

(2010) 03 BOM CK 0039

In the Bombay High Court

Case No : Appeal No. 372 of 2004 in Notice of Motion No. 778 of 2004 in Suit No. 233 of 2004

Severn Trent Water Purification, Inc.

APPELLANT

Vs

Chloro Controls India Private Ltd. and Others

RESPONDENT

Date of Decision : 04-03-2010

Acts Referred:

Arbitration Act, 1940 — Section 24

Arbitration and Conciliation Act, 1996 — Section 44, 45, 5, 8, 8(1)

Civil Procedure Code, 1908 (CPC) — Order 2 Rule 3

Foreign Awards (Recognition and Enforcement) Act, 1961 — Section 3

Citation : (2010) 3 ALLMR 33 : (2010) 2 BomCR 712 : (2010) 112 BOMLR 2030

Hon'ble Judges : V.K. Tahiramani, J;B.H. Marlapalle, J

Bench : Division Bench

Advocate : J.P. Sen, Jyothi Saigal and Shrawan Shah, for the Appellant; Saleh Doctor Naval Agarwal, instructed by B. Munim and Co. for Respondent No. 1, Jaideep Raut, instructed by Cr.By. and Co. for Respondent No. 3, Clive D'Souza, instructed by Legal Associate, for the Respondent

Final Decision : Allowed

Judgement

B.H. Marlapalle, J.—This appeal filed, by the original defendant No. 1, arises from the order dated 8th April, 2004 passed by the learned trial Judge, dismissing Notice of Motion No. 778 of 2004 which was an application u/s 8 of the Arbitration and Conciliation Act, 1996 (the Act for short) and the said Motion was taken out by defendant No. 1. The appeal was dismissed as per the order dated 11th February, 2009 and the said order came to be challenged in Civil Appeal No. 6302 of 2009. The Supreme Court was pleased to allow the appeal by setting aside the order dated 11th February, 2009 and the appeal came to be remitted to this Court for a fresh decision in accordance with law, with a further request to pass a speaking and reasoned order within three months. It is under these circumstances that the appeal is heard afresh.

2. The present respondent No. 1 filed Suit No. 233 of 2004 for a declaration that

the joint venture agreements and supplementary collaboration agreement are valid, subsisting, binding and that the scope of business of defendant No. 5 - Company includes the manufacture, sale distribution and service of the entire range of chlorination equipments, including electro chlorination equipment, of the defendant Nos. 1 and 2, their parents, associates and affiliated companies, as well as of the Kocha family/Chloro Controls Equipment Company and some other reliefs by way of restraining orders against defendant Nos. 1 to 4.

3. The plaintiff is a Private Limited Company and its shares are entirely held by defendant Nos. 9 to 11 (Kocha/Chloro Control Group). Defendant No. 1 - Company was earlier known as "Capital Controls Company Inc." and in or about the year 1990 the Capital Controls Group came to be acquired by Severn Trent Services PLC (UK), originally a stateowned water authority and following privatization from the UK Government in 1989, it proceeded to build a product and services business from the US beginning with the acquisition of the Capital Controls Group. The name of the first defendant was changed to Severn Trent Water Purification Inc with effect from 1/4/2002. Thus defendant Nos. 1 and 2 became the group companies and were earlier part of " the Capital Controls Group" (hereinafter referred to as the Capital Controls/Severn Trent group). Till January, 1999 the defendant Nos. 1 and 2 developed and sold electro chlorination equipment under the brand name "Hypogen" and from January, 1999 onwards the said brand was replaced by the brands "Sanilec" and "Omnipure". Defendant Nos. 1 and 2 carry on the business of manufacture, supply, sale and distribution of chlorination equipments, including gas and electro chlorination equipments. Defendant No. 3 is a company incorporated under the Companies Act, 1956 and engaged in the business of manufacture and marketing of electro chlorination equipment. In or about the year 1989-90, the said defendant No. 3 was floated as a joint venture in technical and financial collaboration with the De Nora group of Italy who held 51% of the equity share capital of the said defendant. Defendant No. 4 is a Private Limited Company incorporated under the Companies Act, 1956 and carries on business in electro chlorination equipments. It had a tie up with an American Company called "Exceltec Inc." which was engaged in the business of electrolytic disinfection equipment.

