Boston Scientific International Bv vs Trivitron Healthcare Pvt. Ltd on 14 August, 2015

Author: K.Ravichandrabaabu

Bench: K.Ravichandrabaabu

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 14-08-2015

(Orders reserved on 20-07-2015)

CORAM:

THE HONOURABLE MR.JUSTICE K.RAVICHANDRABAABU

Application No.3650 of 2015 in C.S.No.380 of 2015

1. Boston Scientific International BV
having office at Vestastraat 6,
6468 Ex Kerkrade, The Netherlands.

2. Boston Scientific India Pvt. Ltd.,
having its Registered Office at
C-40/41, Okhla Industrial Area,
Phase-II, New Delhi, Delhi-110 020,
and having its Branch Office at
8th Floor, Tower-A, Building No.5,
DLF Cybercity,
Gurgaon, India 122 002

.. Applicant in A.No.3650 of 2015 and defendants

Vs.

Trivitron Healthcare Pvt. Ltd.,
Having office at
Trivitron Sapthagiri Bhavan,
No.15, IV Street, Abhiramapuram,
Chennai-600 018,
Represented by Ms.Prema,
Chief Financial Controller.

.. Respondent in A.No.3650 of 2015

Application No.3650 of 2015 is filed and the Judge's Summons issued under Order
Civil Suit No.380 of 2015 is numbered and the plaint is filed under Order 7 Rule 1 of th
(a) for declaration that the Notice of Arbitration, dated 08.04.2015 is null and
(b) for permanent injunction in favour of the plaintiff and against the defendan

For applicants(Defendants) : Mr.Satish Parasaran for Mr.S.Mukundan
For respondent (plaintiff) : Mr.Anirudh Krishnan

ORDER

This application is filed by the defendants to revoke the leave granted by this Court in Application No.3075 of 2015 on 28.04.2015.

2. The respondent/plaintiff has filed the above said suit for declaration that the Notice of Arbitration, dated 08.04.2015 is null and void being contrary to Indian law, and for permanent injunction in favour of the plaintiff and against the defendants, thereby restraining the defendants or any other person on its behalf in any manner proceeding or continuing with the arbitration proceedings initiated by the defendants, vide Notice of Arbitration, dated 08.04.2015.

3. Since the defendants are situated outside the jurisdiction of this Court, the plaintiff filed A.No.3075 of 2015 for leave of this Court to file the suit against the defendants by contending that the cause of action for filing the suit arose when then plaintiff and the first defendant collaborated on the distribution of the first defendant's products in India and in Nepal, specifically in Chennai, pursuant to the international distributorship agreement and dealer agreement, both dated 01.12.2010 and the settlement agreement, dated 30.03.2013.

4. It is the case of the plaintiff that substantial part of cause of action arose in Chennai, as all the above said agreements were executed in Chennai and the payments due to the plaintiff were credited to the plaintiff-Company's Bank only in Chennai, including the payments under each of the above agreements as well as the payments made pursuant to Clauses 2 and 3 of the settlement agreement. It is their further case that part of performance of contract took place in Chennai, where the products of the defendants were distributed to 12 hospitals in Chennai. It is thus contended that only in Chennai, the plaintiff-Company issued instructions to their Bank(s) to stop RTGS transfer to the second defendant-Company, which was the trigger for arbitration, and therefore, substantial part of cause of action arose in Chennai and hence, this Court has jurisdiction to entertain the suit.

5. Based on the above said contentions, this Court, by order dated 28.04.2015 allowed A.No.3075 of 2015, granting leave for the plaintiff to sue against the defendants. On notice and interim injunction having been granted in O.A.No.495 of 2015 , the defendants have filed this application seeking for revocation of the above said leave granted by this Court.

6. It is the contention of the defendants in revocation of leave application that the present suit is not maintainable, as there is valid and binding arbitration agreement between the parties to the suit, namely the settlement agreement, dated 30.03.2013. The defendants have already initiated arbitration process, which is pending on the file of the ICDR (International Centre for Dispute Resolution), USA. The settlement agreement had been executed by all the parties incorporating the arbitration clause by reference. Therefore, this Court has to statutorily refer the parties to arbitration as mandated under Section 45 of the Arbitration and Conciliation Act, 1996. This Court does not have "in-personam" jurisdiction over the defendants to entertain the suit or to pass an order of injunction. The plaintiff has to seek the relief in terms of the contract. The arbitration clause(s) contained in the settlement agreement clearly confer jurisdiction on the ICDR. The dealer agreement and the distributorship agreement are governed by the laws of Common Wealth of Massachusetts, USA. Therefore, the governing law in the case on hand is clearly supported by Massachusetts Law. The parties to agreement have expressly and impliedly accepted the provisions

of the Arbitration and Conciliation Act, 1996. It is further stated that the defendants neither reside nor carry on business within the jurisdiction of this Court. Clause 12 of the Letters Patent empowers this Court to entertain the suit only when the defendants at the time of commencement of the suit, shall dwell or carry on business or personally work for gain, within such limits. As the defendants reside in The Netherlands and New Delhi respectively, no part of cause of action has arisen within the jurisdiction of this Court. In the present case, the arbitration proceedings have been initiated in USA and the entire evidence regarding the subject matter 'suit' is available only in USA. Thus, the suit is not maintainable.

