2019 INSC 700

REPORTABLE

IN THE SUPREME COURT OF INDIA
CIVIL ORIGINAL JURISDICTION

PETITION FOR ARBITRATION (CIVIL) NO. 65 OF 2016

Reckitt Benckiser (India) Private Limited .....Petitioner(s)

:Versus:

Reynders Label Printing India
Private Limited and Anr. ....Respondent(s)

J U D G M E N T

A.M. Khanwilkar, J.

1. The singular question involved in this application filed under Sections 11(5), 11(9) and 11(12)(a) of the Arbitration and Conciliation Act, 1996 (for short "the Act") seeking appointment of a sole arbitrator, is whether respondent No.2 - a company established under the laws of Belgium, having its principal place of business at Nijverheldsstraat 3, 2530 Boechout, Belgium, could be impleaded in the proposed arbitration proceedings despite the fact that it is a non-

signatory party to the agreement dated 1st May, 2014, executed between the applicant and respondent No.1 - a company established under the Companies Act, 2013 - merely because it (respondent No.2) is one of the group companies of which respondent No.1 also is a constituent. The legal position as to when a non-signatory to an arbitration agreement can be impleaded and subjected to arbitration proceedings is no more *res integra*. In the case of ***Chloro Controls India Private Limited Vs. Severn Trent Water Purification Inc. and Ors.***,[1] a three-Judge Bench of this Court opined that ordinarily, an arbitration takes place between the persons who have been parties to both the arbitration agreement as well as the substantive contract underlying it. Invoking the doctrine of "group of companies", it went on to observe that an arbitration agreement entered into by a company, being one within a group of corporate entities, can, in certain circumstances, bind its non-signatory affiliates. That exposition has been followed and applied by another three-

[1] (2013) 1 SCC 641

Judge Bench of this Court in ***Cheran Properties Limited Vs. Kasturi and Sons Limited and Ors.***[2] In paragraph 23 of this decision, the Court, after analysing the earlier decisions and including the doctrine expounded in ***Chloro Controls India Private Limited*** (supra), concluded as follows:

> "23. As the law has evolved, it has recognised that modern business transactions are often effectuated through multiple layers and agreements. There may be transactions within a group of companies. The circumstances in which they have entered into them may reflect an intention to bind both signatory and non-signatory entities within the same group. In holding a non-signatory bound by an arbitration agreement, the court approaches the matter by attributing to the transactions a meaning consistent with the business sense which was intended to be ascribed to them. Therefore, factors such as the relationship of a non-signatory to a party which is a signatory to the agreement, the commonality of subject-matter and the composite nature of the transaction weigh in the balance. The group of companies doctrine is essentially intended to facilitate the fulfilment of a mutually held intent between the parties, where the circumstances indicate that the intent was to bind both signatories and non-signatories. The effort is to find the true essence of the business arrangement and to unravel from a layered structure of commercial arrangements, an intent to bind someone who is not formally a signatory but has assumed the obligation to be bound by the actions of a signatory."

2. In the present case, it is not in dispute that the respondents are constituents of a group of companies known as "Reynders Label Printing Group". The constituent

---

[2] (2018) 16 SCC 413

companies of the said group of companies can be described in the form of a chart appended to the written submission filed by respondent No.1 as Annexure R-1/1, which reads thus:

Reynders Label Printing Group

Reynesco Invest NV		Reynesco NV

Reynders Ttiketten NV (**R-2)**	Reynders Etiquetters Cosmetiques SA	Reynders Pharmaceutical Labels NV	Reynders Label Printing India Pvt. Ltd. (**R-1**)	Reynders Etiquettes France SA	Reynders Etiketten Polska Sp z.o.o.