Defendant No. 5 i.e. Capital Controls India Private Ltd. is a Company incorporated under the Companies Act, 1956 pursuant to the joint venture agreements dated 16/11/1995 executed between the plaintiff and defendant No. 9 on the one hand and the defendant Nos. 1 and 2 on the other. 50% of the share capital of defendant No. 5 is held by the plaintiff and balance of 50% is held by defendant No. 2. Thus, the plaintiff and defendant No. 2 are the joint venture partners which have incorporated the defendant No. 5 - company.

Defendant Nos. 6 to 8 are the Directors of the defendant No. 5 - company appointed by the Capital Controls Group with defendant No. 7 as the Chairman but with no casting vote. Defendant Nos. 9 to 11 are the Directors of the fifth

defendant - company nominated by the Kocha Group/Chloro Control Group and defendant No. 9 is the Managing Director of the said joint venture.

4. Prior to the formation of the joint venture company, the Chloro Control Group carried on the business of manufacture and sale of gas chlorination equipments and from 1980 onwards it developed and commenced the manufacturing of electro chlorination equipment and the business was done in the name of "Chloro Controls Equipments Company", a sole proprietary concern of defendant No. 9 and it was the distributor in India for the products of Capital Controls for more than a decade prior to the formation of the joint venture. It appears that the joint venture was incorporated on 14/11/1995. The joint venture agreements between the 1st/2nd defendants and the plaintiff/defendant No. 9 executed on 16/11/1995 are as under:

5. As per the plaintiff, the main object of the joint venture and as mentioned in its Memorandum of Association is as follows:

to design, manufacture, import, export, act as agent, deal in assembling, testing, erecting, servicing and marketing of gas and electro chlorination equipments.

The Shareholders Agreement is between the defendant No. 2 on one hand and the plaintiff, represented through defendant No. 9, on the other. The International Distributor Agreement is between defendant No. 1 and defendant No. 5. As per the said agreement, Capital Controls agreed to appoint the joint venture as a distributor in India of the products manufactured by Capital Controls subject to the terms and conditions of the said agreement and it would normally be renewed as long as Capital Controls holds at least 26% of the shares in the joint venture. Whereas between defendant No. 1 and defendant No. 5 there are three more agreements i.e., (1) Financial and Technical Know-how License Agreement, (2) Export Sales Agreement and (3) Trademark Registered User License Agreement. Clause 14 of the Shareholders Agreement reads as under;-

14. Financial and Technical Know-how Licence Agreement Chloro Controls and Capital Controls shall together cause the Company to enter into the financial Technical Know- How License Agreement with Capital Controls attached hereto (hereinafter referred to as the License Agreement). Under the said License Agreement and subject to the terms and conditions specified therein, Capital Controls agrees to grant the Company the right and license to manufacture the Products in India in accordance with the Technical Know-How and other technical information possessed by Capital Controls. (the company means the joint venture - defendant No. 5)

It is the contention of the plaintiff that the Capital Controls granted an exclusive license to the joint venture to manufacture all its products in India and to sell them in India, Afghanistan, Nepal and Bhutan and the agreement was to remain in force for 10 years from the date it was filed with the Reserve Bank of India. Clause 2.4 and 2.5 of the Financial and Technical Know-how License Agreement read as under:

2.4 Licensee agrees that it shall not during the terms of this Agreement manufacture or have manufactured for its, sell or offer for sale or be financially interested in any other venture for the manufacture and sale of any goods similar to the Products, without the prior written permission of Capital Controls.

2.5 During the term of this Agreement, Capital Controls and its affiliated companies shall sell the Products in India only through the Licensee.

It is further contended by the plaintiff that between the products listed in the Financial and Technical Know-how License Agreement as well as the International Distributors Agreement, the complete range of the then existing chlorination equipments, including gas and electro chlorination equipments of Capital Controls was covered within the scope of the joint venture agreements and at the time of the execution of the joint venture agreements, the entire chlorination equipment business of Severn Trent was conducted through defendant Nos. 1 and 2 and Severn Trent had no existing or other business in chlorination equipments. In addition, it is also contended that at the relevant time Severn Trent conducted business in electro chlorination equipment of only one brand i.e. Hypogen, which was covered under the above International Distributors Agreement. As per the plaintiff it was also the intention of the parties that the business of the joint venture would include the entire range of chlorination business of Chloro Controls Equipment Company, including its range of electro chlorination equipments and similarly the entire range of chlorination equipments of Severn Trent was ultimately to be manufactured by the joint venture. In short, it is the claim of the plaintiff that the purpose of formation of the joint venture was to fuse and pool together the resources, technology and business in the entire range of chlorination equipments, including electro chlorination equipments of Severn Trent (Capital Controls) with that of Kocha family/Chloro Controls Equipment Company.