7.Mr.Sathish Parasaran, learned counsel appearing for the applicants made his submissions. A written submissions also is filed on behalf of the applicants. The sum and substance of the submissions made on behalf of the applicants are as follows:

> The plaintiff and the first defendant initially entered into an agreement dated 25.11.2008 for the distribution of the products of the first defendant in India. Thereafter, they executed two agreements viz., an International Distributorship Agreement dated 01.12.2010 and a Dealer Agreement dated 06.12.2010. The effective date of both the Agreements was 01.01.2011. Under both the agreements, the first defendant was entitled to assign the agreement without the consent of the plaintiff. The plaintiff and the first defendant indemnified each other's "affiliated companies" for any breach of warranties or failure to comply with any material provisions of these agreements. The parties agreed that the governing law to be Laws of Massachusetts, USA and International Arbitration Rules of the International Centre for Dispute Resolution ("ICDR") and that the seat of arbitration was agreed to be Boston, Massachusetts. Both the agreements contained an identical arbitration clauses. Pursuant to these agreements, the plaintiff had transacted business over a period of three years. The aforesaid relationship between the parties came to an end on signing a settlement deed dated 30.03.2013 by the plaintiff, the first defendant as well as the second defendant. As per the settlement agreement, the Dealer Agreement and the Distributor Agreement would be treated as terminated with effect from 31.12.2012 by specifically providing that certain clauses of those agreements would survive such termination. One such clause was Article 5 which stipulated that the plaintiff and the first defendant would indemnify each other's "affiliated companies" for any breach of warranties, etc., Another provision that was specifically incorporated in the survival clause of Article 7 which contains the arbitration agreement since the Settlement Agreement involves cross payments between several of the first defendant affiliated companies, it was decided that there would be no set-off and the amounts would be actually exchanged. As per the Calculation sheet, the exchange between the parties is the plaintiff was to pay an amount of INR 85,613,087 to the second defendant i.e, INR 79,942,573/- from the Netherlands and INR 5,670,514/- from the first defendant Indian Branch totalling to INR 85,613,087/-. On 06.09.2013, the Director of the second defendant handed over two demand drafts to the plaintiff relying on the assurances provided by them that its dues would be paid. The plaintiff authorised the Bank to honour the RTGS

instructions given by the plaintiff for payment of Rs.85,613,087/- to the second defendant. However after securing the credit of money from the first defendant in their account, the plaintiff withdrew these instructions which has lead to the present dispute between the parties. Therefore, the first defendant and the second defendant initiated arbitration through notice dated 08.04.2015 which is challenged in the suit as null and void.

8.Leave to sue granted by this Court is sought to be revoked on the following reasons:

In view of the existence of a Binding Arbitration Agreement contained in the Settlement Agreement dated 30.03.2013, the plaintiff cannot file the present suit before this court. Here, in this case, as agreed by parties themselves, the most appropriate forum is Arbitration in Massachusetts; the plaintiff is not seeking to challenge the arbitration clause and as such, it would be binding on them; the Arbitration Agreement is 'unconscionable'. Even if a part of clause in the Arbitration Agreement is unworkable as contended by the plaintiff, the court can severe the particular clause so that the rest of the clause can be acted upon; all the three agreements between the parties are purely governed by the laws of commonwealth of Massachusetts, USA.; the defendants are not personally amenable to the jurisdiction of this Court and therefore, this Court does not have any "in personam jurisdiction" over the dispute; the relief sought for in the suit is in the nature of an anti-arbitration/anti-suit injunction. The court would grant an order in the nature of an anti-suit injunction only if the defendant is amenable to the personal jurisdiction of this court; the cause of action as pleaded in the plaint fails to elulcidate any part of the material cause of action arose within the jurisdiction of this court; mere signing of the agreement by the plaintiff and deposit of funds at the plaintiff's place of residence cannot be considered as material cause of action for invoking the jurisdiction of this Court.

9.In support of the above contentions, the learned counsel for the applicants relied on the following decisions:

i)2003(4) SCC 341, (Modi Entertainment Network vs W.S.G.Cricket PTE. LTd.,);

ii)2004(7) SCC 447, (Man Roland Druckimachinen AG vs Multicolour Offset Ltd.);

iii)2014(6) CTC 577, (M/s.Duro Flex Pvt Limited vs M/s. R P Homes Private Ltd.);

iv) AIR 1938 PC 103, (Martin Cashin vs Peter J.Cashin);

v) 2014 SCC Online Bombay 696, (Hansraj Nayyar Medical India vs. Smith Medical International Limited); and

vi)2014(5) SCC 1, (Enercon (India) Limited vs Enercon Gmbh);

10.Per contra, the learned counsel Mr.Anirudh Krishnan appearing for the respondent/plaintiff made his submissions and also filed written arguments. The sum and substance of the submissions made on behalf of the respondent/plaintiff are as follows:

> Clause 12 of the Letters Patent deals with grant of leave to file the suit, when the defendants reside outside Chennai, part of cause of action arises in Chennai and the balance of convenience is not against the plaintiff. Therefore, only the plaint must be gone into by the court, while deciding the issue under clause 12 of Letters Patent. This court at this stage should assume the contention of the plaintiff that the arbitration clause is void to be true, as the determination as to the validity of the clause cannot be gone into a proceeding under clause 12 of the Letters Patent. Relevant provision for deciding such issue is Section 45 of the Arbitration and Conciliation Act, which requires a trial. Therefore, the defendants cannot place reliance on the arbitration clause in their application for revocation of leave. When admittedly the defendants are residing outside the jurisdiction of this court, seeking leave under clause 12 is the appropriate and right course of action as has been done in this case. This court while exercising its original jurisdiction has on numerous occasion granted anti-arbitration/anti -suit injunction where the defendants were outside the jurisdiction limits of this court. In this case, the cause of action has arisen within the jurisdiction of this Court. As the place of execution of contract/arbitration agreement, place of performance of the contract and the place of payments are one and the same viz., Chennai, the balance of convenience should not be against the plaintiff. For the purpose of deciding the balance of convenience at this stage, presumption is that the arbitration clause is void as it is only the averments that can be looked into. When the defendants have been carrying numerous activities within the forum, they cannot take the stand that the forum is a forum non-conveniens and presumption is in favour of the plaintiff in view of the principle that the plaintiff is the dominus litus and also in view of the provision contemplated under section 9 of the code of the Civil Procedure.