3. Keeping in mind the exposition in ***Chloro Controls*** (supra) and ***Cheran Properties*** (supra), the crucial question is whether it is manifest from the indisputable correspondence exchanged between the parties, culminating in the agreement dated 1st May, 2014, that the transactions between the applicant and respondent No.1 were essentially with the group of companies and whether there was a clear intention of the parties to bind both the signatory as well as non-signatory parties (respondent No.1 and respondent No.2, respectively). In other words, whether the indisputable circumstances go to show that the mutual intention of the parties was to bind both

the signatory as well as the non-signatory parties, namely, respondent No.1 and respondent No.2, respectively, qua the existence of an arbitration agreement between the applicant and the said respondents.

4. In the wake of the amended Section 11(6) read with Section 11(6A) of the Act, the enquiry by this Court must confine itself to the examination of existence of an arbitration agreement. No more and no less. For that, we must revert to the assertion made by the applicant in the present application. Be it noted that respondent No.1 has not filed any counter affidavit to refute the assertions made by the applicant in the application under consideration. Respondent No.1, however, through its counsel has urged that respondent No.2 has no concern with the subject agreement dated 1st May, 2014. That agreement is only between the applicant and respondent No.1 and as a result thereof, it would give rise to a domestic commercial arbitration and not an international commercial arbitration. Respondent No.1 has also made it amply clear through its counsel that it will have no objection, whatsoever,

if the Court were to appoint a sole arbitrator for resolving the dispute between the applicant and respondent No.1, who would conduct the arbitration proceedings in accordance with the Act, in Delhi, as a domestic commercial arbitration between the applicant and respondent No.1 alone.

5. Be that as it may, reverting to the averments in the application under consideration, it is mentioned that the dispute arises out of the agreement dated 1st May, 2014, executed between the applicant and respondent No.1, but respondent No.2 has been impleaded because it is the parent/ holding company of respondent No.1. The agreement, in the form of clause 13,[3] contains an arbitration agreement between

[3] "**13. Dispute Resolution**

13.1 Prior to the beginning of any arbitration process the parties hereby undertake to attempt in good faith to resolve any dispute by way of negotiation between senior executives of the parties who have authority to settle such dispute. A copy of any Escalation Notice shall be given to the Regional Senior Vice President (or equivalent person of seniority) of each party or their Affiliates (which copy shall state that it is an Escalation Notice pursuant to this Agreement). Provided, however, that the negotiations shall be completed within thirty (30) days of the date of the Escalation Notice or within such longer period as the parties may agree in writing prior to the expiration of the initial thirty-day period.

13.2 In the event the dispute is not resolved within a period of 30 days from the commencement of such dispute, the dispute shall be referred to arbitration and the parties shall mutually appoint a Sole arbitrator who shall conduct the proceedings in accordance with Indian Arbitration Act, 1996 as amended from time to time or any re-enactment thereof. The arbitration shall be held in Delhi and the proceedings shall be conducted in English.

13.3 The existence of a dispute with respect to this Agreement between the parties shall not relieve either party from performance of its obligations under this Agreement that are not the subject of such dispute."

the parties. In terms of clause 9[4] thereof, respondent No.2 has assumed the liability to indemnify the applicant in case of any loss, damage etc., caused to the applicant on account of acts and omissions of respondent No.1. Respondent No.2 is an integral party to the stated agreement which contains an arbitration agreement in the form of clause 13.2. The applicant has relied upon e-mails exchanged which, according to the applicant, provide the record of an arbitration agreement within the meaning of Section 7(4)(b) of the Act. According to the applicant, the respondents had approached the applicant with an offer to print labels for the applicant, including for booklets and leaflets and labels required for Mucinex, exported to USA. The 'Drug Facts' and other details

---

[4] "**9. Indemnity**

9.1 The Supplier and the Supplier group shall indemnify RB against any claims, losses, damages and expenses howsoever incurred or suffered by RB (and whether direct or consequential or economic loss) arising out of or in connection with

(i) defective workmanship, quality or materials;

(ii) an infringement or alleged infringement of any intellectual property rights caused by the use, manufacture, or supply of the products; and

(iii) negligent performance or failure or delay in performance of the terms of this Agreement by this Supplier.

