IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION

ARBITRATION PETITION (L.) NO. 232 OF 2024
ALONG WITH
INTERIM APPLICATION (L.) NO. 25266 OF 2024
IN
ARBITRATION PETITION (L.) NO. 232 OF 2024

Raymond Limited .. Petitioner/Applicant
Versus
1. M/s. Miltex Apparels
2. Mr. Piyush Jain
3. Mr. Gaurav Sachdeva ..Respondents

Mr. Rohaan Cama *a/w. Saahil Menon, Oindrila Mukherjee i/b. Link Legal, Advocate for Petitioner/Applicant.*

Mr. Karl Tamboly *a/w. Sheetal Shah i/b. M/s. Mehta & Girdharlal, Advocates for Respondents.*

CORAM : SOMASEKHAR SUNDARESAN, J.
Reserved on : January 17, 2025
Pronounced on : February 21, 2025

JUDGEMENT :

Context and Background:

1. This Petition is an appeal filed under Section 37(2)(a) of the Arbitration and Conciliation Act, 1996 ("***the Act***"), challenging an order dated October 4, 2023 ("***Impugned Order***"), by which a Learned Arbitral Tribunal upheld a challenge to its jurisdiction under Section 16 of the Act. The core issue that has to be adjudicated in this Petition is whether the agreement between the parties stood extended beyond its stated term, bringing within the scope of the arbitration clause

contained in it, disputes relating to activities conducted during such extended term.

Context and Factual Background:

2. The Petitioner, Raymond Ltd. ("***Raymond***") is a manufacturer of ready-made branded garments while Respondent No. 1, M/s Miltex Apparels ("***Miltex***"), a partnership firm, is a distributor of such branded garments manufactured by Raymond in the territories of Mumbai, Navi Mumbai and Thane up to Dahanu Road and Raigad District ("***Territory***"). The other Respondents are partners of Miltex.

3. A company called Raymond Apparel Ltd. and Miltex executed a Distributor Agreement dated June 9, 2015 ("***Distributor Agreement***") by which Raymond granted Miltex exclusive rights to distribute products to Raymond's dealers in the Territory for a period of two years. The parties continued to engage commercially. Miltex continued to distribute Raymond's products in the Territory beyond the two-year period provided for in the Distributor Agreement.

4. Disputes and differences had arisen between the parties over payments due to Raymond from Miltex. Arbitration was invoked under Clause 18.1 of the Distributor Agreement by a notice dated July 11, 2022. The business of Raymond Apparel Ltd. (which would include the activity covered by the Distributor Agreement) was vested in Raymond pursuant to a Scheme of Arrangement, which was approved on March 23, 2022. The Learned Arbitral Tribunal was appointed by an order dated March 14, 2023 passed by this Court under Section 11 of the Act.

5. Raymond's Statement of Claim was filed on June 5, 2023 ("***Statement of Claim***"). On July 14, 2023, Miltex filed an application under Section 16 of the Act ("***Section 16 Application***"), primarily contending that the claims made in the Statement of Claim relate to a period during which there was neither any written contract nor any subsisting arbitration agreement between the parties.

6. The Impugned Order upholds Miltex's contention that no valid arbitration agreement existed between the parties during the period to which the claims made in the Statement of Claims can be attributed.

Contentions of the Parties:

7. Mr. Rohaan Cama, Learned Counsel on behalf of the Petitioner would primarily rely upon a letter dated September 2, 2022, by which advocates for Miltex had categorically asserted that the Distributor Agreement continued on the same terms and conditions even after the two-year period covered by it. It had been asserted on behalf of Miltex that the Distributor Agreement was impliedly renewed by the parties by their conduct – among others, by way of emails, whatsapp chats and verbal calls. That apart, Mr. Cama would submit that interpreting the provisions of the Distributor Agreement would show that only the exclusivity feature was meant to have a shelf life of two years.

8. Mr. Karl Tamboly, Learned Counsel on behalf of the Respondents would focus on the Statement of Claim to show that the claims related to the period between October 25, 2019 and May 17, 2021. Learned Counsel would submit that this period to which claims are made by Raymond were crystallised for the first time in the Statement of Claim. According to him, such period would fall out of the

scope of the arbitration clause contained in the Distributor Agreement, which had a scheduled lifespan of two years. He would submit that the Impugned Order correctly relies on ***AN Traders***[1] (a decision of a Learned Single Judge of the Delhi High Court, which the Learned Arbitrator found has an uncanny similarity with the matter at hand). In that case too, there was and has rightly returned the finding that the parties did not have an explicit written agreement that would show their consent to have their disputes adjudicated by arbitration.

