# IN THE HIGH COURT AT CALCUTTA
**Ordinary Original Civil Jurisdiction**
**Commercial Division**

Present:

**The Hon'ble Justice Shekhar B. Saraf**

***G.A. No. 871 of 2020***

***With***

***G.A. No. 872 of 2020***

***C.S. No. 59 of 2020***

***Balasore Alloys Limited***
***Versus***
***Medima LLC***

For the Plaintiff : Mr. Dhruba Ghosh, Sr. Adv.,
Mr. Rishad Medora, Adv.,
Mr. Meghajit Mukherjee, Adv.,
Ms. Anusha Nagarajan, Adv.,
Mr. Shivangi Thard, Adv.

For the Respondent : Mr. S. N. Mookherjee, Sr. Adv.,
Mr. Shaunak Mitra, Adv.,
Ms. Nandini Khaitan, Adv.,
Ms. Shreya Singh, Adv.

**Heard on : 29.06.2020, 09.07.2020 & 06.08.2020**

**Judgment on : 12.08.2020**

**Shekhar B. Saraf, J.:**

1. This suit has been filed by the plaintiff/petitioner, Balasore Alloys Limited (hereinafter referred to as "Balasore") against the defendant/respondent, Medima LLC (hereinafter referred to as "Medima"), primarily seeking an anti-arbitration injunction, restraining the respondent from going forward with its intent to arbitrate in the dispute that has arisen between them, before the International Chamber of Commerce (hereinafter referred to as "ICC") in London, United Kingdom.

2. The facts of the *lis* between the two parties is circumscribed within the following compass:

    a) Balasore is a public limited company, registered under the Companies Act, 2013 with its corporate office at 71, Park Street, Park Plaza, First Floor, Kolkata – 700 016. Balasore is engaged in the commercial activity of manufacturing as well as exporting ferro-alloys. Balasore has an established factory focused on the manufacturing of the said products located in Balgopalpur, Odisha since 1984 wherein Balasore sources its chrome ore from mines located in the Sukinda Valley of Odisha.

    b) Medima, on the other hand, is a limited liability company incorporated as per the laws of New York in the United States of America, with its registered office at 5727, Strickler Road, Clarence, New York, USA.

Medima is engaged in the business of trading of ferro-chrome in the USA and Canada.

c) In the year 2017, both the plaintiff and the respondent entered into an arrangement whereby high carbon ferro chrome (hereinafter referred to as the "said goods") manufactured by Balasore would be sold and distributed exclusively by Medima in the territories of Canada and USA. As per the terms of this exclusive arrangement, the plaintiff exported the said goods to the respondent which in turn, re-sold the said goods to the end customers in the above territories.

d) At the very onset, the *inter-se* arrangement between both the parties was such that their acts were governed by an agreement dated June 19, 2017 (hereinafter referred to as "the 2017 Agreement") wherein a certain tonnage of the said goods was to be exported by the plaintiff and thereafter sold by the respondent in the above quoted territories during the period of June and July, 2017. Clause 14 titled "Miscellaneous" of this agreement under provided for the following:

> "14. MISCELLANEOUS
>
> a) This and the *formal agency agreement to be executed in furtherance hereof*, shall be governed by the laws of India.
>
> b) In the unlikely event of a dispute arising out of this or the agency agreement to the executed in furtherance hereof, the same shall be in the initial stage be attempted to be amicable resolved by the parties

> within a reasonable time, failing which the same shall be referred to the settlement through arbitration in accordance with the applicable arbitration laws of India. The venue of arbitration shall be a suitable location in India where the proceedings shall be conducted in English in accordance with applicable Indian law(s)."

e) The 2017 Agreement provided for a dispute resolution mechanism wherein Indian arbitration was to be preferred with its seat of arbitration to be in India. Pursuant to this Agreement, certain purchase orders were issued by the respondent, to the plaintiff, which contained identical arbitration agreements to the one stated in the 2017 Agreement. However, as stated in clause 14 quoted above, the parties subsequently executed another agreement on March 31, 2018; the plaintiff has referred to the same as the "Pricing Agreement" while the respondent has referred to it as the "Long Term Agreement". But based on the recital noted under clause 29(b) of this agreement, I shall refer to it as the "2018 Agency Agreement". A point of active consideration *apropos* of this 2018 Agency Agreement is the fact that the term of this 2018 Agency Agreement was *retroactively* extended to be operative with effect from March 31, 2017 and is to continue till March 31, 2021, that is for a period of four years.

f) At a brief glance, it is crystal clear that the scope of the 2018 Agency Agreement is that it is a detailed document governing and laying down the blueprint for all future transactions between the parties and while it

would be operative on a retroactive basis, all individual shipments of the said goods, related to such subsequent cases of sale and purchase, between the plaintiff and respondent, would be governed by the 2018 Agency Agreement.

g) However, clause 23 of this 2018 Agency Agreement introduced a sharp departure in relation to the applicable law and designated mode of a mutually acceptable dispute resolution mechanism between the two parties, in contradistinction to the 2017 Agreement and this clause is reproduced below:

> **"23. Governing Law; Disputes**
>
> This Agreement shall be governed by and construed in accordance with the laws of the United Kingdom. Any claim, controversy or dispute arising out of or in connection with this Agreement or the performance hereof, after a thirty calendar day period to enable the parties to resolve such dispute in good faith, shall be submitted to arbitration conducted in the English language in the United Kingdom in accordance with the Rules of Arbitration of the International Chamber of Commerce by 3 (Three) arbitrators appointed in accordance with the said Rules, to be conducted in the English language in London in accordance with British Law. Judgment of the award may be entered and enforced in any court having jurisdiction over the party against whom enforcement is sought."

h) When it comes to the purchase contracts executed between the plaintiff and the respondent, there are three modes of payments which divides these orders into three distinct classes as stated below:

a) The first category[1] of purchase contracts executed from September 6, 2017 to January 8, 2018 provide under 'Payment' for the final payment to be settled on monthly basis after sales to end customers and was quoted as such:

> "*80% of the provisional invoice against cash against documents and balance payment and balance payment to be settled on monthly basis after sale to end customer.*"

b) The second category[2] of these purchase contracts executed from February 12, 2018 to May 10, 2018 under 'Payment' provided for final settlement after sale to end customers to be as per the 2018 Agency Agreement and was quoted as such:

> "*90% provisional payment against CAD and final settlement after sale to end customers as per agency agreement/contract."*

c) The third category[3] of these purchase contracts executed after March 31, 2018, that is, post the coming into effect of the 2018 Agency Agreement which provided for the final settlement mechanism between the parties to be as per the 2018 Agency Agreement, and reads as such:

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[1] First category of these contracts is appended from page no. 52 to page no. 80 of the original petition, filed by the plaintiff, Balasore.
[2] Second category of these contracts is appended from page no. 84 to page no. 144 of the original petition, filed by the plaintiff, Balasore.
[3] Third category of these contracts is appended from page no. 148 to page no. 192 of the original petition, filed by the plaintiff, Balasore.

"*However, final pricing/settlement will be as per the exclusive off take Agreement dated 31.03.2018.*"

The parties agree that the reference to the 'exclusive off take Agreement' means a reference to the 2018 Agency Agreement.

i) The purchase orders also contained certain terms and conditions. The plaintiff has relied on clauses 7, 8 and 9 that are reproduced hereinbelow:

"7. **ARBITRATION:** Disputes and differences arising out of or in connection with or relating to the interpretation of this contract/order shall be referred to the Arbitral Tribunal consisting of 3 Arbitrators of which each party shall appoint one Arbitrator, and the two appointed Arbitrators shall appoint the third Arbitrator who shall act as the Presiding Arbitrator as per the provisions of the Arbitration and Conciliation Act, 1996 and any modification or re-enactment thereto. The venue of the arbitration proceedings shall be at Kolkata and language of the arbitration shall be English. The arbitration award shall be final and binding upon the parties and the parties agree to be bound thereby and to act accordingly. When any dispute has been referred to arbitration, except for the matters in dispute, the parties shall continue to exercise their remaining respective rights and fulfil their remaining respective obligations.

8. **GOVERNING LAWS & JURISDICTION:** The contract shall be governed by, and construed in accordance with, the laws of India and the courts at Kolkata, West Bengal alone shall have exclusive jurisdiction over all disputes arising under, pursuant to and/or in connection with the contract/order.

9. **EXECUTION OF AGREEMENT:** Each of the parties to this agreement represents that it has full legal authority to execute this agreement and that each party shall be bound by the terms and conditions contained in the agreement. Notwithstanding anything

contrary in any other previous documents/correspondence, the provisions of this agreement shall prevail."

j) While independent purchase contracts executed thereafter persisted with the Indian arbitration law and its primacy in clauses 7, 8 and 9 of such contracts, clause 23 of the 2018 Agency Agreement clearly is a departure.

k) With the brooding threat of a dispute between the plaintiff and respondent being apparent, a "Notice of Dispute" dated March 13, 2020 was issued by the attorneys of Medima to Balasore invoking the above quoted clause 23 of the 2018 Agency Agreement, placing on record that Medima was owed USD 2.6 million by Balasore as of January 31, 2020 with the hopes of amicably resolving the dispute within the mandated thirty (30) day period, failing which Medima would be compelled to push for the dispute to be resolved by arbitration before the ICC in London.

l) In response to this notice of dispute, Balasore vide a reply dated April 13, 2020 alleged that this dispute pertains to the independent purchase contracts and would therefore be governed by the Indian arbitration (clauses 7, 8 and 9) as contained therein and not the 2018 Agency Agreement; based on the same, Balasore informed Medima of its intent

to invoke these Indian arbitration clauses under the Indian Arbitration and Conciliation Act, 1996 (hereinafter referred to as Arbitration Act of 1996). The attorneys for Medima responded on April 15, 2020 which espoused the reason for relying on the 2018 Agency Agreement stating therein that the Agency Agreement "controlled" aspects pertaining to the final price settlement mechanism, and therefore, clause 23 would be operative as the pertinent dispute resolution mechanism.

m) The plaintiff thereafter initiated arbitral proceedings in terms of Section 21 of the Arbitration Act, 1996, which the plaintiff contends was before the initiation of proceedings before the ICC by the respondent and an application was filed before the Supreme Court under sub-section (6) to Section 11 of the Arbitration Act of 1996 as a legal recourse for taking appropriate measures in constituting an arbitral tribunal under the *domestic* arbitration agreements.

n) With the expiry of the mandated 30 day period on April 13, 2020 and the dispute still simmering, and having furnished their response by April 15, 2020, Medima filed a "Request for Arbitration" (hereinafter referred to as "RFA") before the ICC in London on April 22, 2020 by invoking clause 23 of the 2018 Agency Agreement. In furtherance of such filing of the RFA, the ICC issued a communication to Balasore, whereby it was informed of the RFA filed by Medima and urged

Balasore to nominate their arbitrator and to file its written response to the RFA within a period of 30 days.

o) While communications were exchanged between the plaintiff and respondent on the more appropriate mode of triggering the dispute resolution mechanism, the ICC by its communication dated June 5, 2020 informed both parties that no response to the RFA had been received by its Secretariat within the specified time period. By a communication dated June 12, 2020 to the ICC Secretariat, the counsel for the plaintiff raised objections to the existence as well as the validity of the arbitration clause in the 2018 Agency Agreement, and urged the Secretariat to place this matter before the ICC Court to decide upon this preliminary issue before constitution of an arbitral tribunal. But the plaintiff also, at the same time recorded, that if such reference was not made to the ICC Court, then the plaintiff would reserve its right to press the objections directly before the arbitral tribunal once so constituted. The counsel for the plaintiff also requested that the arbitral tribunal be composed of a sole arbitrator instead of a panel of three arbitrators.

p) By a communication dated June 16, 2020, the ICC informed Balasore that the requests made by them had not been referred to the ICC Court and would be decided by the arbitral tribunal once so constituted.