6. On 26/2/1996 the joint venture company made an application to the Secretariat for Industrial Approval (SIA), Department of Industrial Development, Ministry of Industries for approval for the setting up of the joint venture company. The SIA granted its approval to the said proposal by letter dated 11/10/1996 and certain amendments were also approved by a further letter dated 21/4/1997. Consequent to this approval by the Government of India, a 7th Agreement called as "Supplementary Collaboration Agreement" (Exh. M) came to be signed between the parties. Based on the said agreement it is contended by the plaintiff that the joint venture agreements covered and were always intended to cover the manufacture and supply of electro chlorination equipments within the scope of business of the joint venture and it denies the contentions of the Capital Controls that the scope of the joint venture did not include dealing with the electro chlorination equipments.

7. The plaintiff alleges that a circular was issued by the first defendant which was received by the joint venture on 1/2/1999 stating that Capital Control's "Hypogen" brand of electro chlorination equipment was to be completely replaced

by Exceltec's "Omnipure" and "Sanilec" and upon such replacement, the joint venture was exclusively entitled to conduct the business in the said brands of "Omnipure" and "Sanilec" in India as well. The dispute between the parties thus centered around the range of products to be manufactured and marketed by the joint venture and the dispute is purely between the Chloro Controls/Kocha Group on one hand and the Capital Controls on the other hand.

8. The suit is filed by the plaintiff as a derivative action by a 50% shareholder of the joint venture company to correct and remedy the illegality /wrongs done to the joint venture by the Capital Controls/Severn Trent group. The crux of the suit, even as per the plaintiff, centers around the following main questions:

(a) the scope of business of the joint venture company was restricted to gas chlorination equipment with the exception of one brand and electro chlorination equipment, viz. "Hypogen", as alleged by the Severn Trent Group Or Whether

(b) the scope of business of the joint venture company covered gas chlorination equipment as well as the entire range of electro chlorination equipment of the Severn Trent group and the Kocha family, as contended by the Kocha Group.

While the suit was pending, the Capital Control/Severn Trent Group issued the letter dated 21/7/2004 purported to terminate the joint venture agreements. It is the claim of the plaintiff that under Clause 21.2 of the Shareholders Agreement, the joint venture agreements are not terminable, save and except by the party not in default or breach of the terms of joint venture agreements fulfilling certain precise conditions set out in the said clause. He said termination has also been challenged in the suit.

9. In the said suit, Notice of Motion No. 778 of 2004 was taken out by the defendant No. 1 u/s 8 of the Act. It is fairly conceded that the said Motion was required to be treated as the one u/s 45 of the Act. The Motion was opposed by the plaintiff and the learned Single Judge, by relying upon the law laid down by the Supreme Court in the case of Sukanya Holdings Pvt. Ltd. Vs. Jayesh H. Pandya and Another, held that different parties are signatories to different agreements and several parties to the suit are not parties to the agreements. Defendant Nos. 3 and 4 are not parties to any of the joint venture agreements. The suit was filed by the plaintiff in their capacity as shareholders of defendant No. 5 and not for themselves as parties to the joint venture agreements and it was filed for the benefit of defendant No. 5 which is not party to the shareholders agreement and not party to the proposed arbitral proceedings. Though law laid down in the case of Sukanya is not distinguishable and squarely applies to the case, the entire subject matter of the suit is required to be the subject matter of the arbitration agreements and bifurcation of the subject matter of the suit is not contemplated while entertaining an application either u/s 8 or Section 45 of the Act. There is no provision for splitting the cause of action and referring the subject matter of the suit for arbitration. In short, the bifurcation of parties as well as bifurcation of the cause of action in the suit cannot be allowed. The

learned Single Judge, therefore, held that there was no fit case to exercise jurisdiction either u/s 8 or Section 45 of the Act to refer the disputes in the suit for arbitration.

10. We are, therefore, required to consider whether the law laid down by the Supreme Court in Sukanya's case is applicable in the instant case and the view taken by the learned Single Judge in dismissing the Notice of Motion is sustainable.