Impugned Order – Core Findings:

9. The Impugned Order holds in favour of Miltex's contention. The findings in the Impugned Order may be summarised thus:-

a. The Distributor Agreement expired in two years, and with it, the arbitration clause too expired;

b. The arbitration agreement could not be invoked in relation to activity between the parties subsequent to such expiry;

c. The Distributor Agreement was not extended or renewed. The parties continued to engage but that relationship is not bound by the arbitration clause since the arbitration agreement cannot be assumed to be automatically extended. Even a mere general reference to the arbitration agreement would not suffice and there has to be a specific reference to the arbitration agreement being included;

[1] *A.N. Traders Private Limited vs. Shriram Distribution Services Private Limited – 2018 SCC OnLine Del 12416.*

d. The arbitration agreement is a separate, independent and distinct contract which does not automatically come to an end, but the mere extension of the Distributor Agreement by conduct of the parties would not and cannot imply the extension of the arbitration agreement; and

e. Under Section 7 of the Act, the arbitration agreement ought to be in writing and there must be *consensus ad idem* that disputes about their arrangements post-expiry of the Distributor Agreement would be adjudicated by arbitration.

10. Primarily, the Learned Arbitral Tribunal has based its reasoning on ***AN Traders***, a decision of the Delhi High Court, which the Learned Arbitrator found has an uncanny similarity with the matter at hand. In that case too, there was a fixed term agreement with an arbitration clause, and the agreement provided that modifications could only be in writing. A contention that the arbitration agreement continued to bind the parties was repelled by a Learned Single Judge of the Delhi High Court on the premise that the ingredients of Section 7 of the Act had not been met. Paragraphs 13 to 15 and Paragraphs 20 to 22 of ***AN Traders*** have been relied upon by the Learned Arbitral Tribunal – these are reproduced below:-

> *13. From the above, it would be apparent that **though an Arbitration Agreement, being an independent agreement, would survive the termination of the main Agreement** of which it is a part, at the same time **it cannot be put in service for adjudicating the disputes that have not arisen under or in relation to such main Agreement but have arisen between the parties post such Agreement**, even though the post Agreement "arrangement" may have been between the parties on similar terms and conditions as contained in the main Agreement.*
>
> *14. It must be remembered that **resolution of disputes through arbitration,***

> ***unless mandated through a statute, is a matter of volition of the parties to an Agreement. The parties have to agree to have their disputes adjudicated through Arbitration. Such Agreement has to conform to Section 7 of the Act and is a sine-qua-non. It cannot be oral****. There has to be a consensus ad idem. It must therefore, be shown that parties not only agreed that their post-Agreement arrangement would be governed by the general terms of the Agreement that expired by efflux of time, but also that any dispute in relation to such post Agreement arrangement would be adjudicated through arbitration.*
>
> *15. In the present case, **admittedly there was no extension of the Term of the Agreement agreed to 'in writing' between the parties**. The Agreement including the Arbitration Agreement, therefore, expired by efflux of time. The **Arbitration Agreement could thereafter have been invoked only for disputes that arose out of or in relation to the Agreement and not for transactions thereafter**.*
>
> ****
>
> *20. I have considered the submission made by the learned counsel for the respondent, however, find no merit in the same. **The Agreement clearly mentions that the same would expire by efflux of time after an expiry of one year from the date of execution thereof. Any extension of the Agreement was to be "in writing." The counsel for the respondent has been unable to show any document executed between the parties extending the terms of the Agreement**.*
>
> *21. Admittedly, the supplies after the expiry of the Agreement were made on the basis of the Purchase Orders placed by the petitioner on the respondent. It is not shown if these Purchase Orders made a reference to the Agreement between the parties. **The cross-examination merely seems to suggest that the same business model and relationship continued between the parties even after the expiry of the terms of the Agreement. This, however, in my opinion does not lead to an inference that the parties had agreed to resolve all their disputes through arbitration, even for the business relation post Agreement**.*
>
> *22. Similarly **merely because the petitioner had not replied to the e-mail dated 18.12.2009, it would not lead to an inference that the Agreement continued between the parties** even after the expiry of the terms thereof.*
>
> *[**Emphasis Supplied**]*

Analysis and Findings:

11. I have examined the record with the assistance of the Learned Counsel for the parties. I have also had the benefit of reviewing all the case law cited by both the Learned Counsel. I find that the Impugned Order is entirely reliant on ***AN Traders*** to hold in favour of Miltex. I will advert to this case law later in this judgement. First, it is important

to analyse the Distributor Agreement and its contents to derive the import of the contractual relationship between the parties.