While Medima vide its communication to the ICC dated June 17, 2020 reiterated the primacy of the 2018 Agency Agreement, by its communication dated June 20, 2020, they flatly rejected the plaintiff's plea for a sole arbitrator and pushed for a tribunal to be constituted comprising of a panel of three arbitrators. Pursuant to such communication, the ICC vide a communication dated June 22, 2020 confirmed that the arbitral tribunal would be constituted comprising a panel of three arbitrators. As a result of such communication from the ICC, Balasore has filed the present suit and the interlocutory application seeking the prayer for issue of an injunction against the aforesaid ICC arbitration proceedings.

3. Interestingly, given that a dispute has now arisen between the parties *inter se*, evident from the "Notice of Dispute" that was initially issued by the attorney for Medima to Balasore on March 13, 2020, a *dichotomy of approach* in resorting to arbitration has now appeared! While the plaintiff seeks to rely on the domestic or Indian arbitration clauses to seek a domestic arbitration and therefore, collaterally seeks the remedy of issuance of an anti-arbitration injunction against the ICC arbitration through this suit, Medima argues that it is the ICC arbitration under clause 23 of the 2018 Agency Agreement that has to be accorded primacy and this court therefore, does not have the power to issue an anti-arbitration injunction to restrain the concerted legal efforts of

Medima. In my opinion, based on the trailing narration of oscillating events, I need to deal primarily, with two questions of critical importance:

I. Does this court have the power and jurisdiction to grant an anti-arbitration injunction against a foreign seated arbitration, and if so, under what circumstances can it be so granted?

II. If the answer to the above question is in the affirmative, do the facts and circumstances in the present case warrant the grant of such an ad interim injunction?

4. Mr. Dhruba Ghosh, learned senior advocate appearing on behalf of the plaintiff, has relied on the following judgments in support of the proposition that the courts in India have the power to grant an anti-arbitration injunction:

i. ***ONGC –v- Western Company of North America*, (1987) 1 SCC 496**,

ii. ***Enercon India Ltd. –v- Enercon GmBH*, (2014) 5 SCC 1**,

iii. ***Board of Trustees, Port of Kolkata –v- Louis Dreyfus***, **MANU/WB/0695/2014,**

iv. ***World Sport Group (Mauritius) Limited –v- MSM Satellite (Singapore) P. Ltd.*, (2014) 11 SCC 639,**

v. ***Modi Entertainment Network –v- W.S.G. Cricket*, (2003) 4 SCC 341,**

vi. ***M.R. Engineers and Contractors Pvt. Ltd. –v- Som Datt Builders Ltd.*, (2009) 7 SCC 696,**

vii. ***Duro Felguera, S.A. –v- Gangavaram Port Limited*, (2017) 9 SCC 729,**

*viii.* ***SBP & Co. –v- Patel Engineering*, (2005) 8 SCC 618,**

*ix.* ***Choudhary Construction –v- State of West* Bengal, 2012 SCC Online Cal 166**, and

x. ***Devi Resources Ltd. v. Ambo Exports Ltd.***, decided by a Division bench of this court dated February 13, 2019.

5. *Per contra*, Mr. Mookherjee, learned senior advocate, appearing on behalf of the respondent, while relying on certain precedents quoted above, has also sought to additionally rely on the following judgments:

i. ***Olympus Superstructures –v- Meena Vijay Khetan*, (1999) 5 SCC 651**,

ii. ***Chatterjee Petrochem Company –v- Haldia Petrochemicals Ltd,*** **(2014) 14 SCC 574**,

iii. ***Kvaerner Cementation India Limited –v- Bajranglal Agarwal and Anr.,*** **(2012) 5 SCC 214**,

iv. ***Sasan Power Ltd –v- North American Coal Corporation (India) Pvt. Ltd.,*** **(2016) 10 SCC 813**,

v. ***Bina Modi –v- Lalit Modi,*** decided by a Single Judge in C.S. (O.S.) 84 of 2020 of the Delhi High Court dated March 3, 2020,

vi. ***Visa Rerssources PTE Ltd. –v- Super Smelters Ltd. & Anr.***, decided by a Division bench of this court dated July 27, 2020.

6. I attach a caveat herein at the onset. Through the course of the hearing, both sides have relied on multiple judgments of the Supreme Court as well as High Courts in India to buttress their respective arguments. However, I would like to refer to ***L.C. Quinn –v- Leathem***,[4] wherein the House of Lords had chosen to observe the following:

> "….that every judgment must be read as applicable to the particular facts proved, or assumed to be proved, since the generality of the expressions which may be found there are not intended to be expositions of the whole law, but governed and qualified by the particular facts of the case in which such expressions are to be found. The other is that a case is only an authority for what it actually decides…."

[4] 1901 AC 495

Bearing the principles outlined in ***L.C. Quinn*** *(supra)*, I am of the view that while certain judgments are merely robust reiterations of the principles of the judgments that I have considered in greater detail through the course of this judgment, some judgments are either not relevant or are distinguishable on facts. I have considered such judgments which were absolutely necessary for deciding this case lest I jeopardized the brevity and coherence of this judgment with the persistent fear of making it too 'voluminous'.

7. Moving forward, Mr. Mookherjee has relied on the judgment of the Delhi High Court, in ***Bina Modi –v- Lalit Modi,***[5] in C.S. (O.S.) 84 of 2020 and Supreme Court judgments reported in ***Chatterjee Petrochem Company and Anr.*** *(supra)* and ***Kvaerner Cementation India*** *(supra)*, in support of the proposition that this court does not have the power to grant an anti-arbitration injunction for a foreign seated arbitration.