9.2 Supplier shall indemnify and hold harmless RB and their respective officers, directors, agents, and employees against any and all claims:

i. Arising out of an alleged breach of the terms and conditions of other provision of this Agreement.

ii. based upon any allegations that the material produced by RB using Product was defective (including, but not limited to, manufacturing or refining defects);

These provisions shall survive termination or expiry of this Agreement."

which were to be printed on the back-label were in accordance with the laws of USA and the respondents were aware of the fact that Mucinex supply is meant for USA market. The applicant relied upon the minutes of the meeting held on 29th May, 2013, between the officials of the applicant and the officials of respondent No.1. Pursuant thereto, the respondents made a presentation to the applicant about their capability to print labels for the applicant, including the booklet and leaflet labels as desired and made several representations about the quality of their product. The applicant asserts that the respondents had held exhaustive negotiations in relation to the execution of agreement whereby the respondents were to provide packaging material to the applicant and its affiliates. Based on negotiations, the applicant, by e-mail dated 23rd April, 2014, circulated a draft of the agreement along with the code of conduct and anti-bribery policy of the applicant. The applicant asserts that the respondents replied to the same through Mr. Frederik Reynders (promoter of respondent No.2 which is the parent company of respondent No.1) by his e-mail

of 23rd April, 2014 at 12:00 PM. The said e-mail sent by Mr. Frederik Reynders was responded to by the applicant on 23rd April, 2014 at 12:10 PM. Further, Mr. Frederik Reynders, by his e-mail of 23rd April, 2014 at 4:09 PM, attached a copy of the draft with some attached comments from the headquarters of the respondents in Belgium (respondent No.2 herein). According to the applicant, the comments related to clause 9 of the draft agreement relating to the indemnity of respondent Nos.1 & 2. It is then stated that in the same e-mail, Mr. Frederik Reynders gave a counter proposal, concerning clause 9.1 of the draft agreement, of providing a document of insurance to inform the applicant about their maximum coverage. On this basis, it is asserted that respondent No.2 was aware of the fact that indemnity is being extended to the applicant and that respondent No.2 was the disclosed principal on whose behalf the respondent No.1 was executing the agreement. It is further asserted that the arbitration agreement was an integral part of the agreement executed between the applicant and respondent No.1, on its behalf and

on behalf of its disclosed principal, namely, respondent No.2. The applicant has then asserted that respondent No.1 addressed an e-mail dated 6th June, 2014, to the applicant enclosing a signed copy of the agreement and further stating that hard copy would be delivered to the applicant. The relevant averments in the application referred to above have been articulated in paragraphs 7.7 to 7.12, which read thus:

> "7.7 The Applicant states that the Respondents had approached it with its offer to print labels for the applicant, including booklet and leaflet labels (required for Mucinex exported to USA). The Drug Facts and other details which were to be printed on the back label were in accordance with the laws of USA and the Respondents were aware of the fact that the Mucinex supply is meant for USA market. True typed copy of the Minutes of Meeting held on November 22, 2013 between the officials with the respondent No.1 are annexed as ANNEXURE A-2 (at pages 133 to 134).
>
> 7.8 The Respondents subsequently made a presentation about their capability to print labels for the Applicant, including booklet and leaflet labels (required for Mucinex exported to USA). During personal meeting and in the presentation, the Respondents represented that they are the market leaders in label printing across the globe and they provide creativity and innovation for self-adhesive labels. Further, the Respondents represented that Reynders label printing in India offers tailor made solutions to fit all needs of the Respondent including perfect adhesion on vials conforming to ISO 15010), every single label is printed as per specifications) and numbering of each label, to ensure quality control. The Respondents offered to print booklet & leaflet labels "*to put extra information on a packaging where the available space for text or images is rather limited*". The Respondents further specifically emphasised that such booklet labels contain a multi-page booklet, glued at the

back, having application in pharmaceutical industry. For the purpose of adhering and maintaining strict quality control measures, the Respondents represented that inspection of printed labels is conducted through a system consisting of *"500 100% camera controlled inspection system, online numbering on back side and units for offline numbering".* Further, in relation to quality assurance, the Respondents represented to the Applicant that they provide standard quality assurance and in addition, they also provide quality check by camera control. True typed copy of the Presentation dated NIL made by the Respondents is annexed as ANNEXURE A-3 (at pages 135 to 156).