Distributor Agreement:

12. Essentially, Clause 2.1 of the Distributor Agreement entailed Miltex being appointed as a distributor of branded garments manufactured by Raymond (the description in *Annexure 1*) on an exclusive basis in the Territory. The activities to be carried out in this role are set out in Clauses 2.1.1 to 2.1.4. Clause 2.2 provides that Miltex shall be the sole or exclusive distributor for Raymond's products "*during the period of this agreement which is 2 (Two) years*". Clause 2.3 clarified what rights of Raymond, the exclusivity would not affect (for instance, direct supply to The Raymond Shop within the Territory or to large format stores such as Shoppers Stop and Lifestyle). Under Clause 2.4, the purchase orders by which such products would be supplied were bound by the terms and conditions set out in *Annexure 2*. Under Clause 2.5, the purchase orders were subject to acceptance by Raymond. Under Clause 2.6, Miltex was bound to dedicate all its efforts to promoting Raymond's products and was not entitled to promote competing products.

13. Under Clause 7.2, the payment terms for the products would be "as mutually agreed" by the parties and more particularly as set out in *Annexure 3*, which in turn sets out the margins available to Miltex with the incentive slabs, credit period, turnover-linked bonus etc. Under Clause 10.3, Miltex was to provide a Performance Bank Guarantee for a sum of Rs. 15 lakhs, which was to be kept alive through the term of the agreement, based on which Raymond would extend credit that would extend up to five times the value of such Performance Bank Guarantee.

14. Clause 13.1 provides that the Distributor Agreement shall continue to remain in force for a period of two years. However, it could be further renewed *for a period* as mutually agreed in writing by either party giving one month's notice before the expiry of the Distributor Agreement, mentioning its intention to further renew it. If agreed by the other party, the Distributor Agreement would stand *renewed on the terms and conditions mutually agreed.*

15. Clause 17 of the Distributor Agreement provides that the agreement shall not be amended or modified except by an instrument in writing signed by both parties.

16. Clause 18 contains the arbitration agreement – which provides that any disputes, differences or questions between the parties "arising from" or "in relation to" any provisions of the Distributor Agreement shall be settled by reference to a sole arbitrator.

17. It will therefore be seen that the Distributor Agreement is a meticulously curated bundle of rights and obligations. In my opinion, the question as to whether the parties extended the term of the agreement beyond an initial period of two years is necessarily a mixed question of fact and law (private law as discernible from contract as opposed to legislation). Whether the parties had actually renewed the Distributor Agreement and if so, on what terms, and thereby the fate of the arbitration agreement, is necessarily a matter of evidence that would entail examining the nature of the relations between the parties after the initial period of two years (which ended on June 8, 2017).

Terms of Engagement post-July 2017 – Not Analysed:

18. When Learned Counsel for both parties were asked if the exclusivity of the relationship in the Territory had continued, and if so until when, neither side was able to point to anything in the record that would provide the answer. For example, there is nothing on record to show whether the Performance Bank Guarantee continued in the same form, substance and amount, from time to time after June 8, 2017. There is nothing on record to consider whether the parties continued to adhere to the provisions on margins, credit period, incentive slabs, turnover-linked bonus and other terms set out in *Annexure 3* on the same terms, or if they varied it, and if so until when was it not varied (or when it was varied). Put differently, none of this forms part of the record and none of it was considered by the Learned Arbitral Tribunal, as is seen from the Impugned Order.

19. What becomes evident is that a binary approach has been adopted in the matter. The foundational premise evidently was that the Distributor Agreement was for a period of two years and that with the sheer efflux of two years, the contractual relationship between the parties including the arbitration agreement perished. Even if the relationship continued on the very same terms, the approach has been to assume that whatever happened after the expiry of two years is not bound by a written contract and with it the arbitration agreement expired. Indeed, the Impugned Order expressly holds that with the expiry of two years, the arbitration agreement perished. It goes a step further to state that even if the parties had actually formally executed an extension, the arbitration agreement would have to be reiterated, without which it should be held to have expired.