11. It would be advantageous to reproduce the observations made by the Supreme Court in Sukanya's case in para 12 to 17 as under:

12. For interpretation of Section 8, Section 5 would have no bearing because it only contemplates that in the matters governed by Part I of the Act, the judicial authority shall not intervene except where so provided in the Act. Except Section 8, there is no other provision in the Act that in a pending suit, the dispute is required to be referred to the arbitrator. Further, the matter is not required to be referred to the Arbitral Tribunal, if (1) the parties to the arbitration agreement have not filed any such application for referring the dispute to the arbitrator; (2) in a pending suit, such application is not filed before submitting first statement on the substance of the dispute; or (3) such application is not accompanied by the original arbitration agreement or duly certified copy thereof. This would, therefore, mean that the Arbitration Act does not oust the jurisdiction of the civil court to decide the dispute in a case where parties to the arbitration agreement do not take appropriate steps as contemplated under Sub-sections (1) and (2) of Section 8 of the Act.

13. Secondly, there is no provision in the Act that when the subject matter of the suit includes subject matter of the arbitration agreement as well as other disputes, the matter is required to be referred to arbitration. There is also no provision for splitting the cause or parties and referring the subject matter of the suit to the arbitrators.

14. Thirdly, there is no provision as to what is required to be done in a case where some parties to the suit are not parties to the arbitration agreement. As against this, u/s 24 of the Arbitration Act, 1940, some of the parties to a suit could apply that the matters in difference between them be referred to arbitration and the court may refer the same to arbitration provided that the same can be separated from the rest of the subject matter of the suit. The section also provided that the suit would continue so far as it related to parties who have not joined in such application.

15. The relevant language used in Section 8 is, "in a matter which is the subject of an arbitration agreement". The court is required to refer the parties to arbitration. Therefore, the suit should be in respect of "a matter" which the parties have agreed to refer and which comes within the ambit of arbitration agreement. Where, however, a suit is commenced - "as to a matter" which lies outside the arbitration agreement and is also between some of the parties who

are not parties to the arbitration agreement, there is no question of application of Section 8. The words "a matter" indicate that the entire subject matter of the suit should be subject to arbitration agreement.

16. The next question which requires consideration is --- even if there is no provision for partly referring the dispute to arbitration, whether such a course is possible u/s 8 of the Act. In our view, it would be difficult to give an interpretation to Section 8 under which bifurcation of the cause of action, that is to say, the subject matter of the suit or in some cases bifurcation of the suit between parties who are parties to the arbitration agreement and others is possible. This would be laying down a totally new procedure not contemplated under the Act. If bifurcation of the subject matter of a suit was contemplated, the legislature would have used appropriate language, it follows that bifurcation of the subject matter of an action brought before a judicial authority is not allowed.

17. Secondly, such bifurcation of suit in two parts, one to be decided by the Arbitral Tribunal and the other to be decided by the Civil Court would inevitably delay the proceedings. The whole purpose of speedy disposal of dispute and decreasing the cost of litigation would be frustrated by such procedure. It would also increase the cost of litigation and harassment to the parties and on occasions there is possibility of conflicting judgments and orders by two different forums.

12. The Supreme Court held that there is no provision in the Act when the subject matter of the suit includes subject matter of the arbitration agreement as well as other disputes, the matter is required to refer to arbitration and further there is no provision for splitting the cause or parties and referring the subject matter of the suit to the arbitrator. There is no provision as to what is required to be done in a case where some parties to the suit are not parties to the arbitration agreement. The provisions akin to Section 24 of the Arbitration Act, 1940 are not available in the Act. It would be difficult to give an interpretation to Section 8 of the Act under which bifurcation of the cause of action, that is to say, the subject matter of the suit or in some cases bifurcation of the suit between the parties who are parties to the arbitration agreement and others is possible. This would be laying down a totally new procedure not contemplated under the Act. It, therefore, follows that bifurcation of the subject matter of an action brought before a judicial authority is not allowed. Similarly, bifurcation of the suit in two parts i.e. one to be decided by the Arbitral Tribunal and the other to be decided by the Civil Court would inevitably delay the proceedings and thus the whole purpose of speedy disposal of disputes and decreasing the cost of litigation would be frustrated by such procedure. In addition, on occasions, there is a possibility of conflicting judgments and orders by two different courts.

13. As is clear from the above chart, the following three agreements provide for a clause of arbitration:

(a) Shareholders Agreement - signed between Defendant No. 2 and the plaintiff, through Defendant No. 9. Clause 30 of the said agreement provides for ICC Arbitration at London.

(b) Financial and Technical Know-how License Agreement - signed between Defendant No. 1 and Defendant No. 5. Clause 26 of the said agreement provides for ICC Arbitration at London.