11.The existence of the personal jurisdiction is a test for grant of anti-injunction and would not act as a jurisdiction bar while deciding the application for leave to sue. Moreover, the question as to whether this court has personal jurisdiction over the defendant is a question of fact which cannot be determined purely on the basis of whether the defendant is residing outside the jurisdiction. Thus, it is a matter for trial. The defendants ought to have sufficient activities in the foreign state viz., India and the present cause of action arises out of one such activity. Moreover, in the present case the dispute is between the two Indian parties viz., the plaintiff and the second defendant and therefore, this Court can exercise the jurisdiction. The defendants are trying to confuse the issue, while considering the application under clause 12 of the Letters Patent by raising points under section 45 of the Mediation and Conciliation Act. Both are to be considered in a different perspective at different stage and not to be confused as one having the controlling power over the other. In other words, foreign laws issues involved in this case is to be decided as questions of fact initiating a trial. Since the determination of the validity of the arbitration agreement involves number of questions of law, which has to be proved as questions of fact, the plaintiff cannot be non suited at this juncture.

Revocation of leave is a drastic remedy, which can be granted only in exceptional circumstances.

12.In support of the above contentions, the learned counsel for the respondent relied on the following decisions:

i)2004(12) SCC 376, (Indian Mineral & Chemicals Co. vs. Deutsche Bank);

ii) 2006(5) SCC 638, Ramesh B.Desai vs Bipin Vadilal Mehta & others;

iii)1989(2) SCC 163, (ABC Laminart Pvt. Ltd. vs A.P.Agencies);

iv)1992(1) L.W.308,(Tuticorin Alkali Chemicals and Fertilizers vs Cochin Silicate and Glass);

v)ILR 2007(2) Delhi 1231, (India TV Independent News Service vs India Broadcast);

vi)2009(7) SCC 696, (M.R.Engineers & Contractors (P) Ltd. vs. Som Datt Builders Ltd.);

vii)2014(11) SCC 639, (World Sport Group Mauritius Limited vs MSM Satellite);

13.Heard the learned counsels appearing for both the parties, perused the relevant materials placed before this Court for the purpose of considering this application and considered various case laws cited by both sides.

14.The point for consideration in this application is as to whether the leave granted to the plaintiff is to be revoked based on the contentions raised by the defendants/applicants herein.

15.The plaintiff filed the above suit seeking for the following reliefs:

(a) for declaration that the Notice of Arbitration, dated 08.04.2015 is null and void being contrary to Indian law, and

(b) for permanent injunction in favour of the plaintiff and against the defendants, thereby restraining the defendants or any other person on its behalf in any manner proceeding or continuing with the arbitration proceedings initiated by the defendants, vide Notice of Arbitration, dated 08.04.2015.

16.As both the defendants are located outside the jurisdiction of this Court, the plaintiff sought leave in Application No.3075 of 2015 to sue the defendants before this Court filed under clause 12 of the Letters Patent. It was contended by the plaintiff in the said application that the substantial part of cause of action arose in Chennai as all the agreements including the Dealer Agreement dated 01.12.2010, International Distributorship Agreement dated 01.12.2010, Settlement Agreement dated 31.03.2013 were executed at Chennai and that payments due to the applicant/plaintiff were made

into their bank in Chennai; that the part of performance of contract took place in Chennai where the products of the first defendant were distributed to 12 hospitals in Chennai. It was further contended therein that all the oral negotiations took place in Chennai, more particularly, the discussions on fifth and sixth November 2014 had taken place at Chennai. It is further contended that a sum of Rs.8.5 crores was deposited by the defendants into the plaintiff's Bank account at Chennai and that the plaintiff issued an instruction to its Bank to stop the RTGS transfer of such amount to the second defendant which was the triggering factor for the issuance of impugned arbitration notice.

17.This court by order dated 28.04.2015 granted leave to the plaintiff by considering the above stated facts and circumstances. Now, the defendants filed the present application to revoke the leave mainly by contending that the Settlement Agreement specifically stipulates that all the disputes are to be decided by the Arbitration in Massachusetts, U.S.A.,; that the defendants are not amenable to the personal jurisdiction of this court; that the cause of action for the suit has arisen outside the jurisdiction of this court; that the ordinary original civil jurisdiction of this court is not an all India jurisdiction; that the part of the cause of action as pleaded by the plaintiff in the suit is immaterial and signing of an agreement within the jurisdiction of this court would not constitute sufficient cause of action.

18.Learned counsels appearing on both sides made elaborate submissions and relied various case laws. Apart from making their submissions in respect of clause 12 of the Letters Patent, both sides have also made their submissions, to certain extent, on the merits of the matter. In my considered view, this court at this stage is not required to go into the merits of the claim made by the plaintiff or the rival contentions of the defendants in respect of the prayer sought for in the suit, while considering the application for revocation of leave. Needless to say that while considering such application for revocation of leave, the plaint is the most material document on which the decision should rest, unless the relevant averments made therein pertain to leave prayer are found factually erroneous or incorrect on the face of it.

19.At this juncture, it is useful to refer to a Division Bench decision of this Court reported in 1983(2) MLJ 314, C.Nagaraj vs. S.Govindaswamy, wherein it has been observed as follows:

> "Further, we have to go only by the averments in the plaint and not by the averments in the affidavit. This position has been made very clear in Multra Electric Supply Co. Ltd. v. Gopal Maran, referred to by the learned Advocate General. In this decision, it has been stated that in an application for revocation of leave under clause 12, the plaint is the most material document on which the decision should rest although such decision does not rest merely on a criticism of the pleading. The petition and the affidavit in support of and against the revocation of leave are relevant, but must be read subject to the overriding considerations and facts pleaded in the plaint. It is not unusual that in such petition and affidavits the plaintiff and the defendant are prone to overstate their respective cases for and against the leave, and such over-statement should be toned down by reference to the plaint."