20. In my opinion, the aforesaid stance is an extreme and sweeping proposition, that not only conflicts with commercial reality of how contracts are approached by business persons but also with the approach the parties contracted in the Distributor Agreement. The process for extension of the term of the Distributor Agreement is set out in Clause 13.1, which provides that either party may issue a written notice one month before the expiry of the first term of two years. If the other party agrees, the Distributor Agreement would stand extended on such terms and conditions as mutually agreed. Therefore, this would necessarily require examination of evidence to see what correspondence the parties traded to discern if they extended the Distributor Agreement and the terms on which they extended it. Precisely in this context, the position taken by none other than the advocates of Miltex (which is now contending that there has been no extension) gains significance.

Miltex's Own Stance on Extension:

21. When Raymond Apparel Ltd.'s advocates issued a notice dated November 17, 2021 demanding payment of the outstanding amount, they asserted that "pursuant to the expiry" of the Distributor Agreement, the distributorship has continued as mutually agreed "on the terms and conditions as mentioned in the said Agreement". It was stated that orders were placed by Miltex and were performed from time to time. The notice demanded payment of Rs. 12.09 crores, of which Rs. 6.85 crores was towards unpaid invoices and the balance towards interest calculated until November 22, 2021. Another notice dated July 11, 2022 was issued by advocates for Raymond, reiterating the same position (this time after the business of Raymond Apparel Ltd. vested

in Raymond). This notice invoked arbitration.

22. On September 2, 2022, Miltex's advocates replied to the aforesaid notice. Specifically, Paragraph 4 of the reply bears reproduction:-

> *"My clients state that even after expiry of the said Agreement (after two years), the said business continued on the same terms and conditions as mentioned therein. My clients further state that they were always in direct communication with your client's Managers / Representatives Mr. Alok Singh, Mr. Pradeep, Mr. Pankaj Sharma & Mr. Sanjay Sudan for all approvals through Emails, Whatsapp chats and verbal calls. The said Agreement was impliedly renewed by the parties by their respective conduct."*
>
> *[Emphasis Supplied]*

23. Therefore, when the first legal demand and threat of arbitration came up, it was Miltex that asserted that the Distributor Agreement had been extended on the same terms. This should have led to an examination of what Emails, WhatsApp chats and calls that Miltex alluded to in its stance on the Distributor Agreement, and whether Miltex is estopped from taking a different stance after litigation started. The doctrine of *post litam motam* would point to words used after litigation commences being unreliable and biased, eroding their value. As opposed to this, words used before litigation starts – the doctrine of *ante litam motam* – would point to a greater degree of reliability given to the words used before the litigation began. Now, the letter issued by Miltex's advocates, on instructions, was after the demand for payment, but before litigation actually started. It took an approach to this Court under Section 11 of the Act for arbitration to come about. Once the Learned Arbitral Tribunal was established and the Statement of Claim was filed, Miltex's stance has changed – to now claim that the agreement had expired and that every part of business activity

conducted thereafter is without the coverage of the arbitration agreement.

24. Instead of calling for and examining evidence, the question has been approached as if the provisions of contract were provisions in fiscal statute – meant to be literally and strictly construed – rather than as communications between commercial parties, and that too with the aid and advice of lawyers (both the letters from Raymond and the letter from Miltex were issued by their respective lawyers). This has led to the singular case law derived from ***AN Traders*** being applied as if it were legislation rather than as case law applicable to the facts of that case.

25. What is also evident from Miltex's advocates' letter dated September 2, 2022 is that Miltex demanded a credit for expenses incurred under instructions of officials of Raymond (Paragraph 8). Such expenses amounting to Rs. 8,16,752/- are particularised. The debit notes issued by Miltex are all dated within the two-year period from the execution of the Distributor Agreement (commencing, June 9, 2015). The expenses for which debit notes had been raised and which, according to Miltex, ought to lead to Miltex getting credit, range from June 13, 2015 to March 31, 2017.

26. Paragraph 9 of the same letter particularises sales from time to time undertaken based on instructions from Raymond, leading to debit notes for an aggregate sum of Rs. 1.69 crores, for which Raymond has not given credit to Miltex. The dates of these debit notes range from April 30, 2018 to February 28, 2022 – entirely after the two-year period from the execution of the Distributor Agreement (commencing, June 9, 2015). This read with the assertion in Paragraph 4, would

necessarily mean that Miltex wanted these debit notes to be respected and given legal treatment in line with the provisions of the Distributor Agreement.