(c) Export Sales Agreement - signed between Defendant No. 5 and Defendant No. 1. Clause 18 of the said agreement provides for arbitration under the Rules of American Arbitration Association to be held at Pennsylvania, USA.

The Supplementary Collaboration Agreement signed between Defendant No. 2 and Defendant No. 5 does not provide for an arbitration clause. Clause 30 of the Shareholders Agreement (between Defendant No. 2 and plaintiff) is in paramateria with Clause 26 of the Financial and Technical Know-how License Agreement (between Defendant No. 1 and Defendant No. 5). Clause 30 of the Shareholders Agreement reads as under:

Any dispute or difference arising under or in connection with this Agreement, or any breach thereof, which cannot be settled by friendly negotiation and agreement between the parties, shall be finally settled by arbitration conducted in accordance with the Rules of Conciliation and Arbitration of the International Chamber of Commerce by three arbitrators designated in conformity with those Rules. The arbitration proceedings shall be held in London, England and shall be governed by and subject to English law. Judgment upon the award rendered may be entered in any court of competent jurisdiction.

Clause 18 of the Export Sales Agreement reads as under:

Any dispute of difference arising under or in connection with this Agreement, or any breach thereof, which cannot be settled by friendly negotiation and agreement between the parties shall be finally settled by arbitration conducted in accordance with the Rules of American Arbitration Association. The arbitration proceedings shall be held in Pennsylvania, U.S.A. Judgment upon the award rendered may be entered in any court of competent jurisdiction.

14. Mr. Sen, the learned Counsel for the appellant, submitted that the judgment in Sukanya's case defines the circumstances in which an application u/s 8 could be allowed and the reference may be possible only if there is a congruence of parties and causes of action, it implies that the parties to the suit are also parties to the arbitration agreement and the cause of action in the suit is within the scope of the arbitration agreement. However, in the said case, there was no controversy as to whether, (a) any of the parties in the suit were necessary or proper, or (b) there was a misjoinder of causes of action in the suit contrary to the provisions of Order II Rule 3 of the C.P.C. It was further submitted by Mr. Sen that in Sukanya's case, the Supreme Court had no occasion to express any view as to what course must be adopted in the event the plaintiff joined a party who is

manifestly not necessary as a party-defendant in the suit only with a view to defeat an arbitration agreement. At the same time, the Supreme Court had no occasion to address a situation where the plaintiff was seeking reliefs against a third party who is not a party to the arbitration agreement but through other defendants who were, in fact, parties to the arbitration agreement. It was pointed out by Mr. Sen that these situations have been addressed by this Court in the case of Zenith Ltd. Vs. M.V. Pontoporos and Others, by the Delhi High Court in the case of Virender Yadav v. Aerosvit Airlines and Ors. and by the Madras High Court in the case of Sundaram Brake Linings Ltd. v. Kotak Mahindra Bank Ltd. Mr. Sen contended that if the view taken by the Supreme Court in Sukanya's case is made applicable in each and every case the very purpose of Section 8 or Section 45 of the Act would be defeated and these sections envisage a legislative policy in favour of a reference of disputes to arbitration where the parties have entered into a private bargain in that behalf. If the reasoning accepted by the learned Single Judge on the basis of the submissions made by the plaintiff is allowed to continue, all that the plaintiff would have to do to escape an arbitration agreement would be to join as a party to the suit any person, however, remotely connected to the cause of action who is not a party to the arbitration agreement. The judgment in Sukanya's case, therefore, certainly does not envisage such a principle to be laid down.

It was also pointed out that the defendant No. 1 sought a reference to arbitration on the basis of the arbitration clauses contained in the Shareholders Agreement and the Financial and Technical Know-how License Agreement. It was pointed out that all other agreements, as noted hereinabove, are described as annexures to the said two agreements except the Supplementary Collaboration Agreement. Mr. Sen also referred to the pleadings set out in the plaint and pointed out that the plaintiff has itself treated the said joint venture agreements as a single consolidated bargain and the sole grievance is that the Capital Controls/Severn Trent Group has acted in breach of the joint venture agreements and the termination of these agreements was illegal. Mr. Sen also highlighted that though the defendant No. 2 has merged with defendant No. 1 and has consequently ceased to exist, the same is disputed by the plaintiff and it is an issue that is capable of being resolved in arbitration on the basis of the evidence that could be adduced by the parties. Referring to the relief sought for in the plaint, it was pointed out by the learned Counsel that injunctive reliefs are sought against defendant Nos. 3 and 4 who have no privity of contract with the plaintiff or defendant No. 5 and defendant Nos. 3 and 4 are stated to be the associate concerns of defendant Nos. 1 and 2. A negative covenant against the sale by defendant Nos. 1 and 2 of certain products in India to be found in the agreement between the plaintiff and defendant No. 2 and in the agreement between defendant No. 1 and defendant No. 5 is sought to be enforced also against defendant Nos. 3 and 4. Defendant Nos. 6 to 11 are the Directors of defendant No. 5 and there are no relief sought against them and their presence is wholly unnecessary for an adjudication of the issues raised in the suit. Mr. Sen,

