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

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CS(COMM) 1265/2016

**IFCI FACTORS LIMITED**

..... Plaintiff

Through: Mr. Anupam Srivastava, Mrs. Monika  
Srivastava & Mr. Dhairya Gupta,  
Advs.

Versus

**SHYAM FORGINGS PRIVATE LIMITED & ORS..... Defendants**

Through: Mr. Mananjay Mishra, Adv. for D-2 to 5.

**CORAM:**

**HON'BLE MR. JUSTICE RAJIV SAHAI ENDLAW**

**ORDER**

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**02.01.2018**

1. The plaintiff has instituted this suit under Order XXXVII of the Code of Civil Procedure, 1908 for recovery of Rs.4,78,37,930.22 paise jointly and severally from defendants no.1 to 5 viz. i) Shyam Forgings Pvt. Ltd.; ii) Brijesh Kumar Agarwal; iii) Nitin Agarwal; iv) Shaifali Chaudhary; and, v) Swati Agarwal pleading:

- i) that the plaintiff is a factor within the meaning of Section 2(i) of the Factoring Regulation Act, 2011;
- ii) that the defendant no.1 Shyam Forgings Pvt. Ltd. was granted the domestic factoring facility worth Rs.3 crores by the plaintiff;
- iii) that separate Deeds of Guarantee were executed by the defendants no.2 to 5 viz. Brijesh Kumar Agarwal, Nitin Agarwal, Shaifali Chaudhary and Swati Agarwal in favour of



the plaintiff, guaranteeing to the plaintiff repayment of Rs.3 crores with interest thereon and agreeing to be jointly and severally liable with the defendant no.1;

- iv) that a sum of Rs.4,78,37,930.22 paise is due jointly and severally from the defendants to the plaintiff; and,
- v) that the defendant no.1 is under liquidation and on an application being CA No.2579/2016 filed by the plaintiff in Company Petition No.487/2014 titled ***Small Industries Development Bank of India Vs. Shyam Forgings Pvt. Ltd.***, the plaintiff has been granted liberty to institute appropriate proceedings against the defendant no.1 Shyam Forgings Pvt. Ltd.

2. The suit was entertained under Order XXXVII of the CPC and the summons for appearance ordered to be issued to the defendants.

3. The counsel for the plaintiff states and the counsel for all the defendants confirms that the defendants no.2 to 5 viz. Brijesh Kumar Agarwal, Nitin Agarwal, Shaifali Chaudhary and Swati Agarwal have entered appearance within the prescribed time.

4. The counsel for the plaintiff states that the defendant no.1 Shyam Forgings Pvt. Ltd. remains to be served and steps are being taken for service of defendant no.1 through the Official Liquidator made the Provisional Liquidator vide order in the aforesaid Company Petition and an application has also been filed for issuance of summons for judgment on the defendants no.2 to 5 viz. viz. Brijesh Kumar Agarwal, Nitin Agarwal, Shaifali Chaudhary and Swati Agarwal.



**IA No.14593/2017 (of the defendants under Section 8 of the Arbitration & Conciliation Act, 1996)**

5. This application has been filed on behalf of all the defendants under Section 8 of the Arbitration & Conciliation Act, 1996.

6. The application came up first before this Court on 8<sup>th</sup> December, 2017 when the counsel for the plaintiff appearing on advance notice on enquiry admitted that there exists an arbitration clause. However on enquiry that if that be so, why should the suit be not disposed of by referring the parties to arbitration, the counsel then appearing for the plaintiff stated that he was not the 'main counsel'. In this view of the matter, the hearing was adjourned to today and the Chairman & Managing Director of the plaintiff was also requested to ensure that litigations of the plaintiff are properly pursued and are not neglected.

7. The counsel for the plaintiff today states that it was brought to the notice of the Chairman & Managing Director of the plaintiff but he is unable to state as to what steps Chairman & Managing Director of the plaintiff has taken to ensure that the litigations are not neglected.

8. The Chairman & Managing Director of the plaintiff is again requested to take steps for appropriate representation of the plaintiff before the Court in the proceedings filed by the plaintiff.

9. I have at the outset enquired from the counsel who is appearing for all the defendants and who has filed the application for all the defendants as to how he is representing the defendant no.1 Shyam Forgings Pvt. Ltd. who is admittedly under liquidation and qua which a Provisional Liquidator has been appointed.



10. The counsel for the defendants states that he has been instructed by the defendants no.2 to 5 to appear for defendant no.1.