27. Paragraph 10 of the very same letter then proceeds to list the end-of-season sale conducted by Miltex under instructions from Raymond with discounts in the range of 20% to 40%. Debit notes had been raised for a sum of Rs. ~2.16 crores, and these are particularised. The date range here is between November 30, 2017 and February 28, 2022 – again entirely after the period of two years from the execution of the Distributor Agreement (commencing, June 9, 2015).

28. Paragraph 11 of that letter from the advocates of Miltex also particularises debit notes raised by each party on the other in relation to return of products. The date range in this list of debit notes are particularised as a bulk item for the period between December 2015 and June 2017 (this portion is entirely within two years from execution of the Distributor Agreement) and then month-wise notes, which range from July 2018 and September 2021 (this portion is entirely outside the two years from execution of the Distributor Agreement). The very fact that the two periods are spoken of in the same breath by Miltex's advocates would mean that the period was one continuum and not meant to be broken up in a binary manner between the period before expiry of two years from June 9, 2015 and the period after the second anniversary.

29. There is also a reference to loan from Tata Capital for payments to be made to Raymond directly upon bills being raised, and a return of the debt due to Tata Capital (Paragraph 15) – this is without reference to dates. There are also references to Email and instructions in

WhatsApp communications and confirmations of incentives in Paragraph 17.

30. The notice dated November 17, 2021 from Raymond Apparel Ltd. had specifically made references to the Distributor Agreement and its provisions such as Annexure 2 in Paragraph 5. Miltex's reply to that paragraph does not assert that there is no valid agreement in force, and instead goes on to allege that Raymond was supplying stock in excess of the orders placed by Miltex.

31. When these contents of the letter issued by advocates for Miltex are read with the explicit assertion made on instructions from Miltex in Paragraph 4 of the same letter (that the Distributor Agreement stood extended), it would be reasonable to conclude that the parties were *ad idem* that the terms of the Distributor Agreement stood renewed and extended by mutual consent. Such extension would also mean that the arbitration agreement also stood extended. The Learned Arbitral Tribunal has simply stated that even if the Distributor Agreement was extended, the arbitration agreement contained in it, ought to have been expressly extended to cover such extension. To hold so, the Impugned Order invokes the doctrine of incorporation by reference to suggest that when one instrument incorporates the arbitration clause in another, such incorporation should be expressly made in written words. However, in the matter at hand, the extension is not by another instrument but Miltex's own advocates have stated, on instructions, that the entire Distributor Agreement stood extended, without having to execute another instrument. Therefore, to my mind, the reliance in the Impugned Order, on the principles governing incorporation of a clause by reference and the citation of case law on that principle, are not relevant to the facts of this case.

Blanket Reliance on AN Traders:

32. The error of the Learned Arbitral Tribunal lies in a blanket adoption of the law declared in ***AN Traders***. By doing so, the Learned Arbitral Tribunal has taken the stance that even if there was an extension of the agreement (whether in writing or by conduct) unless the arbitration clause is explicitly reiterated in writing it would not stand extended since it would fall foul of Section 7 of the Act. Such a stance is directly contrary to the law declared by the Supreme Court in ***BPCL***[2], which is pressed into service on behalf of Raymond in this Petition.

Case Law Analysed:

33. ***AN Traders*** indeed places reliance on a judgement of the Supreme Court in ***Kishorilal Gupta***[3] but Mr. Cama is right in his submission that ***Kishorilal Gupta*** was rendered in 1960, well before the Act, which has made explicit provision for the validity of the arbitration agreement, and is therefore, distinguishable. That apart, Mr. Cama also draws my attention to two other judgements by other Learned Single Judges of the same High Court, which had not been cited before the Learned Single Judge in ***AN Traders***. These are ***Carrier Airconditioning***[4] (rendered in 2009) and ***Shine Travels***[5] (rendered in 2016).