7.9 In the interregnum, the Applicant entered into a Supply Agreement dated April 16, 2014 with its affiliate in India viz., RB Healthcare. True typed copy of the Supply Agreement executed between the Applicant and RB Healthcare dated 16.04.2014 is annexed as ANNEXURE A-4 (at pages 157 to 189).

7.10 The Applicant and Respondents held detailed negotiations in relation to execution of an agreement, whereby the Respondents were to provide packaging material to the Applicant and its affiliates. Based on negotiations, the Applicant by email dated April 23, 2014, circulated a draft of the Agreement along with the Code of Conduct and Anti-Bribery policy, of the Applicant. True typed copy of the email 23.04.2014 addressed by the Applicant to the Respondents is annexed as ANNEXURE A-5 (at pages 190 to 191). The applicant also requested the Respondents to attach a copy of the executed specifications of Mucinex labels and signed copy of the pricing/costing agreement for Mucinex Labels. It is relevant to state that Clause 9 of the draft Agreement, specifically stated "*The Supplier and the Supplier group shall indemnify RB against any claims, losses, damages and expenses howsoever incurred or suffered by RB (and whether direct or consequential or economic loss) arising out of or in connection with……negligence performance or failure or delay in performance of the terms of this agreement by the Supplier".*

7.11 In response, **the Respondents through Mr. Frederik Reynders (promoter of Respondent No.2 which is a parent of Respondent No.1) by his email responded on**

April 23, 2014 at 12:00 pm. True typed copy of the email dated April 23, 2014 addressed by Mr. Frederik Reynders to the Applicant is annexed as ANNEXURE A-6 (at page 192). **The said email sent by Mr. Frederik Reynders was responded by the Applicant on April 23, 2014 at 12:10 pm.** True typed copy of the email dated April 23, 2014 addressed by the Applicant to Mr. Frederik Reynders is annexed as ANNEXUXRE A-7 (at page 193). **Further, Mr. Frederik Reynders by his email of April 23, 2014 at 04.09 pm attached a copy of the draft Agreement with "some comments of our HQ in Belgium (Respondent No.2 herein)".** True typed copy of the email dated April 23, 2014 with the commented Agreement sent by Mr. Frederik Reynders to the Applicant is annexed as ANNEXURE A-8 (at page 194). The comments related to Clause 9 of the draft Agreement relating to Indemnity extended by the Respondent Nos.1 and 2. **In the same email, Mr. Reynders also stated that for Clause 9.1 of the draft Agreement, *"I will provide you with an document of our Insurance to inform you about our maximum coverage".*** From the above, it is clear that Respondent No.2 was aware of the fact that indemnity is being extended to the Applicant and the fact that Respondent No.2 is the disclosed principal, on whose behalf the Respondent No.1 is executing the Agreement. In this regard, it is relevant to state that the arbitration agreement is an integral part of the Agreement executed between the Applicant and the Respondent No.1. Hence, the arbitration agreement also has been executed by Respondent No.1 on its behalf and on behalf of its disclosed principal i.e. the Respondent No.2.

7.12 **After further discussions, the Respondent No.1, on its behalf of and on behalf of its parent and disclosed principal – Reynders Belgium) of Respondent No.2, executed the Agreement on May 1, 2014 and sent the same to the Applicant.** In this context it is stated that the Respondent No.1 had addressed an email dated June 6, 2014 to the Applicant enclosing the signed copy of the Agreement and further stating that hard copy shall be delivered to the Applicant. True typed copy of the email dated June 6, 2014 sent by the Respondent No.1 to the Applicant is annexed as ANNEXURE A-9 (at page 195). The

Agreement was subsequently executed by the Applicant and a hard copy, was sent to the Respondents."