8. Therefore, this question needs to be dealt with first. When it comes to the power vested in this court in issuing an anti-arbitration injunction, the law laid down by a Division bench of *this* court in ***Devi Resources Ltd.*** *(supra)*, and also relied on by Mr. Dhruba Ghosh, learned senior advocate for the plaintiff, does authoritatively lay down the position as such:

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[5] (MANU/DE/0685/2020).

> "53…[I]n every case, it is the duty of the court to exercise extreme caution and circumspection before issuing an anti-suit or anti-arbitration injunction and, as high authorities instruct, the injunction should be *in personam* and issued against a party amenable to the jurisdiction of the court issuing the injunction and not issued against a foreign court or a foreign arbitral tribunal.
>
> 54. Just as the legal trinity of justice, equity and good conscience casts a duty on a court to see that a party before it is not unfairly prejudiced, the principles of comity, the respect for the sovereignty of a friendly nation and the need for self-restraint should guide a court to issue an injunction of such nature only in the most extreme and gross situations and not mere asking. A court must be alive to the fact that even an injunction *in personam* in such a situation interferes with the functioning of a sovereign or a private forum which may not be subject to the writ of that court. *At the same time, despite placing such an onerous burden on a court assessing the propriety of such an injunction, the authority of such a court, unless it is of very limited jurisdiction, cannot be doubted, particularly if it is a High Court in this country exercising its original civil jurisdiction…*"
>
> **(Emphasis supplied)**

9. As far as the reliance placed on ***Chatterjee Petrochem Company*** *(supra)* is concerned which was utilized to argue that this court cannot grant an injunction against a foreign seated arbitration, I do not find favour with the same and I negate such a submission unequivocally. The Division Bench in ***Devi Resources Ltd.*** *(supra)*, did also, in fact consider the implications of ***Chatterjee Petrochem Company*** *(supra)* but recorded[6] that the finding of the Supreme Court was based on the discovery that the original principal

[6] Devi Resources Ltd. –v- Ambo Exports Ltd., at paragraph 61.

agreement dated January 12, 2002 in that case was still subsisting; it had not been novated and therefore enforcing the intention to arbitrate the dispute before the ICC in Paris possessed sound legal propriety. And it is due to such a basal finding, that the Supreme Court in ***Chatterjee Petrochem Company*** *(supra)* declined to grant a permanent injunction in that case and dismissed the suit. And therefore, accordingly, based on such consideration, the argument put forth by the learned counsel for the respondent by placing their reliance on ***Chatterjee Petrochem Company*** *(supra)* is rejected.

10. Mr. Mookherjee has also argued that where arbitration has commenced without the intervention of the court, as is the case herein, no injunction should be granted to impede the progress of such an arbitral proceeding. He has placed his reliance on ***Kvaerner Cementation*** *(supra),* to lend credibility to this limb of his argument. However, I do place my overwhelming reliance on the authoritative dictum of the majority opinion of the Supreme Court in ***SBP & Co.*** *(supra)* Constitution Bench ruling, wherein the majority of six of the seven learned judges, had conclusively **rejected** the argument that an arbitral tribunal *solely* has competence, *to the complete exclusion of civil courts*, to determine its own jurisdiction.[7] In light of the majority opinion rendered in ***SBP & Co.*** *(supra),* it may therefore be interpreted that the dictum in ***Kvaerner Cementation*** *(supra),* relied on by Mr. Mookherjee, learned senior advocate, stands implicitly overruled for two reasons: *firstly,* the case was

reportedly decided on March 21, 2001, i.e. prior to the ruling in ***SBP & Co.*** *(supra)* and *secondly*, it was decided by a three Judges Bench of the Supreme Court. I hold as such.

11. Now, let me come to the important juncture of considering the dictum laid down by the Hon'ble Single Judge of the Delhi High Court in ***Bina Modi*** *(supra)*. The decision laid, in my opinion, a misplaced emphasis on the dictum of the Supreme Court in ***Kvaerner Cementation*** *(supra).* Paragraph 30 of the judgment in *Bina Modi (supra)*, which deals with this importance laid on ***Kvaerner Cementation*** *(supra)* absorbed much of my time as well as consideration. While the learned Single Judge in that case affirmatively stated that notwithstanding the length of the order (***Kvaerner Cementation*** is a short and curt, one-page order), it was still a binding precedent rendered by the Supreme Court and by virtue of the same, was binding on all the High Courts by virtue of Article 141 of the Constitution of India. Additionally, the learned judge had also reasoned that since ***Kvaerner Cementation*** *(supra)* had held the field for more than two decades, it was '*just, reasonable and the need of the hour*' that such a view on which the parties had acted not be disturbed.[8] I do not wish to deal with the other facets that the learned judge has traversed through to justify this line of precedential reasoning; my answer is as curt as the length of the order in ***Kvaerner Cementation*** *(supra).*

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[7] *SBP & Co. –v- Patel Engineering*, (2005) 8 SCC 618 at paragraph 19.
[8] Supra note 5, Sub-paragraph (C) of Paragraph 30.

12. In my humble opinion, the learned judge was not made aware of the Supreme Court's Constitution Bench ruling in ***SBP & Co.*** *(supra)* which I have already held, has implicitly overruled ***Kvaerner Cementation*** *(supra)* as far as an arbitral tribunal*, alongside civil courts*, being competent to rule on issues of jurisdiction as well as examining the existence and validity of an arbitration agreement, are concerned. And for this simple reason alone, the law laid down by the Single Judge in ***Bina Modi*** *(supra)* cannot be of any precedential value. This judgment has been appealed before a Division Bench of the Delhi High Court which is now seized of the matter wherein as on the last date of hearing dated July 30, 2020, the court had directed both parties that they stay their hands *qua* the ICC arbitration in Singapore. Therefore, this precedent in no way aids the argumentative line towed by the respondent.