therefore, submitted that there are valid and subsisting arbitration agreements to which plaintiff, defendant No. 1, defendant No. 2 and defendant No. 5 are the parties, the proper course to adopt would be to refer the disputes between the plaintiff and defendant Nos. 1 to 5 to arbitration if defendant Nos. 3 and 4 consent for the same and defendant Nos. 6 to 11 are neither necessary nor proper parties for an adjudication of the issues in controversy.

15. While supporting the view taken by the learned trial Judge, Mr. Doctor, the learned Senior Counsel for the plaintiff, submitted that different parties are signatories to different agreements and some parties to suit are not parties to any arbitration agreement. The agreements covered different fields and aspects of the joint venture as well as the rights and obligations of the parties to the said agreements. Defendant No. 2 is a party to only the Shareholders Agreement and the subsequent Supplementary Collaboration Agreement and plaintiff-company is not a party to the Financial and Technical Know-how License Agreement and, therefore, no question can arise of the plaintiff, in their derivative capacity or otherwise, invoking the arbitration clause in the License Agreement. It is also pointed out that the right of defendant No. 5 - Company to distribute electro chlorination equipment of Capital Control/Severn Trent Group arises from the International Distributor Agreement dated 16/11/1995 which does not contain any arbitration clause. It is also claimed that reliefs against defendant Nos. 3 and 4 have sought in tort though they are not parties to any joint venture agreements and defendant Nos. 6 to 8 have acted wrongfully and in breach of their duty towards the defendant No. 5 - Company. Thus defendant Nos. 3, 4 and 6 to 8 are the necessary and proper parties and they cannot be said to have been joined to defeat the arbitration. As per Mr. Doctor the application filed u/s 45 of the Act has been rightly dismissed by the learned trial Judge and the law laid down by this Court in the case of Zenith Ltd. and Ors., by the Delhi High Court in the case of Virender Yadav and by the Madras High Court in the case of Sundaram Break Linings Ltd. is not applicable, and in any case the law laid down by the Supreme Court in Sukanya's case is squarely applicable to the facts of this case. The view taken by the learned Single Judge cannot be faulted on any count and consequently the appeal is required to be dismissed. It was also contended that the law laid down in Sukanya's case has been reaffirmed in the case of India Household and Healthcare Ltd. Vs. LG Household and Healthcare Ltd., and Rashtriya Ispat Nigam Limited and Another Vs. Verma Transport Company, .

On the issue of merger of defendant No. 2 with defendant No. 5, it was submitted by Mr. Doctor that the said contentions are baseless and irrelevant since, in any event, as to whether parties to the suit are parties to the arbitration and whether the subject matter of the suit is covered by the arbitration agreement as laid down in Sukanya's case are not made out.

It is stated that the merger of defendant Nos. 1 and 2 was under consideration in Company Petition No. 857 of 2004 for winding up of defendant No. 5 and serious

doubts were cast upon the merger by the Division Bench of this Court.

16. For ready reference, Section 8 and Section 45 of the Act are reproduced as under:

8. Power to refer parties to arbitration where there is an arbitration agreement.-

(1) A judicial authority before which an action is brought in a matter which is the subject of an arbitration agreement shall, if a party so applies not later than when submitting his first statement on the substance of the dispute, refer the parties to arbitration.

(2) The application referred to in Sub-section (1) shall not be entertained unless it is accompanied by the original arbitration agreement or a duly certified copy thereof.

(3) Notwithstanding that an application has been made under Sub-section (1) and that the issue is pending before the judicial authority, an arbitration may be commenced or continued and an arbitral award made.

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 of 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 conditions which are required to be satisfied u/s 8 of the Act before the Court can exercise its powers are:

- (1) there is an arbitration agreement;
- (2) the party to the agreement brings an action in the Court against the other party;
- (3) the subject matter of the action is same as the subject matter of the arbitration agreement; and
- (4) the other party moves the court for referring the parties to the arbitration before he submits his first statement on the substance of the dispute.