20.Thus, to decide the question as to whether this Court has jurisdiction to entertain the suit, the plaint has to be read as a whole and while doing so, this Court need not make an elaborate enquiry as to the correctness or otherwise of the facts pleaded by the plaintiff. At this juncture, it is useful to refer to the decision of the Division Bench of this Court reported in 2012(5) MLJ 276, (U.P.Cricket Association vs B.C.C.I.) wherein at paragraph No.16, it is observed as follows:

> "16. In order to consider whether High Court Original Side has jurisdiction to entertain the suit, the plaint has to be read as a whole. Whether any part of action has accrued within the jurisdiction of this Court would depend upon the facts and circumstances of a given case. .....The Court was not required to make an elaborate enquiry as to the correctness or otherwise of the facts pleaded by the plaintiff. Going by the plaint averments, when part of cause of action is said to have arisen at Chennai, the learned Judge was not right in saying that only a fraction of cause of action has arisen at Chennai and the learned Judge was not justified in revoking the leave to sue."

21.In 2004(12) SCC 376, (Indian Mineral & Chemicals Co. vs Deutsche Bank), the Hon'ble Supreme Court has observed that the assertions in a plaint must be true for the purpose of determining whether leave is liable to be revoked. Paragraph No.10 of the above decision reads as follows:

> "10.We are of the opinion that the learned Judges erred in revoking leave under clause 12 of the Letters Patent in view of the clear assertions made in the plaint, and the assertions in a plaint must be assumed to be true for the purpose of determining whether leave is liable to be revoked on a point of demurrer."

22.Clause 12 of the Letters Patent deals with the circumstances under which leave to sue has to be granted. Clause 12 of the Letters Patent reads as follows:

> "12.Original jurisdiction as to suits:-And we do further ordain that the said High Court of Judicature at Madras, in exercise of its ordinary original civil jurisdiction, shall be empowered to receive, try, and determine suits of every description if, in the case of suits for land or other immovable property, such land or property shall be situated, or, in all other cases, if the cause of action shall have arisen, either wholly, or in case the leave of the Court shall have been first obtained, in part, within the local limits of the ordinary original jurisdiction of the said High Court: or if the defendant at the time of the commencement of the suit shall dwell or carry on business or personally work for gain, within such limits; except that the said High Court shall not have such original jurisdiction in cases falling within the jurisdiction of the Small Cause at Madras, in which the debt or damage, or value of the property sued for does not exceed hundred rupees."

23.Under clause 12, this Court, in exercise of its ordinary original civil jurisdiction, is empowered to receive, try and determine suits of every description if the cause of action shall have arisen either whole or in part and the defendant at the time of commencement of the suit shall dwell or carry on

business or personally work for gain within its jurisdiction. However, if the cause of action shall have arisen in part, the leave of the court should be obtained first, for this court to exercise its ordinary original civil jurisdiction to receive, try and determine such suits. Likewise, if the defendants are not residing within the jurisdiction, and however if the cause of action either in part or whole has arisen within the jurisdiction against those defendants, then again, the leave has to be obtained first against those defendants, who are residing outside the jurisdiction or carrying on business outside the jurisdiction for this court to exercise its ordinary original civil jurisdiction as against those defendants. Therefore, the material consideration for this court, while deciding the application under clause 12, is the plaint averments and the averments made in the affidavit filed in support of such application seeking leave to sue. It is not necessary for this court to conduct an elaborate enquiry on the contentions raised in respect of the merits of the matter raised by both parties at this stage. On the other hand, it is like considering the application under Order 7 Rule 11 CPC, seeking rejection of the plaint on the ground that the same does not disclose cause of action. It is well settled that while deciding such application under Order 7 Rule 11 C.P.C., only the plaint averments are to be taken up for consideration to decide as to whether the cause of action has been disclosed therein or not. In other words, the cause of action as stated in the plaint is the relevant consideration to find out as to whether the plaint discloses cause of action and not the rival contentions pleaded by the defendant on merits, who seeks for rejection of the plaint. In my considered view, the very same approach is to be made, while considering the application seeking leave to sue as well as revocation of leave. If the plaint and the affidavit filed in support of the leave application make out a case for grant of leave as required under clause 12 of the Letters Patent, that is the end of the matter in so far as the grant of leave is concerned, if such contentions of the plaintiff referable to his leave application are not found to be false, based on the contentions of the defendants. In other words, it is needless to say that granting leave to the plaintiff to sue does not mean that the court has accepted the claim of the plaintiff or the various contentions raised by him touching upon the merits of the claim, as true and valid. Granting leave is only a preliminary order allowing the plaintiff to file the suit against a particular defendant or defendants and therefore, such permission cannot be construed as an acceptance of his pleadings on merits as well. In other words, it is not a prejudicial order. That is why such applications are allowed most of the times at the time of hearing it for admission itself as such discretion is vested with this court keeping it in mind that rights of the parties on merits are not at all affected in any manner by granting such leave.

24. Therefore, it has to be seen in this case, as to whether the grant of leave to the plaintiff by this court is to be sustained based on the plaint and affidavit filed by the plaintiff in support of such application or it has to be revoked based on the contentions raised by the defendants.

25.Before answering the above said issue, it is better to understand as to what is the real dispute between the parties, in a nutshell, which is as follows:

> The suit itself is filed challenging the notice of arbitration dated 08.04.2015 as null and void and being contrary to Indian Law and for permanent injunction restraining the defendants in any manner proceeding or continuing with the arbitration proceedings initiated by the defendants through notice of arbitration dated 08.04.2015. The plaintiff and the first defendant entered into an International