13. In view of the discussions above, I am of the view that courts in India do have the power to grant anti-arbitration injunctions. However, this power is to be used sparingly and with abundant caution, a caveat once previously stated in ***Devi Resources Ltd.*** *(supra)* by the learned Division Bench of this court. It is only under the circumstances enumerated in and exhaustively discussed in paragraph 24 of ***Modi Entertainment Network*** *(supra)*, which I reproduce herein as follows, which would merit the grant of an anti-arbitration injunction and therefore, its rare and controlled usage:

"24. From the above discussion the following principles emerge:

1) In exercising discretion to grant an ant-suit injunction the court must be satisfied of the following aspects:

    a) the defendant, against whom injunction is sought, is amenable to the personal jurisdiction of the court;

    b) if the injunction is declined, the ends of justice will be defeated and injustice will be perpetuated; and

    c) the principle of comity - respect for the court in which the commencement or continuance of action/proceeding is sought to be restrained - must be borne in mind.

2) In a case where more forums than one are available, the court in exercise of its discretion to grant anti-suit injunction will examine as to which is the appropriate forum (forum conveniens) having regard to the convenience of the parties and may grant anti-suit injunction in regard to proceedings which are oppressive or vexatious or in a forum non-conveniens.

3) Where the jurisdiction of a court is invoked on the basis of jurisdiction clause in a contract, the recitals therein in regard to exclusive or non-exclusive jurisdiction of the court of the choice of parties are not determinative but are relevant factors and when a question arises as to the nature of the jurisdiction agreed to between the parties the court has to decide the same on a true interpretation of the contract on the facts and in the circumstances of each case.

4) A court of natural jurisdiction will not normally grant anti-suit injunction against a defendant before it where parties have agreed to submit to the exclusive jurisdiction of a court including a foreign court, a forum of their choice in regard to the commencement or continuance of proceedings in the court of choice, save in exceptional case for good and sufficient reasons, with a view to prevent injustice in circumstances such as which permit a contracting party to be

relieved of the burden of the contract; or since the date of the contract the circumstances or subsequent events have made it impossible for the party seeking injunction to prosecute the case in the court of choice because the essence of the jurisdiction of the court does not exist or because of a *vis major* or force majeure and the like.

5) *Where parties have agreed, under a non-exclusive jurisdiction clause, to approach a neutral foreign forum and be governed by the law applicable to it for the resolution of their disputes arising under the contract, ordinarily no anti-suit injunction will be granted in regard to proceedings in such a forum conveniens and favoured forum as it shall be presumed that the parties have thought over their convenience and all other relevant factors before submitting to the non-exclusive jurisdiction of the court of their choice which cannot be treated just as an alternative forum.*

6) *A party to the contract containing jurisdiction clause cannot normally be prevented from approaching the court of choice of the parties as it would amount to aiding breach of the contract; yet when one of the parties to the jurisdiction clause approaches the court of choice in which exclusive or non-exclusive jurisdiction is created, the proceedings in that court* ***cannot*** *per se be treated as vexatious or oppressive nor can the court be said to be forum non-conveniens.*

7) *The burden of establishing that the forum of choice is a forum non-conveniens or the proceedings therein are oppressive or vexatious would be on the party so contending to aver and prove the same.*

**(Emphasis supplied)**

**Accordingly, the first question is answered in the affirmative.**

14. Before considering the scope and impact of clause 23 of the 2018 Agency Agreement, I intend to make one thing clear at the very onset. The plaintiff has argued that they were the first party to initiate the arbitration proceedings against the respondent under Section 21 of the Arbitration Act of 1996 on April 13, 2020. However, this in my opinion, is a patently erroneous argument and is liable to be rejected. A simple perusal of the documents on record showcases, that while the RFA was filed against the plaintiff, by the respondent before the ICC on April 22, 2020, it was the respondent which had first issued the "Notice of Dispute" to the plaintiff under clause 23 of the 2018 Agency Agreement on March 13, 2020, and as per its timeline had respectfully waited for the mandatory period of thirty days to expire, whilst they waited for an amicable settlement of the dispute raised. In any event, the particular factum of which party initiated the arbitration proceedings first, in my opinion, would have no bearing on the jurisdiction of this Court or on the decision of this Court with respect to whether in the fact of the present case an anti arbitration injunction should be issued.

15. Now let me deal with the issue of the operability of clause 23 of the 2018 Agency Agreement. Mr. Ghosh has drawn my attention to the dictum of the Supreme Court in ***M.R. Engineers*** *(supra)*. He has relied on this precedent to highlight the point of law which stated that there existed a difference between reference to another document in a contract and incorporation of another

document in a contract, by reference. He has also relied on ***Choudhary Construction*** *(supra)* wherein it was held by this court that the arbitration clause in the special conditions would override the provision in the general conditions which barred arbitration. Hereinafter, Mr. Ghosh had also cited the ruling in ***Duro Felguera*** *(supra)*, specifically paragraph 26 to harp on the point that where a principal agreement has an arbitration clause but there exists a separate arbitration clause in another contract which specifically governs the rights and obligations in respect of a part of the works covered under the principal agreement, disputes arising from the other contract have to be referred to arbitration in terms of the arbitration agreement in the separate contract.

16. Let me first consider the ruling in ***M.R. Engineers*** *(supra)*, which was subsequently also followed by the Supreme Court in ***Duro Felguera*** *(supra).* The relevant portions of the judgment rendered by R. Raveendran, J. in ***M.R. Engineers*** are delineated below:

> "18. On the other hand, where there is only a reference to a document in a contract in a particular context, the document will not get incorporated in entirety into the contract. For example, if a contract provides that the specifications of the supplies will be as provided in an earlier contract or another purchase order, then it will be necessary to look to that document only for the limited purpose of ascertainment of specifications of the goods to be supplied. The referred document cannot be looked into for any other purpose, say price or payment of price. Similarly, if a contract between X and Y provides that the terms of payment to Y will be as in the contract between X

and Z, then only the terms of payment from the contract between X and Z, will be read as part of the contract between X and Y. The other terms say, relating to quantity or delivery cannot be looked into.