34. In ***BPCL***, the Supreme Court considered the question as to

[2] *Bharat Petroleum Corporation Ltd. Vs. Great Eastern Shipping Co. Ltd. – (2008) 1 SCC 503*
[3] *Union of India vs. Kishorilal Gupta & Bros – (1960) 1 SCR 493*
[4] *Carrier Airconditioning and Refrigeration Ltd. Vs. Linc Digital Systems Pvt Ltd. And Ors – 2009 SCC OnLine Del 774*
[5] *Shine Travels & Cargo Pvt. Ltd. Vs. Mitisui Prime Advanced Composite India Ltd. – 2016 SCC OnLine Del 4152*

whether on expiry of an agreement, despite the continued conduct of the parties implicitly consistent with the expired agreement, the arbitration clause would perish. In the facts of that case, the parties did not sign an actual extension – in fact, one party expressed its willingness to extend on the same terms and the other party ignored the letter and there was not even a reply to it. Invoking the principle of *sub silentio*, the Supreme Court ruled as follows:-

> *"20……**Admittedly, no such agreement was signed between the parties. Indubitably, there was no further exchange of correspondence between the parties** during the year. **Nevertheless, the appellant continued to use the vessel on hire with them under the time charter dated 6-5-1997**. The **conduct of the parties,** as evidenced in the said correspondence and, in particular the appellant's silence on the respondent's letters dated 5-11-1998 and 4-1-1999, **coupled with the fact that they continued to use the vessel, manifestly goes to show that except for the charter rate, there was no other dispute between the parties**. **They accepted the stand of the respondent sub silentio** and thus, **continued to bind themselves by other terms and conditions** contained in the charter party dated 6-5-1997, **which obviously included the arbitration clause.***
>
> *[**Emphasis Supplied**]*

35. The Learned Arbitral Tribunal did not have the benefit of ***BPCL*** as it was not cited. Indeed, ***BPCL*** was not even noticed in ***AN Traders***. Although Mr. Tamboly rightly points out that the decision of the Learned Single Judge in ***AN Traders*** came to be upheld by a Learned Division Bench of the Delhi High Court[6], despite ***BPCL***, ***Carrier Airconditioning*** and ***Shine Travels*** having been brought to its attention in the course of the appeal. That apart, the Learned Division Bench was not moved by the case law not noticed in ***AN Traders*** because it adopted the approach that the scope of review in an appeal under Section 37 is really narrow. The Learned Division Bench held that unless there is a patent error of law or a manifest perversity, rulings under Section 34, ought not to be interfered with.

[6] *Shriram Distribution Services Pvt. Ltd. Vs. A.N. Traders Pvt. Ltd. – 2019 SCC OnLine Del 11695*

36. However, the facts in ***AN Traders*** can be distinguished. The agreement in ***AN Traders*** related to the supplies to be made to the locations specified in a schedule to the agreement. The argument accepted by the Delhi High Court was two-fold – that the supplies to the locations listed in the agreement alone formed subject matter of disputes amenable to the arbitration clause in that agreement. It also examined the period of the agreement and ruled that activity relating to the period prior to the expiry of the term would be covered by the arbitration agreement and the period after that expiry would not be covered. It was noticed by both the Benches that the addition of locations to those listed in the agreement had not been effected in writing. Since the agreement had a provision that required any modification to be in writing, the addition of new locations was held by the Learned Division Bench to be explicitly outside the scope of the agreement. There is nothing in these decisions of the two Benches in ***AN Traders*** to suggest that there was an explicit statement made on instructions to lawyers, that the agreement stood extended.

37. As regards the Learned Single Judge's approach to the period of the agreement, the Learned Division Bench relied on the law declared by another Learned Division Bench of the Delhi High Court[7] to state that the scope of review under Section 37 of the Act was even narrower. Adopting the principle that unless the Learned Single Judge's decision is shown to be palpably erroneous in law or manifestly perverse, it was held that the ruling in ***AN Traders*** was not worthy of interference.

38. Both Mr. Cama and Mr. Tamboly submit that there is no judgement of this Court squarely covering the issue. To my mind, the reasoning in ***BPCL***, which is the law declared by the Supreme Court

[7] *MTNL v. Finolex Cables Ltd. – FAO (OS) 227/2017*

ought to be respected, and is indeed appealing, based as it is on commercial common sense. Indeed, if parties to an agreement are held to have extended a contract, all terms in that agreement would stand extended *sub silentio* and by necessary implication. It is far-fetched to expect a reiteration of just the arbitration clause for that clause to be extended in the eyes of law. Such an expectation also militates against the first principle that the arbitration clause in fact, outlives the agreement it is contained in – now statutorily provided in Section 16(1) of the Act. Not only is the arbitration clause an independent agreement, but even the void nature of the agreement in which it resides would not render the arbitration agreement void. This first principle would point to the longevity of the arbitration clause being the intended legislative objective rather than an interpretation that would render the arbitration clause dead even if the agreement as a whole were to have been extended by the parties.