Dispute Agreement and Dealership Agreement both dated 01.12.2010 for the purpose of distributing medical equipments in India and Nepal. It is the case of the plaintiff that majority of the distribution pursuant to the above said agreements was carried out in India including many hospitals in Chennai. Admittedly, both the agreements were executed in Chennai and the payments under those agreements were made into the plaintiff's bank account in Chennai. During the course of performance of these agreements, some dispute arose between the parties resulting in termination of the agreements on 07.06.2012 followed by entering into a Settlement Agreement on 30.03.2013. The said settlement agreement was entered into between the plaintiff, the first defendant and the second defendant. According to the plaintiff, there was no separate arbitration clause in the said Settlement Agreement. Thus, it is contended by the plaintiff that the governing law clause originally available in the Dealership Agreement and the Distributorship Agreement, did not automatically get incorporated into the Settlement Agreement. Further, it is the contention of the plaintiff that the parties to the agreements are the plaintiff and its affiliates on one hand and only the first defendant on the other hand. Therefore, it is contended that "Affiliates" of the first defendant have not been included as parties to the Dealership and International Distributorship Agreements. Thus, it is the case of the plaintiff that the contract recognises a difference between the "Affiliate" and "Assignee". Further, it is contended that clause 7.11 of the Dealership Agreement specifically provides that where there is an assignment from the first defendant to its Indian entity (second defendant), the transaction between the plaintiff and the second defendant would be governed only by Indian Law. Therefore, it is contended that the arbitration clause available in the Dealer Agreement and International Distributorship Agreement was only between the plaintiff and the first defendant and it does not include the second defendant. It is further contended that though the Settlement Agreement was a tripartite Agreement, there was no separate clause in the Settlement Agreement. The contention of the plaintiff is that the governing law clause in the Dealership Agreement and the International Distributorship Agreement did not automatically stand incorporated into the Settlement Agreement. It is their further case that there was no specific reference to an arbitration clause and mere survival of clause 7 does not result in incorporation of clause 7 into the Settlement Agreement. Thus, it is the categorical case of the plaintiff that the relationship between the plaintiff and the second defendant is not governed by any arbitration clause as the second defendant is not a signatory to the Dealership and International Distributorship Agreement and when the arbitration is sought to be invoked pursuant to the Settlement Agreement, the same cannot be permitted since the Settlement Agreement does not have an arbitration clause and the arbitration clause contained in the Dealer Agreement and International Distributorship Agreement did not stand incorporated into the Settlement Agreement. Therefore, it is their contention that in the absence of specific arbitration clause in the Settlement Agreement, the defendants cannot drag the plaintiff to the arbitration proceedings initiated at Massachusetts, U.S.A., by issuing the impugned arbitration notice dated 08.04.2015.

26.Thus the perusal of all the above contentions would show that the crux of the issue in the main suit is as to whether the Settlement Agreement dated 30.03.2013, in effect stipulates for resolving disputes between the parties to such agreement through arbitration proceedings and whether the recitals of such agreement in an unequivocal terms and without any ambiguity make the parties for such reference with certainity. Certainly, consideration of such issue is possible only after conducting the trial, as it involves not only the interpretation of several clauses relating to the present dispute in all the three agreements and also the appreciation of the actual intention of the parties while entering into those agreements through their oral testimonies. Therefore, it requires a trial and consequently, the merits and contentions raised by both parties in respect of the disputed reference to the arbitration under the Settlement Agreement dated 30.03.2013, cannot be gone into at this juncture.

27.However, for the purpose of considering this application under clause (12), it is seen that following are the admitted facts and circumstances:

a) All the three agreements viz., International Distributorship agreement dated 01.12.2010, Dealership Agreement dated 01.12.2010 and Settlement Agreement dated 30.03.2013 were entered into at Chennai between the parties;

b) The crucial agreement viz., Settlement Agreement dated 30.03.2013 was entered into by the plaintiff and both the defendants;

c) The plaintiff has performed its part of contract mostly in India and in particular, many hospitals in Chennai;

d) Certain payments were made to the plaintiff by the first defendant by making deposit into the plaintiff's bank account at Chennai;

e) A sum of Rs.8.65 crores deposited into the account of the plaintiff by the first defendant was not transferred to the second plaintiff which has resulted in issuing impugned arbitration notice.

28. It is the contention of the plaintiff that as per the above said arrangement, the plaintiff has to transfer the said amount to the second defendant, as a quid pro quo for the payments promised to be made to the plaintiff. It is the contention of the plaintiff that the defendants have refused to make the payment due to the plaintiff, which had resulted the plaintiff to stop the payment to the second defendant. To put it simply, it is the case of the plaintiff that the understanding between the parties were that the first defendant will transfer the money of Rs.8.65 crores to the plaintiff, who in turn should transfer the same to the second defendant and such transfer by the plaintiff to the second defendant was to be made as a quid pro quo for the payments promised to the plaintiff. When the first defendant has not kept up their promise and consequently when the plaintiff gave instruction to the Bank to stop payment to the second defendant, the issuance of the impugned arbitration notice has resulted.

29. The above stated facts and circumstances would show that the substantial part of cause of action for the plaintiff to file the present suit has undoubtedly arisen within the jurisdiction of this court as against the defendants, even though they are situated outside the jurisdiction of this court.

30.It is the contention of the defendants that the Settlement Agreement specifically stipulates that all the disputes are to be decided in Massachusetts, U.S.A.,; In so far as this contention is concerned, I am of the view that when the plaintiff questions the very existence or applicability of an arbitration clause in the Settlement Agreement and when such an issue is to be gone into and decided only after the conduct of trial, more particularly, when it involves the interpretation of certain clauses in the above said agreement, the above contention raised by the defendants cannot be gone into at this stage, that too, while considering the application under clause 12 of the Letters Patent;

ii)The next contention of the defendants is that both the defendants are not amenable to the personal jurisdiction of this court. I am not able to accept the above said contention, since the leave under clause 12 is sought only because both the defendants are not located within the jurisdiction of this court. In fact, the phrase used under clause 12 of the Letters Patent viz., "determine suits of every description" would indicate that exercise of power of original jurisdiction of this court cannot be restricted only in respect of certain types or categories of suits alone. In other words, in my considered view, the defendants are not justified in their contention that the anti-injunction suits cannot be entertained by this court, if the defendants are located outside the jurisdiction. If such contention is accepted, the purpose of clause 12 of Letters Patent and the power conferred on this court thereunder would be defeated. Once the leave is granted, those defendants are automatically brought within the jurisdiction of this court for contesting the matter. Even otherwise, the issue with regard to the personal jurisdiction of the defendants is certainly an issue which involves consideration of various facts and circumstances of the case and the activities of the parties. Merely because the defendants are residing outside the jurisdiction, it does not mean that they are not amenable to the jurisdiction of this court, if some of their business activities relevant to the case have taken place within the jurisdiction of this court. Needless to say that to decide the amenability of the defendants to the personal jurisdiction of this court, various facts and circumstances as contained in the pleadings need to be gone into and the same is possible only by conducting the trial.