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24. The scope and intent of Section 7(5) of the Act may therefore be summarized thus:

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(iii) Where a contract between the parties provides that the execution or performance of that contract shall be in terms of another contract (which contains the terms and conditions relating to performance and a provision for settlement of disputes by arbitration), then, the terms of the referred contract in regard to execution/ performance alone will apply, and not the arbitration agreement in the referred contract, unless there is a special reference to the arbitration clause also.

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** ”

17. While paragraph 18 of ***M.R. Engineers*** *(supra)* deals with three parties X, Y and Z in the illustrative example, that necessarily is not the case herein where there are *two* parties competing for a dispute resolution mechanism under two separate contracts bearing divergent arbitration clauses. Based on the dictum outlined in paragraph 24(iii) of ***M.R. Engineers*** *(supra),* clause 23 of the 2018 Agency Agreement, however, does not become applicable to the purchase contracts since it is repugnant to the arbitration clauses contained in the purchase contracts. However, it is to be noted that clause 23, apart from being an arbitration clause also covers the aspect of *governing law* and proper law for the purposes of the 2018 agreement. Furthermore, the dictum of ***M.R. Engineers*** *(supra)* does not take away the right of the parties to raise a dispute under the 2018 Agency Agreement unless the arbitration clause therein has become inoperative or incapable of being performed.

18. While ***Duro Felguera*** *(supra)* did endorse the ruling in ***M.R. Engineers*** *(supra)*, Mr. Mookherjee was quick to point out *apropos* that the dispute in ***Duro Felguera*** *(supra)*, was covered under Part I of the Arbitration Act of 1996 thereby not being a foreign seated arbitration, unlike in the present dispute which attracts Part II of the Arbitration Act of 1996. Therefore, this argument

does the service of distinguishing the dictum of ***Duro Felguera*** *(supra)* in this present case and makes it inapplicable herein.

19. Now, upon a perusal of the 2018 Agency Agreement and the several purchase contracts, it is manifestly clear that the 2018 Agency Agreement is an umbrella agreement, in the nature of an agency, while the other purchase contracts are in reference to individual sale and purchase contracts. I should draw the spotlight, yet again to the fact that the 2018 Agency Agreement was put into operation retroactively for the contracts starting in 2017 and the period for the agency is to last till March 31, 2021.

20. Mr. Mookherjee, has relied on ***Olympus Superstructures (P) Ltd.*** *(supra)* to drive home the point that the 2018 Agency Agreement is indeed the "mother agreement", and therefore, as per settled law, those disputes in connection with the main agreement and disputes in regard to other matters connected with the subject matter of the main agreement would be governed by the general arbitration clause of the *mother agreement*. Paragraph 30 of ***Olympus Superstructures*** *(supra)* laid down the following exposition of law:

> "30. *If there is a situation where there are disputes and differences in connection with the main agreement and also disputes in regard to* ***"other matters" "connected"*** *with the subject-matter of the main agreement then in such a situation, in our view, we are governed by the general arbitration clause*

> *39 of the main agreement under which disputes under the main agreement and disputes connected therewith can be referred to the same arbitral tribunal.* This clause 39 no doubt does not refer to any named arbitrators. So far as clause 5 of the Interior Design Agreement is concerned, it refers to disputes and differences arising from that agreement which can be referred to named arbitrators and the said clause 5, *in our opinion, comes into play only in a situation where there are no disputes and differences in relation to the main agreement and the disputes and differences are solely confined to the Interior Design Agreement. That, in our view, is the true intention of the parties and that is the only way by which the general arbitration provision in clause 39 of the main agreement and the arbitration provision for a named arbitrator contained in clause 5 of the Interior Design Agreement can be harmonized or reconciled."*
>
> **(Emphasis supplied**)

21. Mr. Mookherjee further relied on paragraphs 24-35 of the original petition, to indicate that the purported disputes raised by the plaintiff is very much covered under the scope of the 2018 Agency Agreement and that the present disputes cannot be settled by resorting to the purchase contracts alone, in an isolated silo. In his submission, the domestic arbitration mechanism could have been triggered if disputes arose pertaining to specific facets of quantity, quality, logistics, *et al.*, pertaining to the delivery of the said goods under the individual or specific purchase contracts. But it is averred, that is not the *lis* which has arisen in this case. Mr. Mookherjee, importantly, drew my attention to paragraph 30 of the plaintiff's petition, to exhibit a conceded averment by the plaintiff, which stated that these were disputes apart from the purchase contracts only.

22. Furthermore, he drew the attention of this court to pages 40-49 of the petition filed by the plaintiff in a bid to focus the spotlight on the point, that the 2018 Agency Agreement is all encompassing and the disputes that have arisen are very much within the scope of the 2018 Agency Agreement or rechristened in alternative terms, the mother agreement, in this case.

23. The respondent has also advocated the need to *harmonize* the different arbitration clauses, i.e., the Indian arbitration clauses contained in the separate purchase contracts and the ICC arbitration clause contained in the 2018 Agency Agreement. While the independent purchase contracts have utilized the myopic phrase, "*..of this contract/order"*, the ICC arbitration clause has opted for an expansive phrase "*..this Agreement or the performance hereof*".

24. The respondent has argued that in none of the purchase contracts was the final price settlement mechanism (inclusive of deductions and liquidation process) dealt with; rather, it was within the scope of the clauses 8, 9 and 10 of the 2018 Agency Agreement. They have also drawn the attention of this court that the purported dispute raised by Balasore does not, in fact relate to the individual shipments or purchase orders at all.