(emphasis supplied)

6. We deem it apposite to reproduce the correspondence, referred to in the aforesaid paragraphs of the application under consideration, for examining the case made out by the applicant as to whether respondent No.2 can be said to have assented or had an intention to become party to the arbitration agreement by its conduct, without being a signatory to the agreement dated 1st May, 2014. Annexures-5 to 9 referred to by the applicant read thus:

"**ANNEXURE A-5**

From: Joshi, Sonu [mail to:Sonu.Joshi@rb.com]
Sent: woensdag 23 april 2014 10:38
To: **Frederic Reynders**
Subject: Commercial Agreement sigh-off-RB & Reynders

Dear Frederik,
As per our Global procurement policies and procedures, it is mandatory for RB to sign-off a commercial agreement, document on code of conduct and Anti-Bribery policies with all of our suppliers. Accordingly, please find the following documents for immediate sign-off.
1. Code of Conduct
2. Anti-Bribery and
3. Commercial agreement (Packing material Supply Agreement) Along with the above, please attach a copy of the signed-off specs of Mucinex labels and the signed copy of our pricing/costing agreement on the Mucinex labels.

Please go through the commercial agreement, provide all relevant details i.e. Company Name, Address, Supply/Mfg. location, Details of Products manufactured/supplied, Agreed payment terms etc. and send us the duly signed (by the authorized signatory) & company stamped copy along with the signed & stamped copies of the Code of Conduct and Anti Bribery policies.

For any information or clarifications, please contact me.
Request you to email/send us all the documents latest by 30th April 2014 and if earlier it would be really appreciated.

Regards,

Sonu Dev Joshi
Manager Procurement –Packing Material
RB
Plot – 48, Institutional Area, Sector-32, Gurgaon – 122001
Direct-91-124-4028197; Mobile +91 85273-99487
www.reckittbenckiser.com

ANNEXURE A-6

On 23-Apr-2014, at 12:00 pm., "Frederik Reynders" <**fre@reynders.com**> wrote:

Dear Sonu,
We will provide you with all complete documents before 30th.
A lead time of 14 days is highly requested and recommended a leaflet label after receival of PO till delivery at RB factory in Baddi.
Please confirm.

Best regards,

Frederik Reynders
Reynders_Label Printing India Pvt. Ltd.
www.reynders.com

ANNEXURE A-7

From: Joshi, Sonu [mail to: Sonu.Joshi@rb.com]
Sent: woensdag 23 april 2014 12:10
To: **Frederic Reynders**
Cc: **Kari Vandenbussche**

Subject: Re: Commercial Agreement sign-off – RB & Reynders

Hi Frederik

Thanks.

We (me and you) will discuss on the lead-times, align on some buffer days and publish the official lead times to BADDI planning team.
The unofficial or real/crash/squeeze lead time must remain between the three of us.

Regards

Sonu Dev Joshi
Manager-PM Procuremen
RB

ANNEXURE A-8

From: **Frederic Reynders [mail to:fre@reynders.com]**
Sent: Wednesday, April 23, 2014 4:09 PM
To: Joshi, Sonu
Cc: **Kari Vandenbussche**

Subject: RE: Commercial Agreement sign-off – RB & Reynders

Dear Sonu,

Please find attached the contract **with some comments of our HQ in Belgium.** We will discuss & agree on a realistic and necessary lead time between the 3 of us.
For 9.1. I will provide you with an document of our insurance to inform you about our maximum coverage.

Waiting for your feedback. Feel free to call in case of any questions.