31. No doubt, the learned counsel for the defendants strongly relied on the decision of the Hon'ble Supreme Court reported in 2003(4) SCC 341, (Modi Entertainment Network vs W.S.G.Cricket PTE Ltd.) to contend that when the defendants are not amenable to the jurisdiction of this court, the leave cannot be granted. Paragraph No.24 of the above said decision was referred to, which reads as follows:

> "24.From the above discussion the following principles emerge:
>
> (1) In exercising discretion to grant an anti-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 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 choice of the parties are not determinative but are relevant factors and when a question arises as to the nature of 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 an 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.

32.Perusal of the above said decision would show that the issue involved in that case was not with regard to leave under clause 12 of the Letters Patent. In that case, the contract between the parties therein contained a non exclusive jurisdiction of the English Court and the appellant therein filed a suit in Bombay High Court claiming damages, whereas the respondent therein filed an action in the English Court claiming arrears. Thus, the appellant therein sought an anti-injunction against the respondent therein in regard to action in English court. Based upon the above said facts, the Apex Court has observed that in exercising discretionary power to grant an anti-suit injunction, the court must be satisfied that the defendant is amenable to the personal jurisdiction of the court. First of all, the above decision deals with grant of anti suit injunction in respect of parties who have admittedly entered into a contract containing a non exclusive clause of English Court. Here, in this case this Court at this stage is not required to go into the question as to whether the plaintiff is entitled to anti-injunction as prayed for in the suit or not. Moreover, the contention of the plaintiff is that the Settlement Agreement does not contain arbitration clause. Therefore, this court has to first decide, in the main suit, as to whether the terms of the Settlement Agreement is to be construed of having an arbitration clause, by appreciation of evidence. When that being the position, I do not think that the above decision of the Apex court is helping the defendants in any manner.

33. AIR 1938 PC 103 (Martin Cashin vs Peter J.Cashin) and 2004(7) SCC 447,(Man Roland Druckimachinen AG vs Multicolour Offset Ltd) are relied on by the defendants for the proposition that when a party agreed to a particular forum, he is bound by it and the court should enforce such agreement. There is no quarrel about the said proposition. But, here in this case, the plaintiff is not agreeing that it has submitted to the jurisdiction of arbitration at Massachusetts, U.S.A., as the Settlement Agreement does not contain an arbitration clause to that effect. Therefore, till such issue is finally decided, the above said decision is not helping the defendants in any manner, at present.

34.2014(6) CTC 577, (M/s.Duro Flex Pvt Limited vs M/s.Duroflex Sittings System and another), a Full Bench decision of this Court is relied on by the defendants to contend that existence of a meagre part of cause of action itself cannot be a ground for granting leave. Perusal of the above said decision shows that the registration of trade mark in that case alone had taken place within the jurisdiction of this court and therefore, the Hon'ble Full Bench has observed that mere registration of trademark alone will not give a cause of action in a particular court. The facts and circumstances of the present case, as already discussed supra, undoubtedly show that most of the cause of action have arisen within the jurisdiction of this court. Therefore, the above decision which is factually distinguishable is not helping the defendants in any manner. In fact, the Hon'ble Full Bench has also considered the issue with regard to the balance of convenience and forum convenience at paragraph Nos.57 and 58, which reads as follows:

> "57.There is little doubt that the principles of forum conveniens, though not applicable to civil proceedings, have a role to play insofar as the consideration of grant of leave or revocation thereof under clause 12 of the Letters Patent is concerned. This is irrespective of the fact as to what expression is used. As observed aforesaid, the balance of convenience is also forum conveniens. The test applied is of appropriateness or suitability of the forum which ought to apply, whether it be called forum conveniens or that the jurisdiction of the Court under section 20 of the Code of Civil Procedure is different from Clause 12 of the Letters Patent (Food Corporation of India case (supra).
>
> 58.We are thus of the view that in considering an application for grant of leave or revocation thereof, the appropriateness or suitability of the forum would be material and to that extent, principle akin to forum conveniens would apply."

In this case, the facts and circumstances would reveal that the present forum viz., this court is the appropriate forum convenient to the plaintiff as substantial part of the cause of action has arisen within the jurisdiction of this court between the parties.

35.2014 SCC Online Bombay 696, (Hansraj Nayyar Medical India vs Smith Medical International Limited) is relied on by the defendants to contend that there is no cause of action for the plaintiff to file the present suit before this court. In the case before the Bombay High Court, the plaintiff therein contended that the cause of action arose at the place where the impugned proceeding were sought to be served on the plaintiff seeking an anti-suit injunction. Therefore, the Bombay High Court rejected such contention by observing that no principle authority was cited for the said proposition. In this case, the contention of the plaintiff is not as contended before the Bombay High Court. The facts and circumstances of the present case are totally different and therefore, the above said decision is also factually distinguishable.

36.2014(5) SCC 1, (Enercon (India) Limited vs Enercon Gmbh) is also relied on by the learned counsel for the applicants to contend that even if there is an unworkable arbitration clause in the arbitration agreement, the court while interpreting such an agreement should make the same workable within permissible limits of law. The Apex Court in the above decision observed at paragraph No.88 as follows:

> "88.In our opinion, the courts have to adopt a pragmatic approach and not a pedantic or technical approach while interpreting or construing an arbitration agreement or arbitration clause. Therefore, when faced with a seemingly unworkable arbitration clause, it would be the duty of the court to make the same workable within the permissible limits of the law, without stretching it beyond the boundaries of recognition. In other words, a common sense approach has to be adopted to give effect to the intention of the parties to arbitrate. In such a case, the court ought to adopt the attitude of a reasonable business person, having business common sense as well as being equipped with knowledge that may be peculiar to the business venture. The arbitration clause cannot be construed with a purely legalistic mindset, as if one

is construing a provision in a statute."