25. And therefore, in light of that specific argument, it has been argued by the respondent that since the 2018 Agency Agreement subsists until March 31, 2021, *both arbitration clauses* have to be read in a harmonious manner.

26. The main thrust of the arguments of the plaintiff is that the present disputes are in reference to the independent purchase contracts and not in reference to the 2018 Agency Agreement. Mr. Ghosh strenuously submits in light of the persistent usage of Indian arbitration law and its primacy in clauses 7, 8 and 9 in the 37 purchase contracts, it signifies that clause 23 of the 2018 Agency Agreement mandating ICC in London as venue and the United Kingdom as the seat of the arbitration, became "inoperative".

27. Yet, since this arbitration is under Part-II of the Arbitration Act of 1996 (since the place of arbitration is outside India), Section 45 immediately has to be considered which contains the term 'inoperative'. Section 45 is reproduced as follows:

> "**45. Power of judicial authority to refer parties to arbitration. –** Notwithstanding anything contained in Part I or in the Code of Civil Procedure, 1908 (5 0f 1908), a judicial authority, when seized of an action in a matter in respect of which the parties have made an agreement referred to in section 44, shall, at the request of one of the parties or any person claiming through or under him, refer the parties to arbitration, unless it finds that the said agreement is null and void, *inoperative* or incapable of being performed.

The interpretative scope of this term was examined in detail by the Supreme Court in ***World Sport Group (Mauritius) Ltd.*** *(supra)*. The Court had held the following:

> "33....[T]he authorities on the meaning of the words "*inoperative or incapable of being performed"* do not support this contention of Mr. Subramanium. The words "*inoperative or incapable of being performed"* in Section 45 of the Act have been taken from Article II(3) of the New York Convention as set out in para 27 of this judgment. *Redfern and Hunter on International Arbitration* (5th Edn.) published by the Oxford University Press has explained the meaning of these words "*inoperative or incapable of being performed"* used in the New York Convention at p. 148, thus:
>
> > 'At first sight it is difficult to see a distinction between the terms 'inoperative' and incapable of being performed'. *However, an arbitration clause is inoperative where it has ceased to have effect as a result, for example, of a failure of the parties to comply with a time-limit, or where the parties by their conduct impliedly revoked the arbitration agreement.'* "
>
> **(Emphasis supplied**)

Paragraph 34 of ***World Sport Group (Mauritius) Ltd.*** *(supra)*, further quoted an authoritative article on the New York Convention, to carve out the scope of the term 'inoperative' as reproduced below:

> "The word '*inoperative'* can be said to cover those cases where the arbitration agreement has ceased to have effect, *such as revocation by the parties."*
>
> **(Emphasis supplied)**

28. Mr. Mookherjee, during his submissions before this Court had relied on the Supreme Court's ruling in ***Sasan Power Ltd.*** *(supra)* to point out the *scope of enquiry* by this court under Section 45 of the Arbitration Act of 1996. I reproduce the pertinent paragraphs below:

"48. It is settled law that an arbitration agreement is an independent or "self-contained" agreement. In a given case, a written agreement for arbitration could form part of another agreement, described by Lord Diplock as the "substantive contract" by which parties create contractual rights and obligations. Notwithstanding the fact that all such rights and obligations arising out of a substantive contract and the agreement to have the disputes (if any, arising out of such substantive contract) settled through the process of arbitration are contained in the same document, the arbitration agreement is an independent agreement. *Arbitration agreement/clause is not that governs rights and obligations arising out of the substantive contract: It only governs the way of settling disputes between the parties.*

49. *In our opinion, the scope of enquiry (even) under Section 45* ***is confined only to the question whether the arbitration agreement is*** *"null and void,* ***inoperative*** *or incapable of being performed"* but not the legality and validity of the substantive contract.

**(Emphasis supplied)**

29. Mr. Mookherjee based his arguments on the rulings of ***World Sport Group (Mauritius) Ltd.*** *(supra)* and ***Sasan Power Ltd.*** *(supra)* to contend that as a condition precedent for this suit to lie before this court, the plaintiff had to satisfy the conditions stipulated under Section 45 of the Arbitration Act of 1996. Since, the plaintiff has failed on such count, that is to showcase how the 2018 Agency Agreement had become "inoperative", this suit accordingly, does not lie and is liable to be dismissed.

30. While Mr. Ghosh, on behalf of the plaintiff, has assiduously outlined that both parties had discussed certain difficulties in the operability of the 2018 Agency Agreement and intended to amend upon the same, such an averment to my mind is purely 'anecdotal'. It is also a matter of record, may I hasten to add, that this is indeed reflected for there has been no amendment to the 2018 Agency Agreement by both parties and since it subsists, it continues to do so for *all intents and purposes.* And therefore, I do discover, that the submission of the plaintiff Balasore that the ICC arbitration clause in the 2018 Agency Agreement stands as "inoperative", runs counter to the facts in the present case.

31. The plaintiff, on the other hand, has failed to conclusively discharge its burden of exhibiting that the ICC in London, the alternate forum in this case, is either a *forum non-conveniens* or that the proceedings initiated before it by the respondent are oppressive or vexatious in nature, as was ruled under sub-paragraph (7) of paragraph 24 of the Supreme Court's judgment in ***Modi Entertainment Network*** *(supra)*, extracted above. The very fact that no amendment was made to clause 23 of the 2018 Agency Agreement, also triggers the applicability of sub-paragraph (5) of paragraph 24 of the judgment rendered in ***Modi Entertainment Network*** *(supra)*, thereby directing me towards the inference that both the plaintiff and respondent had thought over their convenience and all relevant factors before submitting to the non-exclusive jurisdiction of the court of their choice (or the ICC, which is the

"neutral foreign forum", as is the case here) which now, cannot be merely treated as an alternative forum by the plaintiff, just because a dispute has now taken birth.

