The following is the relief para in this application:

> "It is most respectfully prayed that this Hon'ble Court may be pleased to dismiss the suit of the plaintiff and refer the parties to arbitration in accordance with the contract between the parties under Clause 13 of the General Conditions of sale and in accordance with Section 8 of the Arbitration and Conciliation Act, 1996 for adjudication of the disputes between the parties."

2. I may note that a learned Single Judge of this Court on 7.1.2005 in IA no. 388/2002 filed by the defendant no.1 for dismissal of the suit on the ground that the Courts in UK have jurisdiction, passed a judgment dismissing the application. This order was sustained by the Division Bench in appeal in FAO(OS) No.138/2005 for different reasons, and it was observed that the said judgment would not be a reflection for decision of the present application filed under Section 8 by the defendant no.1. Para 21 of the order of the Division Bench reads as under:-

> "21. No doubt, the learned Single Judge not have dwelled on second part of Clause 13 and decided as to whether that is contrary to the provisions of Section 28 of the Contract Act or not, that may be an issue which may arise when part II of Clause 13 comes up for discussion while deciding the application of the defendant No. 1 under Section 8 of the Arbitration and Conciliation Act. For our purpose it is sufficient that when for the purpose of application under Order 7 Rules 10 and 11 of the Code, second part of Clause 13 is not relevant, the jurisdiction would be decided on the touchstone of Section 20 CPC. The approach of the learned Single Judge to that extent, while deciding the application under

> Order 7 Rule 11 CPC for which the only relevant provisions was first II of Clause 13, was not correct. However, still the outcome remains the same. For reasons given above, we are of the opinion that the application of the appellant/defendant No. 1 filed under Order 7 Rule 11 CPC for rejection of the plaint is without any merit. Accordingly, this appeal is dismissed with costs."

3. Today the counsel for the parties agree that the present application under Section 8 of the Arbitration and Conciliation Act, 1996 has to be decided and it is also agreed that this application is actually wrongly filed under Section 8 of the Indian Act whereas the application ought to have been filed under Section 9 of the UK Act and which is the Arbitration Act of 1996 of UK. I am saying that the provisions of Section 9 of the English Act applies inasmuch as the Division Bench in its judgment dated 27.8.2008 has held that though the Courts in India will have jurisdiction in view of the judgment of the Supreme Court in the case of ***Laxman Prasad vs. Prodigy Electronics Ltd. and Anr., 2008 (1) SCC 618***, however, it is the UK Law which will govern the parties in view of Clause 13 of the agreement which reads as under:-

> "**GOVERNING LAW AND FORUM FOR RESOLUTION OF DISPUTES:**

The contract shall be construed in accordance with and governed by English law. Sellers shall be entitled at their opinion, to refer any dispute arising under this contract to arbitration in accordance with the rules and regulations of London Metal Exchange or to institute proceedings against Buyers in any courts of competent jurisdiction."

4. Section 9 of the UK Arbitration Act reads as under:-

"9 **Stay of legal proceedings**

(1) A party to an arbitration agreement against whom legal proceedings are brought (whether by way of claim or counterclaim) in respect of a matter which under the agreement is to be referred to arbitration may (upon notice to the other parties to be proceedings) apply to the court in which the proceedings have been brought to stay the proceedings so far as they concerned that matter.

(2) An application may be made notwithstanding that the matter is to be referred to arbitration only after the exhaustion of other dispute resolution procedures.

(3) An application may not be made by a person before taking the appropriate procedural step (if any) to acknowledge the legal proceedings against him or after he was taken any step in those proceedings to answer the substantive claim.

(4) On an application under this section the court shall grant a stay unless satisfied that the arbitration agreement is null and void, inoperative, or incapable of being performed.

(5) If the court refuses to stay the legal proceedings, any provision that an award is a condition precedent to the bringing of legal proceedings in respect of any matter is of no effect in relation to those proceedings."

The aforesaid provision of the UK Act is similar to Section 34 of the erstwhile Arbitration Act, 1940 and Section 8 of the extant Arbitration and Conciliation Act, 1996.

5. The following are the admitted factual aspects for disposing of the present application of the defendant no.1:-

i) Parties are governed by the UK Law.

ii) UK Law will mean both the substantive UK Law as well as UK Law of Arbitration.

iii) The UK law of Arbitration is UK's Arbitration Act of 1996.