In my considered view, the above observation made by the Apex Court may be relied on by the defendants while considering the merits of the suit and not while considering the application filed under clause 12 of the Letters Patent. In fact, perusal of the above observation of the Apex Court would show that a common sense approach has to be adopted to give effect to the interest of the parties to arbitrate and while interpreting in an arbitration agreement, the court is to make a seemingly unworkable arbitration clause as workable within the permissible limits of law. In my considered view, the stage for such exercise has not arisen so far in this matter. Therefore, I find that the above decision is not helping the applicants in any manner at this stage.

37.Per contra, the learned counsel appearing for the plaintiff/respondent cited various decisions in support of his contention out of which some of them are as follows:

> In 2006(5) SCC 638,(Ramesh B.Desai vs Bipin Vadilal Mehta & others) at paragraph No.16, the Apex Court has observed as follows:
>
> "16.It was emphasised in para 25 of the report that the statement in the plaint without addition or subtraction must show that it is barred by any law to attract application of Order 7 Rule 11 CPC. The principle is, therefore, well settled that in order to examine whether the plaint is barred by any law, as contemplated by clause (d) of Order 7 Rule 11 CPC, the averments made in the plaint alone have to be seen and they have to be assumed to be correct. It is not permissible to look into the pleas raised in the written statement or to any piece of evidence. Applying the said principle, the plea raised by the contesting respondents that the company petition was barred by limitation has to be examined by looking into the averments made in the company petition alone and any affidavit filed in reply to the company petition or the contents of the affidavit filed in support of Company Application No.113 of 1995 filed by the respondents seeking dismissal of the company petition cannot at all be looked into."

I have already pointed out that the principle applicable to Order 7 Rule 11(a) CPC is to be applied while considering the application under clause 12 of the Letters Patent. In the above said decision, the Apex court has categorically observed that the averments made in the plaint has to be seen and they have to be assumed to be correct and it is not permissible to look into the pleas raised in the written statement.

38.In so far as the consideration of cause of action is concerned, the Hon'ble Supreme Court in 1989(2) SCC 163,(A.B.C. Laminart Pvt. Ltd. & Anr vs A.P. Agencies), observed at paragraph Nos.11, 12 and 15 as follows:

> "11.The jurisdiction of the Court in matter of a contract will depend on the situs of the contract and the cause of action arising through connecting factors.

12.A cause of action means every fact, which, if traversed, it would be necessary for the plaintiff to prove in order to support his right to a judgment of the Court. In other words, it is a bundle of facts which taken with the law applicable to them gives the plaintiff a fight to relief against the defendant. It must include some act done by the defendant since in the absence of such an act no cause of action can possibly accrue. It is not limited to the actual infringement of the right sued on but includes all the material facts on which it is founded. It does not comprise evidence necessary to prove such facts, but every fact necessary for the plaintiff to prove to enable him to obtain a decree. Everything which if not proved would give the defendant a right to immediate judgment must be part of the cause of action. But it has no relation whatever to the defence which may be set up by the defendant nor does it depend upon the character of the relief prayed for by t he plaintiff.

15.In the matter of a contract there may arise causes of action of various kinds. In a suit for damages for breach of contract the cause of action consists of the making of t he contract, and of its breach, so that the suit may be filed either at the place where the contract was made or at the place where it should have been performed and the breach occurred. The making of the contract is part of the cause of action. A suit on a contract, therefore, can be filed at the place where it was made. The determination of the place where the contract was made is part of the Law of Contract. But making of an offer on a particular place does not form cause of action in a suit for damages for breach of contract. Ordinarily, acceptance of an offer and its intimation result in a contract and hence a suit can be filed in a court within whose jurisdiction the acceptance was communicated. The performance of a contract is part of cause of action and a suit in respect of the breach can always be filed at the place where the contract should have been performed or its performance completed. If the contract is to be performed at the place where it is made, the suit on the contract is to be filed there and nowhere else. In suits for agency actions the cause of action arises at the place where the contract of agency was made or the place where actions are to be rendered and payment is to be made by the agent. Part of cause of action arises where money is expressly or impliedly payable under a contract. In cases of repudiation of a contract, the place where repudiation is received is the place where the suit would lie. If a contract is pleaded as part of the cause of action giving jurisdiction to the Court where the suit is filed and that contract is found to be invalid, such part of cause of the action disappears The above are some of the connecting factors."

(emphasis supplied)

39.In 2007 ILR (2) Delhi 1231,((India TV) Independent News Service Pvt. Ltd. v. India Broadcast Live LLC and others), paragraph No.59 reads as follows:

" 59. A perusal of the aforesaid shows that the legal position as regards forum non convenience is that a stay on the ground of forum non convenience would be granted where a court is satisfied that there is another available forum having jurisdiction.

> Also the plaintiff's choice of forum is usually not disturbed unless the balance of convenience is strongly in favour of the defendant. In determining whether a more appropriate forum exists, connecting factors, such as those effecting the convenience of parties, expenses involved and the law governing the relevant transactions are to be looked into. The mere fact that a part of the cause of action has arisen within the jurisdiction of the court may itself not be considered to be a determinative factor compelling the court to decide the matter on merits. In determining which of the available forums is the forum convenience in a given matter, the convenience of all the parties had to be seen. "

40.In 2014(11) SCC 639,(World Sport Group (Mauritius) Limited vs. MSM Satellite (Singapore) PTE), the Apex Court observed at paragraph Nos.22 and 23 as follows:

> "We are unable to accept the first contention of Mr. Venugopal that as Clause 9 of the Facilitation Deed provides that any party may seek equitable relief in a court of competent jurisdiction in Singapore, or such other court that may have jurisdiction over the parties, the Bombay High Court had no jurisdiction to entertain the suit and restrain the arbitration proceedings at Singapore because of the principle of Comity of Courts. In Black s Law Dictionary, 5th Edition, Judicial Comity, has been explained in the following words:
>
> Judicial comity:- The principle in accordance with which the courts of one State or jurisdiction will give effect to the laws and judicial decisions of another, not as a matter of obligation, but out of deference and respect. Thus, what is meant by the principle of comity is that courts of one state or jurisdiction will give effect to the laws and judicial decisions of another state or jurisdiction, not as a matter of obligation but out of deference and mutual respect.
>
> 23. In the present case no decision of a court of foreign country or no law of a foreign country has been cited on behalf of the appellant to contend that the courts in India out of deference to such decision of the foreign court or foreign law must not assume jurisdiction to restrain arbitration proceedings at Singapore. On the other hand, as has been rightly submitted by Mr. Subramanium, under Section 9 of the CPC, the courts in India have jurisdiction to try all suits of a civil nature excepting suits of which cognizance is either expressly or impliedly barred. Thus, the appropriate civil court in India has jurisdiction to entertain the suit and pass appropriate orders in the suit by virtue of Section 9 of the CPC and Clause 9 of the Facilitation Deed providing that courts in Singapore or any other court having jurisdiction over the parties can be approached for equitable relief could not oust the jurisdiction of the appropriate civil court conferred by Section 9 of the CPC."

In the above decision, the Hon'ble Supreme Court has categorically found that courts in India have jurisdiction to try all suits of civil nature under section 9 of the Code of Civil Procedure excepting suits which are either expressly or impliedly barred. Perusal of the facts of that case before the Apex

Court would show that a similar anti injunction suit filed before Bombay High Court was opposed by contending that the Bombay High Court has no jurisdiction to entertain such suit to restrain the arbitration proceedings at Singapore. Such contention was negatived by the Apex Court by holding that cause of action for filing the suit arose within the jurisdiction of Bombay High Court.

41.In 2009(7) SCC 696, (M.R.Engineers & Contractors (P) Ltd. vs. Som Datt Builders Ltd.), it has been observed at paragraph Nos.22, 24 and 33 as follows:

> "22. A general reference to another contract will not be sufficient to incorporate the arbitration clause from the referred contract into the contract under consideration. There should be a special reference indicating a mutual intention to incorporate the arbitration clause from another document into the contract. The exception to the requirement of special reference is where the referred document is not another contract, but a standard form of terms and conditions of trade associations or regulatory institutions which publish or circulate such standard terms and conditions for the benefit of the members or others who want to adopt the same.
>
> ..24. The scope and intent of Section 7(5) of the Act may therefore be summarised thus:
>
> (i) An arbitration clause in another document, would get incorporated into a contract by reference, if the following conditions are fulfilled:
>
> (1) the contract should contain a clear reference to the documents containing arbitration clause, (2) the reference to the other document should clearly indicate an intention to incorporate the arbitration clause into the contract, (3) the arbitration clause should be appropriate, that is capable of application in respect of disputes under the contract and should not be repugnant to any term of the contract.
>
> (ii) When the parties enter into a contract, making a general reference to another contract, such general reference would not have the effect of incorporating the arbitration clause from the referred document into the contract between the parties. The arbitration clause from another contract can be incorporated into the contract (where such reference is made), only by a specific reference to arbitration clause.
>
> (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 special reference to the arbitration clause also.
>
> (iv) Where the contract provides that the standard form of terms and conditions of an independent trade or professional institution (as for example the standard terms and

conditions of a trade association or architects association) will bind them or apply to the contract, such standard form of terms and conditions including any provision for arbitration in such standard terms and conditions, shall be deemed to be incorporated by reference. Sometimes the contract may also say that the parties are familiar with those terms and conditions or that the parties have read and understood the said terms and conditions.

(v) Where the contract between the parties stipulates that the conditions of contract of one of the parties to the contract shall form a part of their contract (as for example the general conditions of contract of the Government where the Government is a party), the arbitration clause forming part of such general conditions of contract will apply to the contract between the parties.

33.An arbitration clause though an integral part of the contract, is an agreement within an agreement. It is a collateral term of a contract, independent of and distinct from its substantive terms. It is not a term relating to "carrying out" of the contract. In the absence of a clear or specific indication that the main contract in entirety including the arbitration agreement was intended to be made applicable to the sub-contract between the parties, and as the wording of the sub-contract discloses only an intention to incorporate by reference the terms of the contract relating to execution of the work as contrasted from the dispute resolution, we are of the view that the arbitration clause in the main contract did not form part of the sub-contract between the parties."

42.From the above decision of the Apex Court, it is evident that a clear or specific indication regarding the arbitration agreement between the parties must be made available in an agreement itself. On the other hand, if such an arbitration agreement is to be inferred by reference from the earlier agreements, such inference cannot be made as a matter of course automatically, as the burden is on the party who seeks for such inference, which he has to discharge and establish the same before the Court by adducing evidence in support of such claim. In this case, the defendants contend that the arbitration clause in the Settlement Agreement is to be inferred by reference. On the other hand, the plaintiff disputes such contention and raises a plea that the second defendant not being a party to the earlier two agreements, is not entitled to seek such inference of reference of arbitration clause. Therefore, all these issues are to be gone into at trial and therefore, this court at this stage cannot express any view on the same.

43.Thus, considering all the facts and circumstances narrated above, this court finds that substantial cause of action has arisen within the jurisdiction of this court for the plaintiff as against the defendants for maintaining the suit before this Court. Therefore, this Court finds that the defendants have not made out a case for revoking the leave already granted. Accordingly, Application No.3650 of 2015 is dismissed.

14- 08- 2015 Index: Yes Internet: Yes cs/vri Copy to The Sub-Assistant Registrar, Original Side, High Court, Madras.

K.RAVICHANDRABAABU,J vri Pre-delivery Order in in 14-08-2015