Frederik Reynders
Reynders_Label Printing India Pvt. Ltd.
www.reynders.com

ANNEXURE A-9

From: **Kari Vandenbussche [mail to:fre@reynders.com]**
Sent: Friday, June 06, 2014 4:38 PM
To: Joshi, Sonu
Cc: **Frederic Reynders**

Subject: FW: Commercial Agreement sign-off – RB & Reynders

Dear Mr. Sonu Joshi,
Attached you find the signed agreement with Company stamp, hard copies will be delivered today at your R&B office in Gurgaon.

Best regards,

Kari Vandenbussche
Site Manager
Plot no. F 686 – Chopanki Ind. Area
Chopanki 301019 – Bhiwadi – Rajasthan
T + 91 987 1024 467
M + 91 987 102 4467
F + 91 149 330 5403
www.reynders.com"

(emphasis supplied)

7. Respondent No.2 has filed its counter affidavit and emphatically refuted the assertions made by the applicant that

respondent No.2 is the parent or holding company of respondent No.1. It is stated that respondent No.1 and respondent No.2 both are part of Reynders Label Printing Group. This group is an internationally operating group of seven printing companies and each of these companies has its own separate legal entities and operates in different offices independently. Further, these companies only share a common parent entity, namely, Reynesco NV which is also the holding company of both respondent companies. First, respondent No.2 had no presence or operation whatsoever in India and was not involved in the negotiation, execution and/or performance of the agreement. There is no privity of contract between the applicant and respondent No.2. Second, respondent No.2 in its counter affidavit has clearly stated that Mr. Frederik Reynders was not the promoter of respondent No.2. However, Mr. Frederik Reynders was an employee of respondent No.1. The signatory to the stated agreement, Mr. Kari Vandenbussche, had neither exercised any managerial functions for respondent No.2, nor was he an authorized

representative or a director of respondent No.2 with any authority to appoint the said respondent. The relevant extract of the counter affidavit reads thus:

> "**THE ANSWERING RESPONDENT DID NOT PARTICIPATE IN THE NEGOTIATIONS PERTAINING THE AGREEMENT**
>
> 15. **It is incorrect to state that the answering Respondent was at any point in time involved in the negotiations with respect to the Agreement. The answering Respondent did not make any presentation or representations to the Applicant. From the documents annexed by the Applicant, there is nothing to show that the answering Respondent ever made any presentation to the Applicant or was present at any meeting prior to the date of the alleged Agreement.**
>
> 16. **Contrary to what has been alleged by the Applicant, the answering Respondent did not provide any comments on the draft of the Agreement. The answering Respondent submits that it is not aware of the e-mail dated 23.04.2014, as alleged by the Applicant. Respondent No.1 did not forward e-mail dated 23.04.2014 or any such e-mail to the answering Respondent seeking comments of the answering Respondent on the draft of the Agreement. The reference to *HQ in Belgium* is not a reference to the answering Respondent. As explained above, the answering Respondent is but one of seven subsidiaries of the holding company Reynesco NV.**
>
> 17. The answering Respondent submits that it was not party to any negotiations pertaining to the Agreement. **The signatory to the Agreement, Mr. Karl Vandenbussche, and Mr. Frederik Reynders, who is alleged to have carried out the negotiations with respect to the Agreement, were not representing (or purporting to**

represent) or acting in any way for the answering Respondent, and they had no authority to bind the answering Respondent.

18. The answering Respondent has no connection to the present dispute not having been a party in any capacity to the negotiation, execution, or enforcement of the Agreement.

RESPONDENT NO.1 HAD NO AUTHORITY TO BIND THE ANSWERING RESPONDENT AND DID NOT EXECUTE THE AGREEMENT ON BEHALF OF THE ANSWERING RESPONDENT.