6. There are three propositions which have been urged before me for the disposal of the present application and which are:-

i) Whether a clause which entitles only one of the parties to refer the disputes to arbitration is a valid clause in law i.e whether a clause giving entitlement only to one of the parties to an agreement to refer the matter to arbitration is invalid because reference to arbitration requires a bilateral act of parties.

ii) Whether the application should be allowed by staying the proceedings or it should be dismissed inasmuch as the arbitration proceedings as of today cannot be invoked by the defendant no.1/applicant as they are barred by limitation in terms of the UK law of limitation being its Limitation Act, 1980.

iii) Whether the disputes in the present case cannot be referred to arbitration inasmuch as the defendant no.2 is not a party to the arbitration agreement, and it is required that all the parties to the suit should be parties to the arbitration agreement in view of the judgment of the Supreme Court reported as ***Sukanya Holdings Pvt. Ltd. vs. Jayesh H. Pandya and Anr., 2003 (5) SCC 531***.

7. So far as the first aspect as to whether an arbitration clause is valid although only one of the parties to the contract is entitled to refer the matter to the arbitration, it is sufficient for me to refer to two judgments of the UK Courts. The first is the judgment in the case of ***Pittalis & Ors vs. Sherefettin, 1986 (2) All England Reporter 227*** and second is of ***NB Three Shipping Ltd. vs. Harebell Shipping Ltd, 2004 (EWHC) 2001.*** The

relevant para in the ***Pittalis*** case is the following para at page 231 of the reporter and which reads as under:-

> "……
>
> Looking at the matter apart from authority, I can see no reason why, if an agreement between two persons confers on one of them alone the right to refer the matter to arbitration, the reference should not constitute an arbitration. There is a fully bilateral agreement which constitutes a contract to refer. The fact that the option is exercisable by only one of the parties seems to me to be irrelevant. The arrangement suits both parties. The reason why not is so in cases such as the present and in the *Tote Bookmakers* case is because the landlord is protected, if there is no arbitration, by his own assessment of the rent as stated in his notice; and the tenant is protected, if he is dissatisfied with the landlord's assessment of the rent, by his right to refer the matter to arbitration. Both sides, therefore, have accepted the arrangement and there is no question of any lack of mutuality.
>
> …. ……" (underlining added)

8. The relevant portions of the judgment in the case of ***NB Three Shipping Ltd.(supra)*** are paras 10 to 12 of the said judgment and which read as under:-

> "10. I start with the proper construction of Clause 47 of the Charterparty. It seems to me that under the agreement, Charterers' right to litigate against the Owner is "limited" to bringing proceedings in the English Court: Clause 47.09. In

the normal course of events, where a dispute arose the parties would seek to resolve by agreement whether that dispute was to be arbitrated or litigated, but with a reservation of a right to Owners to decide to ["determines to"] have that dispute referred to arbitration [Clause 47.10]. Thus it would have been in the contemplation of the parties that the issue of arbitration or not would be decided before proceedings were commenced in the courts by Charterers. In this case, Charterers have not initiated the discussion contemplated by Clause 47.10 and, in those circumstances, were bound to start an action in the English court, as they did. If Charterers' construction of clause 47.02 were correct, the clause would have a very limited effect. The first part of the clause confers jurisdiction on the English court to "settle any dispute" arising out of or in connection with the Charterparty; the second part gives the Owner an option. If Charterers are right, that option only applies when the Owners are deciding whether to start an action in the court; once court proceedings are started, no question of an option could arise. If Charterers started an action then, so the argument goes, the option did not exist; if Owners started an action then their option has been exercised. Effectively, therefore, the second part of Clause 47.02 says nothing. Further, by starting proceedings without a letter before action, Charterers could avoid the consequences of Clause 47.10 and Owners' right to determine that the disputes should be resolved by arbitration.

11. I cannot accept that argument because it seems to me to contradict the commercial sense of the clause as a whole. Clause 47 is designed to give 'better' right to Owners than to Charterers. Thus, although Charterers are limited to action in the English Court, Owners are given the right to bring proceedings in any court which has jurisdiction by virtue of a Convention and Charterers waive objections on grounds of forum non conveniens; Charterers are required to provide a place for service within this jurisdiction whereas Owners are