It is thus clear that one of the aspects to be considered by the Court, while considering the application for referring the parties to arbitration, is that the subject matter of the action is the same as a subject matter of the arbitration agreement. P. Anand Gajapathi Raju and Others Vs. P.V.G. Raju (Died) and Others, . Whereas the scheme of Section 45 is differently worded and it begins with non obstante clause. It states that notwithstanding anything contained in Part I or in the Code of Civil procedure, 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. However, both the sections are, in most part, *para materia*, as to the circumstances in which a reference can be made of disputes to arbitration.

17. In the instant case, there is no dispute between the parties that the application submitted by the appellants before the learned trial Judge was required to be treated as an application u/s 45 of the Act and not u/s 8 of the Act.

It is pertinent to note that the learned Counsel appearing for defendant Nos. 3 and 4, on instructions, stated that they support the appellant for going in for arbitration. Even on the averments made in the plaint, the crux of the dispute appears to be between Chloro Control/Kocha Group on one hand and Capital Control/Severn Trent on the other. In para 8 of this judgment, we have noted down the two main issues on which the crux of the suit filed by the plaintiffs centers around. It is the contention of the Kocha Group that the scope of the business of the joint venture company i.e. defendant No. 5 covers gas chlorination equipment as well as the entire range of electro chlorination equipment of the Severn Trent Group/Capital Control Group of the Kocha Family. Whereas, as per defendant Nos. 1 and 2, the scope of business of the joint venture Company (Defendant No. 5) was restricted to gas chlorination equipment with the exception of one brand and electro chlorination equipment i.e. "Hypogen" .

18. During the pendency of the suit, the Capital Control/Severn Trent Group issued the letter dated 21.7.2004 and purported to terminate the joint venture agreements. The suit filed by the plaintiff is admittedly for the benefit of the joint venture company i.e. Defendant No. 5 and it is the joint venture of the Chloro Controls of the Kocha Group on one hand and Capital Controls/Severn Trent Group on the other hand. The defendant Nos. 3 and 4 were the distributors of Chlorination products in India, on behalf of the DeNora and Exceltec Group of Companies, respectively and both these companies have been taken over by the Severn Trent Group. Defendant Nos. 6 to 8 on one hand and defendant Nos. 9 to 11 on the other hand are the nominees on the Board of Directors of the Joint Venture of the Capital Control Group and Chloro Controls Group respectively. Defendant No. 9 was appointed as the Managing Director of defendant No. 5 company as per the agreement between Defendant No. 5 and defendant No. 9 and therefore, the said agreement cannot be called as a joint venture agreement. There are two main joint venture agreements i.e. Shareholders Agreement and Financial & Technical Know how License Agreement and the remaining agreements i.e. International Distributor Agreement, Export Sales Agreement and Trademark Registered Users Agreement are the annexures to these two agreements. Both these main agreements provide for arbitration i.e. arbitration at Landon. The reliefs claimed are against defendant Nos. 1 and 2 as well as defendant Nos. 3 and 4. Injunctive reliefs are sought against defendant Nos. 3 and 4, though they do not have privity of contract with the plaintiff as well

as defendant No. 5. They are stated to be the associate/group companies of defendant Nos. 1 and 2. A negative covenant against the sale by defendant Nos. 1 and 2 of certain products in India, to be found in the agreement between defendant Nos. 1 and 5, is sought to be enforced against defendant Nos. 3 and 4. Even otherwise, the plaintiff itself has treated all the agreements signed on 16/11/1995, as a single consolidated agreement, as is clear from a plain reading of the plaint.