19. **The signatory to the Agreement is Mr. Karl Vandenbussche, who at no point time exercised any managerial functions for the answering Respondent. Mr. Vandenbussche has never been an authorized representative or a director of the answering Respondent, having any authority to bind the answering Respondent.**

20. **Further, Mr. Frederik Reynders, who is alleged to have carried out the negotiations with respect to the Agreement, has incorrectly been described as the *promoter* of the answering Respondent. Mr. Frederik Reynders was not and has never been an employee, officer or representative of the answering Respondent.**

21. The Applicant contends that the fact that Mr. Frederik Reynders was acting on behalf of the answering Respondent and the answering Respondent is the parent company of Respondent No.1 binds the answering Respondent to the Agreement and consequently the arbitration Agreement. **It is submitted that the answering Respondent is not the parent company of Reynders India and at no point in time was Mr. Frederik Reynders ever employed by the answering Respondent or for that matter Reynesco NV.** Clearly, Mr. Frederik Reynders was not acting for the answering Respondent, and had no authority to bind the answering Respondent. From the communication and documents annexed by the Applicant, there is nothing to show that Mr. Vandenbussche or Mr. Frederik Reynders represented themselves to be the agents of the answering

> Respondent or authorized persons acting for the answering Respondent.
>
> 22. It is submitted that the answering Respondent has no connection to the present dispute not having been a party in any capacity to the negotiation, execution, or enforcement of the Agreement. Therefore, the Applicant's submission that the Agreement was executed by Respondent No.1 on behalf of Respondent No.2, is incorrect. As demonstrated above, the answering Respondent was never a participant in the negotiations between the Applicant and Respondent No.1."

(emphasis supplied)

8. The applicant has filed a rejoinder affidavit in which it is vaguely stated that Mr. Frederik Reynders, during the stage of negotiation of the agreement, was taking directions from the representatives of respondent No.2. In paragraphs 10 to 12 of the said affidavit, in response to the stand taken by respondent No.2, the applicant has stated thus:

> "10. The contents of Para 15 are wrong and denied. It is a matter of record (Annexure – A3 at Page 135 of the Application) that the Respondents had approached the Applicant at the time of negotiation of Agreement under the common banner of 'Reynders Label Printing' and in that capacity had made a presentation to the Applicant. In fact, the Respondents market themselves as a label printing company, the printing being executed through various sites around the world.
>
> 11. The contents of Para 16-18 are incorrect and denied. It is a matter of record that Respondent No.2 had actively participated in the negotiation of the Agreement. It is a matter of record (Annexure A-8 at Page 194 of Application) that Respondent No.1 was taking directions from Respondent No.2 during the stage of negotiations of the

> Agreement. **In fact, Respondent No.2 through Mr. Kristof Vandenbroucke had shared comments on the Agreement. The same Mr. Kristof Vandenbroucke subsequently participated in the escalation meeting held in Amsterdam for amicable resolution of the disputes that have arisen between the parties.** Without prejudice to the same, it is submitted that it is inconsequential whether or not Respondent No.2 participated in negotiations of the Agreement. As elaborated in the Preliminary Submissions, there is irrefutable evidence that Respondent No.2 has assented to the Agreement.
>
> 12. The contents of Para 19-22 are wrong and denied. **It is a matter of record (Annexure A-8 at Page 194 of the Application) that Mr. Frederik Reynders, during the stage of negotiations of the Agreement, was taking directions from representatives of Respondent No.2.** In any case, as demonstrated hereinabove, Respondent No.2 has admitted to its liability under the Indemnity Clause, its limited objection being the extent of its liability thereunder. Additionally, Respondent No.2 had participated in the escalation meetings held in Amsterdam under the Arbitration Clause. Clearly the paragraphs under reply are an afterthought."
>
> (emphasis supplied)

9. In the backdrop of the averments in the application and the correspondence exchanged between the parties adverted to by the applicant, it is obvious that the thrust of the claim of the applicant is that Mr. Frederik Reynders was acting for and on behalf of respondent No.2, as a result of which the respondent No.2 has assented to the arbitration agreement. This basis has been completely demolished by respondent