not; Charterers are constrained not to challenge enforcement of any judgment "which is given or would be enforced by an English Court" whereas Owners are not. It seems to me that clause 47.02 gives Owners a right to stop or stay a court action brought against them, at their option. This gives the clause some practical effect and was designed to apply in circumstances such as these. If Charterers seek to bypass the Owners' determination to have disputes resolved by arbitration as contemplated by Clause 47.10, then Owners' option of bringing the disputes to arbitration remains, continuing Owners' control over the issue or arbitration or court. Charterers can obtain no advantage from 'jumping the starting gun'. Whilst I can see the force of the submission as to the words 'bringing any disputes' and the absence of the word 'refer'; it is, in my view putting too much weight on what is a point of semantics. The sense of the whole of Clause 47 is clear, I think. It seems to me that the option granted by clause 47.02 is not open ended. It would cease to be available if Owners took a step in the action or they otherwise led Charterers to believe on reasonable grounds that the option to stay would not be exercised. It would have been better had the precise circumstances in which the option could be exercised or lost were spelt out with greater clarity, but this failure does not, in my judgment render the clause unenforceable. In other cases referred to, the election or option has been properly circumscribed; here, Owners have given themselves in this Charterparty considerable latitude, consistent with what is, largely, a one-sided clause.

12. What is the interrelationship between section 9(1) of the Act and this interpretation of the contract? Mr. Allen says that no case has been decided where the stay is applied for against a party who has, by bringing proceedings, not breached any agreement to arbitrate. It seems to me that that point is not well made. Clause 47, as Mr. Hancock QC submitted has two streams running through it: the litigation

> stream and the arbitration stream. The arbitration stream [Clause 47.10] satisfies the requirements of an arbitration agreement since a one sided choice of arbitration is sufficient. The words of section 9(1) "in respect of a matter which under the agreement is to be referred to arbitration" are to be applied when the application for a stay is applied for. Are these disputes under the agreement to be referred to arbitration? Yes, once the option which Owners have has been exercised. These are disputes which, at Owners' option they wish to be arbitrated under the arbitration agreement. Neither the fact that the proceedings were properly brought nor that the terms of section 9(1) only commence an action in the belief that the other party would not exercise a right to apply for a stay; his action may have been proper. So here, if Owners had decided not to exercise their option. I would be sorry if any other conclusion had to be reached. Apart from anything else, one of the fundamental objectives of the 1996 Act is to give the parties' autonomy over their choice of forum. On my view of the contract, once Owners exercise their option the parties have agreed that the disputes should be arbitrated. By refusing a stay the court would not be according to them their autonomy." (underlining added)

9. In view of the aforesaid two judgments, I am of the opinion that as per the law as applicable in UK, the position is that a clause and an agreement which entitle only one of the parties to seek reference to arbitration, is very much a valid clause and does not fall foul of the law.

10. I therefore hold that the application is not liable to be dismissed on the ground that the contractual clause 13 only empowers the defendant no.1 to refer the matter to arbitration.

11. The next issue is whether no purpose would be served in allowing of the application inasmuch as till date, the defendant no.1 has not invoked the applicable and agreed procedure of the London Metal Exchange regulations for reference of the disputes to arbitration. This aspect has to be read alongwith certain provisions of UK Law of Limitation i.e its Limitation Act, 1980 as also certain provisions of the UK Arbitration Act, 1996. The relevant regulation of the London Metal Exchange and the relevant provisions of the Arbitration Act, 1996 and the Limitation Act, 1980 read as under:-

> "London Metal Exchange Procedure:-
>
> COMMENCEMENT
>
> A Claimant shall commences an arbitration pursuant to these Arbitration regulations by serving a Notice to Arbitrate on the Respondent, and by sending a copy of the Notice to Arbitrate to the Secretary accompanied by the Registration Fee and Deposit. The Deposit shall be paid by cash or cheque drawn on a London clearing bank made payable to The London Metal Exchange Limited.

Subject to Regulation 6.3, the Notice to Arbitrate shall contain at least the following information.

(a) the address for service of the Claimant.

(b) a brief statement of the nature and circumstances of the dispute including a brief description of any contract, sufficient to enable the Respondent to identity it, to which the dispute relates;

(c) a brief statement of the relief claimed.

(d) the Claimant's proposal with regard to the number of arbitrators to form the Tribunal;

(e) the Claimant's nomination of one arbitrator from the Panel; and

(f) the person and address of the Respondent to which the Notice to Arbitrate has been sent.

2.3 The Secretary shall acknowledge receipt of the Deposit and Registration Fee, indicating the date on which payment was made, and shall copy such acknowledgement to the Respondent. The Notice to Arbitrate shall not be valid, and time shall not start to run for the purpose of any other provision of these Arbitration Regulations until the Deposit and Registration Fee have been paid and all the above information has been supplied to the Respondent and to the Secretary.

…….

There are other related provisions of the London Metal Exchange Regulation, however, I need not refer to the same as the important relevant portions I have re-produced above.