19. In the case of Zenith Limited (Supra) and in the case of Virender Yadav, the plaintiffs had a subsisting agreement with some of the defendants, which contained an arbitration clause and in addition to the parties to the agreement, the plaintiffs also sought reliefs against persons who were alleged to be acting as agents or on behalf of the persons with whom the plaintiffs had a subsisting contract. In other words, the person who was sought to be impleaded as an agent and against whom reliefs were sought was not a party to the Arbitration Agreement between his principal and the plaintiffs. In both the cases, a reference to the arbitration of the disputes in the suit was allowed on the basis that the reliefs that had been sought against the third party in his capacity as an agent and the cause of action against the principal and the agent was synonymous and indistinguishable. In the case of Sundaram Brake Linings Ltd. (Supra), some of the defendants were not parties to the Arbitration Agreement between the plaintiffs and the defendant-Bank but were employees of the plaintiffs against whom certain allegations of fraud were sought to be levied. The application filed u/s 8 of the Act by the defendant - Bank for reference of the disputes to the arbitration was allowed on the ground that other defendants were not necessary parties and that an Arbitration Agreement could not be defeated by joining a party who was not necessary for determining the issues in controversy in the suit. The judgment in the case of Svenska Handelsbanken and Ors. v. Indian Charge Chrome and Ors. (1994) 2 SCC 155 concerned a case where the plaintiff had filed a suit against several defendants, some of whom were lenders and others were suppliers. There were arbitration clauses in the agreements between the plaintiff and its lenders and between plaintiff and its supplier, but there was not a single arbitration agreement to which the plaintiff and all the defendants were party. However, the application made by various defendants u/s 3 of the Foreign Awards (Recognition and Enforcement) Act, 1961 for the stay of the suit was allowed. In the case of Novartis Vaccines & Diagnostics Inc. v. Aventis Pharma Ltd. and Ors. which was relied upon by the plaintiff, some of the defendants were not party to the Arbitration Agreement and the plea that these parties were not necessary was repelled by the High Court holding that unless a formal application was moved to delete the party-defendant, an application u/s 8 of the Act was liable to be rejected, if such a defendant was not a party to the Arbitration Agreement. In the case of Kaveri Gas Power Limited Vs. Sri Kaderi Ambal Mills Limited and Others relied upon by the plaintiff, no doubt was cast on the correctness of the views expressed in the case of Sundaram Brake Linings (Supra).

20. The foundation of the plaintiff's opposition to the application u/s 45 of the Act for reference to arbitration is based on the denial that the defendant Nos. 1 and 2 have merged from 31/3/2003. This issue of merger between these two companies has not been decided by the Supreme Court in the case of Severn Trent Water Purification, Inc. Vs. Chloro Controls (India) Private Ltd. and Another, . In the said case the following three issues were considered by the Supreme Court:

(1) Whether a winding-up petition filed by Severn Trent is maintainable in the capacity as a contributory?

(2) Whether a winding-up petition filed by Severn Trent is maintainable in the capacity as a creditor?

(3) Whether a winding-up petition filed by Severn Trent is liable to be dismissed at the threshold on the ground of premature advertisement by Severn Trent without an order of the court as required by law?

The first question was answered in the negative and it was held that a winding-up petition filed by the Severn Trent in the capacity as a contributory was not maintainable. On the second issue, the Supreme Court thought it appropriate not to express any opinion either way. The issue as to whether defendant No. 2 has merged with defendant No. 1 under the relevant law of the State of Delaware can be decided during the arbitration proceedings and that too as a preliminary point and if it is held that they have, in fact, merged, the arguments of the plaintiff to oppose the arbitration would fall to the ground. As noted earlier, the crux of the disputes, as raised in the suit, is between the Chloro Control Group on one hand and the Capital Controls/Severn Trent Group on the other in respect of the range of products manufactured or marketed by defendant No. 5 under the joint venture agreements. Defendant Nos. 1 to 4 are, even by the plaintiff's own contentions, the group companies or associate companies of Severn Trent Group and these disputes revolve around the Joint Venture agreements which are, in fact, only two agreements as noted hereinabove and the remaining four agreements are only annexures. Both these main agreements have an arbitration clause.

Under these circumstances, in our considered opinion, the law laid down by the Apex Court in the case of Sukanya Holdings (Supra) and relied upon by the learned Single Judge is not applicable in the facts of the case in hand. The concept of separation of parties, separation of reliefs or separation of cause in the suit on making a reference to arbitration would not arise in the instant case. Hence, the application filed by the appellant u/s 45 of the Act must succeed.

21. In the premises, the appeal succeeds and the same is allowed. The impugned order dated 8/4/2004 is hereby quashed and set aside. Notice of Motion No. 778 of 2004 filed in Suit No. 233 of 2004 for reference to arbitration u/s 45 of the Act is made absolute in terms of prayer Clause (a) and (b).

We make it clear that the issue of merger of defendant No. 2 with defendant No. 1 with effect from 31/3/2003 shall be decided in the arbitration proceedings as a preliminary issue.

Parties to bear their own costs.

After pronouncement of the Judgment, an oral application has been submitted by Mr. Naval Agarwal, the learned Counsel for respondent No. 1, for stay to the operation of this order.

Oral application is allowed and the operation of this order is stayed for a period of four weeks from today.