32. To my mind, however, this possibly could not have been argued by the plaintiff for the fact that the plaintiff, an Indian company and the respondent, a limited liability company registered in the United States, had **chosen a *third*, *independent* and *non-partisan seat* for such arbitration.** Moreover, the law to be applied was also chosen to be English law (neutral) and not American law or Indian law. In my view, having chosen such a neutral venue and applicable law, neither party is at a disadvantage before the ICC.

33. Rather, what is manifestly clear from the actions of the plaintiff pursued before the ICC Secretariat is that they are not averse to the endorsement of their participation in the ICC arbitration as is evident from their pleas to have the arbitration conducted by a sole arbitrator and the fact that if their plea for determination of a valid arbitration agreement was not adjudicated by the ICC Court, the plaintiff would retain undiluted rights to argue the same once the arbitral tribunal was so constituted in accordance with the extant ICC Rules. The stand taken by Balasore before the ICC agreeing to the arbitration by a sole arbitrator and retaining its right to urge the jurisdiction point before such

arbitrator does not by itself bar them from filing the present suit. However, the conduct of Balasore in subjecting itself to the ICC jurisdiction and its acquiescence to a sole arbitrator is one of the factors to be examined by this Court while granting an ad interim injunction.

34. The mere possibility that "multiplicity of proceedings" may arise, is not a ground in itself for the grant of an anti-arbitration injunction against the respondent, if such ground is not coupled with the plea of either *forum non-conveniens* or vexatious or oppressive proceedings launched before such a neutral foreign forum. The Supreme Court in its ruling in ***World Sport Group (Mauritius) Ltd.*** *(supra)* had quoted the book *Recognition and Conferment of Foreign Arbitral Awards: A Global Commentary on the New York* Convention in paragraph 35 to succinctly put forth this position of law. I reproduce it below:

> "The terms *inoperative* refers to cases where the arbitration agreement has ceased to have effect by the time the court is asked to refer the parties to arbitration. For example, the arbitration agreement ceases to have effect if there has already been an arbitral award or a court decision with res judicata effect concerning the same subject-matter and parties. *However, the mere existence of multiple proceedings is not sufficient to render the arbitration agreement inoperative*..."
>
> **(Emphasis supplied)**

I have already stated that plaintiff has prima facie failed to prove that the 2018 Agency Agreement is inoperative, and therefore, it subsists for all intents and

purposes. I further have come to the prima facie conclusion that the plaintiff has also failed to discharge the burden that the proceedings launched before a neutral foreign forum is a *forum non-conveniens* or that it is vexatious or oppressive in its nature. **Accordingly, the second question is answered in the negative.**

35. For the sake of clarity, I would want to summarize my conclusions:

(a) Civil courts have the power to grant an anti-arbitration injunction; however, the same should be done sparingly in line with principles outlined in paragraph 24 of ***Modi Entertainment Network*** *(supra)*;

(b) Where a contract between the parties provides that the execution or performance of that contract shall be in terms of another contract (which contains the terms and conditions relating to performance and a provision for settlement of disputes by arbitration), then, the terms of the referred contract in regard to execution/ performance alone will apply, and not the arbitration agreement in the referred contract, unless there is a special reference to the arbitration clause also. In light of the same, the purchase contracts would be governed by the Indian

domestic arbitration clause in the purchase orders and not clause 23 of the Agency Agreement as the same is repugnant to the Arbitration clause in the Purchase orders;

(c) Point (b) above, however does not take away the right of the parties to raise a dispute under the 2018 Agency Agreement unless the arbitration clause therein has become inoperative or incapable of being performed;

(d) The burden of proof to show that the arbitration clause in the 2018 Agency Agreement has become inoperative or incapable of being performed is on the party asserting the same, in this case, the plaintiff;

(e) The burden of proof to show that there exist *forum non-conveniens* or proceedings launched before a neutral foreign forum is vexatious or oppressive is also upon the party asserting the same, in this case, the plaintiff;

(f) The mere existence of multiple proceedings and/or chance of a matter proceeding in multiple forums are not sufficient reasons to render an arbitration agreement inoperative;

(g) The fact that the pricing mechanism in the 2018 Agency Agreement has been incorporated into the purchase orders does not by itself make the arbitration clause in the 2018 Agency Agreement inoperative. The 2018 Agency Agreement being in the nature of an umbrella agreement subsists and the arbitration clause therein continues to operate on all aspects of the agreement;

(h) The parties have agreed to the 2018 Agency Agreement and the purchase orders with their eyes open, and if multiple proceedings may arise due to certain ambiguities, so be it. That fact alone cannot make one of the proceedings, especially a neutral foreign seated arbitration applying a neutral governing and proper law, a vexatious or oppressive proceeding.

(i) The stand taken by Balasore before the ICC agreeing to the arbitration by a sole arbitrator and retaining its right to urge the jurisdiction point before such arbitrator does not by itself bar them from filing the present suit. However, the conduct of Balasore in subjecting itself to the ICC jurisdiction and its acquiescence to a sole arbitrator is one of the factors to be examined by this Court while granting an ad interim injunction.

36. In light of the above conclusions, I do not see any reason why an ad interim order for anti-arbitration injunction should be granted restraining the respondent from pursuing the arbitration before the ICC in London.

37. Parties are directed to file their affidavits in G.A. 872 of 2020. Affidavit in opposition to be filed within 6 weeks, reply thereto, 3 weeks thereafter. Liberty to mention for final hearing thereafter. The urgency petition bearing G.A. 871 of 2020 is disposed of.

38. I would like to congratulate lawyers appearing for both parties for their assiduous efforts in trying to convince the court on behalf of their clients. Arguments made during the course of the hearing were both invasive and thought provoking and have resulted in substantial enhancement in the ken of knowledge of this Court on the subject.

39. Urgent photostat certified copy of this order, if applied for, should be made available to the parties upon compliance with the requisite formalities.

**(Shekhar B. Saraf, J.)**