12. So far as the UK Arbitration Act is concerned, it is necessary to re-produce Sections 14, 16 and 18 of the Arbitration Act of 1996, and they read as under:

> "**14 Commencement of arbitral proceedings**
>
> (1) The parties are free to agree when arbitral proceedings are to be regarded as commenced for the purposes of this Part and for the purposes of the Limitation Acts.
>
> (2) If there is no such agreement the following provisions apply.
>
> (3) Where the arbitrator is named or designated in the arbitration agreement, arbitral proceedings are commenced in respect of a matter when one party serves on the other party or parties a notice in writing requiring him or them to submit that matter to the person so named or designated.
>
> (4) Where the arbitrator or arbitrators are to be appointed by the parties, arbitral proceedings are commenced in respect of a matter when one party serves on the other party or parties notice in writing requiring him or them to appoint an arbitrator or to agree to the appointment of an arbitrator in respect of that matter.
>
> (5) Where the arbitrator or arbitrators are to be appointed by a person other than a party to the proceedings, arbitral proceedings are commenced in respect of a matter when one party gives notice in writing to that person requesting him to make the appointment in respect of that matter.
>
> ……..
>
> **16 Procedure for appointment of arbitrators**

(1) The parties are free to agree on the procedure for appointing the arbitrator or arbitrators, including the procedure for appointing any chairman or umpire.

(2) If or to the extent that there is no such agreement, the following provisions apply.

(3) If the tribunal is to consist of a sole arbitrator, the parties shall jointly appoint the arbitrator not later than 28 days after service of a request in writing by either party to do so.

(4) If the tribunal is to consist of two arbitrators, each party shall appoint one arbitrator not later than 14 days after service of a request in writing by either party to do so.

(5) If the tribunal is to consist of three arbitrators-

(a) each party shall appoint one arbitrator not later than 14 days after service of a request in writing by either party to do so, and

(b) the two so appointed shall forthwith appoint a third arbitrator as the chairman of the tribunal.

(6) If the tribunal is to consist of two arbitrators and an umpire-

(a) each party shall appoint one arbitrator not later than 14 days after service of a request in writing by either party to do so, and

(b) the two so appointed may appoint an umpire at any time after they themselves are appointed and shall do so before any substantive hearing or forthwith if they cannot agree on a matter relating to the arbitration.

(7) In any other case (in particular, if there are more than two parties) section 18 applies as in the case of a failure of the agreed appointment procedure.

…….

18 Failure of appointment procedure

(1) The parties are free to agree what is to happen in the event of a failure of the procedure for the appointment of the arbitral tribunal.

There is no failure if an appointment is duly made under section 17 (power in case of default to appoint sole arbitrator), unless that appointment is set aside.

(2) If or to the extent that there is no such agreement any party to the arbitration agreement may (upon notice to the other parties) apply to the court to exercise its powers under this section.

(3) Those powers are-

(a) to give directions as to the making of any necessary appointments;

(b) to direct that the tribunal shall be constituted by such appointments (or any one or more of them) as have been made;

(c) to revoke any appointments already made;

(d) to make any necessary appointments itself.

(4) An appointment made by the court under this section has effect as if made with the agreement of the parties.

(5) The leave of the court is required for any appeal from a decision of the court under this section."

The aforesaid provisions are similar to the provisions of Sections 21, 11, 13 and 43 of the Indian Arbitration Act of 1996.

13. The relevant provision of the UK Law of Limitation is Section 5 and this provision reads as under:-

> "**5 Time limit for actins founded on simple contract.**
>
> An action founded on simple contract shall not be brought after the expiration of six years from the date on which the cause of action accrued."

14. The conjoined reading of the provisions of the regulations of the London Metal Exchange, of the UK Arbitration Act and the UK Law of Limitation, shows that with respect to contractual matters an action found on a simple contract cannot be brought after expiration of six years from the date when cause of action accrued.