39. The explicit statement of the advocates for Miltex, evidently based on extensive factual instructions from Miltex, in their letter dated September 2, 2022 cannot be wished away. The instructions from Miltex is a clear and sharp pointer to the contracting intent of the parties. Each of the advocates of Raymond and Miltex have confirmed in their writings that their clients had instructed them to assert that the Distributor Agreement stood extended and they continued to operate on that basis. That is a strong pointer to the intention of the parties and the ***consensus*** *ad idem* between the parties. Therefore, merely because the Statement of Claim sought payment under invoices raised after the expiry of two years from June 9, 2017, Miltex cannot be allowed to change its stance altogether and try its luck with a jurisdictional question.

40. It must be stated that the contention of Miltex was attractive at first blush. However, upon a review of the material on record and owing to ***BPCL*** not having been noticed at all in ***AN Traders***, I am convinced that the Learned Arbitral Tribunal erred in simply adopting the position obtaining in ***AN Traders*** and applying to the facts of the matter at hand. The Learned Division Bench having formed a view that there is no palpable error of law or manifest perversity in ***AN Traders*** after ***BPCL*** was brought to its attention, also does not title the scales in favour of Miltex. In ***AN Traders***, there was an explicit provision that amendments should only be in writing and yet an expansion of the locations covered by the agreement took place without any writing. There is a similar clause in the Distributor Agreement, but it is nobody's case that the terms of the Distributor Agreement were amended. The renewal of the term is covered by a specific provision (Clause 13.1) while amendment and modification is covered by a different specific provision (Clause 17).

41. Clause 13.1 does provide for a procedure for extension of the term – notice one month before expiry of the original term and its acceptance. If the parties have, regardless, effected an extension (and that is what each party's advocates has stated in writing and that too on instructions, and in words used before the litigation started), it would be inappropriate for such an extension to be displaced solely on the basis of assertions made and by applying ***AN Traders*** as if it were statute and not case law. I have already alluded to the doctrines of *ante litam motam* and *post litam motam* above. The backtracking by Miltex after the Statement of Claim was filed does not inspire confidence.

42. Besides, the Impugned Order has no discussion on facts to ascertain if the terms were continued with or without modification and

if modified, when they were modified. No evidence was led to show what WhatsApp messages had been traded and how the parties conducted themselves after June 8, 2017. It was Miltex that alluded to conduct of the parties after that date and asserted that the Distributor Agreement stood renewed on the same terms. It was Miltex that alluded to running disputes over debit notes that ought to be given effect by Raymond and the dates of such debit notes relate to both periods – before and after June 8, 2017. All of this has been wished away by simply relying on ***AN Traders***.

Conclusions and Direction:

43. Therefore, I am afraid the Impugned Order is not sustainable and is hereby quashed and set aside. The Learned Arbitral Tribunal shall call for the Statement of Defence, and make the parties lead evidence and examine the evidence to answer mixed questions of fact and law involved. The Learned Arbitral Tribunal, being the master of the proceedings, would be best placed to decide how such evidence would be used and at what stage the jurisdiction would be ruled upon – alongside the final ruling or as a preliminary issue after the evidence necessary to answer the mixed question of fact and law becomes available. It would be inappropriate for me to dictate how and in what sequence the Learned Arbitral Tribunal should conduct the proceedings. I have restricted myself to examining the sustainability of the Impugned Order, which I have found, for the reasons set out above, to be unsustainable.

44. The appeal under Section 37(2)(a) contained in this Petition is allowed in the aforesaid terms. Considering the truly piquant nature of legal issues arising in this case, which the parties were entitled to

pursue, I am satisfied that costs need not follow the event.

45. In these circumstances, the Interim Application, if any, also stands ***finally disposed of***. Since the Petition was taken up for final hearing by consent of the parties, delay if any, stood condoned.

46. All actions required to be taken pursuant to this order, shall be taken upon receipt of a downloaded copy as available on this Court's website.

[SOMASEKHAR SUNDARESAN, J.]