No.2 by stating, on affidavit, that Mr. Frederik Reynders was in no way associated with respondent No.2 and was only an employee of respondent No.1, who acted in that capacity during the negotiations preceding the execution of agreement. Thus, respondent No.2 was neither the signatory to the arbitration agreement nor did have any causal connection with the process of negotiations preceding the agreement or the execution thereof, whatsoever. If the main plank of the applicant, that Mr. Frederik Reynders was acting for and on behalf of respondent No.2 and had the authority of respondent No.2, collapses, then it must necessarily follow that respondent No.2 was not a party to the stated agreement nor had it given assent to the arbitration agreement and, in absence thereof, even if respondent No.2 happens to be a constituent of the group of companies of which respondent No.1 is also a constituent, that will be of no avail. For, the burden is on the applicant to establish that respondent No.2 had an intention to consent to the arbitration agreement and be party thereto, maybe for the limited purpose of enforcing

the indemnity clause 9 in the agreement, which refers to respondent No.1 and the supplier group against any claim of loss, damages and expenses, howsoever incurred or suffered by the applicant and arising out of or in connection with matters specified therein. That burden has not been discharged by the applicant at all. On this finding, it must necessarily follow that respondent No.2 cannot be subjected to the proposed arbitration proceedings. Considering the averments in the application under consideration, it is not necessary for us to enquire into the fact as to which other constituent of the group of companies, of which the respondents form a part, had participated in the negotiation process.

10. Suffice it to observe that respondent No.2 was never involved in the negotiation process concerning the stated agreement dated 1st May, 2014. On this finding, the application must fail as against respondent No.2 and as a consequence whereof, the provisions for making reference to the sole arbitrator, on the assumption that it is an

international commercial arbitration, cannot be taken forward. As respondent No.1 is a company having been established under the provisions of the Indian Companies Act and having its registered office in India, the applicant can pursue its remedy against respondent No.1 for appointment of a sole arbitrator to conduct arbitration proceedings, as a domestic commercial arbitration.

11. Indeed, the applicant had vehemently relied upon the circumstances and correspondence post-contract but that cannot be the basis to answer the matter in issue. The respondent No.2 has justly relied upon the exposition in ***Godhra Electricity Co. Ltd. and Anr. Vs. State of Gujarat and Anr.***,[5] to buttress the argument that post-negotiations in law would not bind the respondent No.2 qua the arbitration agreement limited between applicant and respondent No.1. In any case, even this plea is based on the assumption that Mr. Frederik Reynders was associated with and had authority to transact on behalf of respondent No.2, which assertion has

[5] (1975) 1 SCC 199

been refuted and rebutted by respondent No.2. It is clearly stated that Mr. Frederik Reynders was neither connected to nor had any authority of respondent No.2, but was only an employee of respondent No.1 and acted only in that capacity.

12. For the view that we have taken, it is unnecessary to dilate on other contentions. Suffice it to observe that the application must fail against respondent No.2 and on that conclusion, no relief can be granted to the applicant who has invoked the jurisdiction of this Court on the assumption that it is a case of international commercial arbitration. Despite that, respondent No.1 through counsel has urged that as the subject agreement between the applicant and respondent No.1 contains an arbitration clause (clause 13) and since disputes have arisen between them, the respondent No.1 would agree to the appointment of a sole arbitrator by this Court for conducting arbitration proceedings between the applicant and respondent No.1, as domestic commercial arbitration. This stand has been reiterated in the written submissions filed on behalf of respondent No.1, filed after the conclusion of the oral

arguments. Resultantly, even though no relief can be granted to the applicant as against respondent No.2, we proceed to pass the following order in the interest of justice.

13. The arbitration application is dismissed as against respondent No.2. However, we appoint Mr. Justice Badar Durrez Ahmed (Former Chief Justice, Jammu & Kashmir High Court) as the sole arbitrator to conduct domestic commercial arbitration at New Delhi, between the applicant and respondent No.1 on the terms and conditions as specified in the Act of 1996.

14. Application stands disposed of in the above terms. No costs. All pending interim applications are also disposed of.

.....J.
(A.M. Khanwilkar)

.....J.
(Ajay Rastogi)

New Delhi;
July 01, 2019.