15. For the sake of completion of narration, I must state that there is a provision of Section 11A of the UK Limitation Act which provides for a period of 10 years, however, that is with respect to proceedings before the Consumer Forum under the UK Consumer Protection Act of 1987, and therefore, this provision of Section 11A will not apply with respect to contractual disputes which are not to be enforced under the UK Consumer Protection Act, 1987. Section 14(5) of the Arbitration Act of UK makes it abundantly clear that the arbitration proceedings commence when a person

who has to appoint an Arbitrator is not a party to the contract, is given a notice to appoint an arbitrator. In the present case, Arbitrator has to be appointed, in terms of the regulations, by the designated authority of the London Metal Exchange, and therefore, Section 14(5) will be applicable and proceedings would have commenced only if notice was given by the defendant no.1 in terms of the above reproduced London Metal Exchange regulations to refer the matter to arbitration. Admittedly, till date no notice has been issued under Section 14(5) by the defendant no.1 to the designated authority in the London Metal Exchange to commence the proceedings of arbitration as prescribed in the regulation, and nor has the defendant no.1 deposited any registration fee or other charges in terms of the regulation of the London Metal Exchange. The net effect therefore is that, no doubt, the application when treated under Section 9 only requires this Court to stay the proceedings so as to enable the defendant no.1 to invoke the arbitration proceedings, however, no purpose would be served in staying the present suit under Section 9 by allowing the defendant no.1 to invoke the arbitration proceedings inasmuch as, as on date, the proceedings to seek an appointment of an Arbitrator would be grossly barred by time. Staying of the present proceedings under Section 9 of the UK Arbitration Act, 1996 would

therefore result in futility and for such purpose I refuse to stay the proceedings in the present suit.

16. Learned counsel for the defendant no.1 did at one stage sought to argue that it is not the defendant no.1 who will be the claimant in the arbitration proceedings, and therefore, the entitlement to still approach the London Metal Exchange would not be barred by limitation, however, such an argument has no force inasmuch as admittedly in the peculiar facts of the present case what the defendant no.1 had to refer to arbitration were not its claims, but the claims of the present plaintiff in this suit. It is not open to the defendant no.1 to urge that since it has no claims, it need not have approached under the London Metal Exchange regulation the designated authority of the London Metal Exchange to refer the matter to the arbitration. If I accept the argument urged on behalf of the defendant no.1 it would result in a very incongruous position i.e it is only the defendant no.1 who could have sought arbitration and not the plaintiff, and the defendant no.1 can keep on simply sitting and state that since it is not the defendant no.1's claims which has to be referred to the arbitration proceedings, no limitation would apply to the defendant no.1. In my opinion, this would

amount to allowing the defendant no.1 to take advantage of its own wrong because on the one hand surely there has to be one forum for getting the disputes decided (and which is the arbitration in terms of the regulations of the London Metal Exchange in this case) and on the other hand, the defendant no.1 can simply sit tight and frustrate the proceedings in the present suit by stating that it can at any stage seek reference to arbitration. In fact if the arguments of the defendant no.1 are taken to their logical conclusion it can also mean that even at the stage of final arguments after both the parties have led evidence, an application under Section 9 of the UK Arbitration Act could have been moved and this Court will be bound to allow such an application and stay the suit. I therefore cannot agree with the argument as urged on behalf of the defendant no.1. Every claim has two sides i.e a claim and the defence to the same, and it is both the claim and the defence which jointly are the subject matter of the disputes which are to be arbitrated. The claim and defence are but two different sides of the same coin of disputes which are/have to be the subject matter of arbitration. It cannot be urged that only one side of the coin is not a dispute to be raised by the defendant no.1, and which is the claim of the plaintiff in the present suit,

and therefore, the law of limitation cannot apply. I accordingly reject the argument as raised on behalf of the defendant no.1.

17. The final argument of the plaintiff is based on the judgment of the Supreme Court in the case of ***Sukanya Holdings Pvt. Ltd***. (supra), however, I need not go into such an argument inasmuch as I am dismissing the application of the defendant no.1 under Section 9 of the UK Act in terms of the proposition no.2 i.e the futility to allow the defendant no.1 to invoke arbitration which as on date is time barred.

18. In view of the aforesaid discussion, there is no merit in the application, which is accordingly dismissed, leaving the parties to bear their own costs.

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19. Counsel for the plaintiff states that right of the defendant to file written statement in this suit which is pending since the year 1998 was closed, however, the counsel for the defendant no.1 has drawn my attention to the order dated 3.3.2008 passed by a learned Single Judge in IA No.9703/2001 for recall of the orders dated 15.2.2000 and 21.3.2001. These

applications of the defendant no.1 were disposed of by observing that no orders need to be passed at that stage in those applications seeking right by the defendant no.1 to file the written statement by recalling the order dated 21.3.2001, and the prayers/applications would be examined after disposal of the application filed by the defendant no.1 under Section 8 of the Arbitration and Conciliation Act, 1996, and which I have dismissed today.

20. Accordingly, list IA Nos.9703/2001 and 3375/2002 for arguments on 7th December, 2012.

VALMIKI J. MEHTA, J

OCTOBER 01, 2012
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