11. The question is of authority of defendants no.2 to 5 to instruct the advocate to appear on behalf of defendant no.1 once the Provisional Liquidator has been appointed and to which query no answer is forthcoming. It is quite obvious that the application though purported to be on behalf of all the defendants is on behalf of defendants no.2 to 5 only.

12. Though the counsel for the plaintiff on 8<sup>th</sup> December, 2017 had admitted the existence of arbitration clause but today states that the Arbitration Agreement is with the defendant no.1 only and not with the defendants no.2 to 5 and for which reason the plaintiff, instead of initiating arbitral proceedings, has instituted this suit.

13. A perusal of the Agreement dated 7<sup>th</sup> May, 2010 at page 68 of the paper book, and which is stated to contain arbitration clause, shows the same to be between the plaintiff and the defendant no.1 only and though it is a term of the said Agreement that the defendants no.2 to 5 will / have submitted their personal guarantees but arbitration clause contained in the said Agreement is as under:

“25. ARBITRATION

All disputes, differences, claims, questions and controversies arising in connection with this Agreement which the Parties are unable to settle between themselves, shall be referred to Arbitration, in accordance with the Arbitration and Conciliation Act, 1996 or any statutory amendment or modification thereof. The Arbitration proceedings shall be held in the English Language and shall be held at Mumbai / New Delhi.”



14. Each of the defendants no.2 to 5 have executed separate Deeds all dated 7<sup>th</sup> May, 2010, of guarantee in favour of the plaintiff guaranteeing to the plaintiff payment of the dues by the defendant no.1 jointly and severally with the defendant no.1 and the said Deeds also provide that the same are independent of the agreement of the plaintiff with the defendant no.1. Admittedly the said Deeds of Guarantee do not contain any arbitration clause. I have also scanned one of the Deeds of Guarantee executed by defendant no.2 Brijesh Kumar Agarwal and do not find any clause therein which may incorporate therein the arbitration clause as contained in the Agreement between the plaintiff and the defendant no.1

15. The counsel for the defendants states that the Deeds of Guarantees executed by defendants no.3 to 5 are identical to that executed by the defendant no.2.

16. The counsel for the plaintiff / non-applicant has relied on ***Sukanya Holdings Pvt. Ltd. Vs. Jayesh H. Pandya*** (2003) 5 SCC 531 where the Supreme Court has *inter alia* held, that where 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; that the words 'a matter' indicates entire subject matter of the suit should be subject to arbitration agreement; that 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. The counsel for the plaintiff



has also referred to the dicta of the Division Bench of this Court in *Ameet Lalchand Shah Vs. Rishabh Enterprises* MANU/DE/1010/2017 laying down that *Chloro Controls India Pvt. Ltd. Vs. Severn Trent Water Purification Inc.* (2013) 1 SCC 641 does not overrule *Sukanya Holdings Pvt. Ltd.* supra which continues to hold the fray.

17. Per contra, the counsel for the defendants / applicants, without citing any judgment, merely referred to the language of Section 8 and contended that once the parties have agreed to the dispute being referred to arbitration, it would cover the guarantees as well. Else, the emphasis of the counsel for the defendants is on the merits of the claim and which are not to be gone into at this stage.

18. The Courts, in the judgments aforesaid having already pronounced on the language of Section 8, it is not open for this Bench to reconsider the same.

19. It is also the contention of the counsel for the defendants that all the documents were executed in pursuance to the sanction letter dated 7<sup>th</sup> April, 2010 at page 56 of the documents filed and since all the documents are part of the same transaction, the arbitration clause in the main agreement would apply to the supplementary documents as well.

20. Owing to the claim of the plaintiff in the suit, besides against the defendant no.1 with whom the plaintiff admits arbitration agreement, being also against the defendants no.2 to 5, following the judgments aforesaid, the application is dismissed.



**CS(COMM) 1265/2016**

21. The counsel for the defendants no.2 to 5 waives service of summons for judgment and states that leave to defend application on behalf of defendants no.2 to 5 shall be filed within the prescribed time from today.
22. Last opportunity is given to the plaintiff to serve the defendants no.1 through Official Liquidator returnable on 19<sup>th</sup> March, 2018.
23. If leave to defend application is filed, reply thereto be also filed at least one week before the next date of hearing.
24. List on 19<sup>th</sup> March, 2018.

**RAJIV SAHAI ENDLAW, J**

**JANUARY 02, 2018**

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