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

Reserved on: 18th March, 2021
Pronounced on: 5th July, 2021

\+ **ARB. P. 241/2021**

SWASTIK PIPE LTD. ..... Petitioner
Through: Mr. Sanjay Jain and Ms. Puja Chourasiya, Advocate.

versus

SHRI RAM AUTOTECH PVT. LTD. ..... Respondent
Through: None.

CORAM:
HON'BLE MR. JUSTICE SANJEEV NARULA

JUDGMENT

SANJEEV NARULA, J.

1. The present petition under Section 11(6) of the Arbitration and Conciliation Act, 1996 [*hereinafter referred to as the* '***Act***'] seeks appointment of a Sole Arbitrator to adjudicate the disputes arising from the tax invoices issued by the Petitioner – Swastik Pipe Ltd. [*hereinafter referred to as* '***SPL***'] in the course of their dealings with the Respondent – Shri Ram Autotech Pvt. Ltd. [*hereinafter referred to as* '***SRAPL***'].

2. Briefly stated, the facts emerging from the petition, are as follows: SPL is engaged in the business of manufacturing, exporting, and supplying steel pipes and tubes to heavy engineering industries in India and abroad. SRAPL is in the business of manufacturing and supplying sheet metal and plastic moulded components. SRAPL placed orders with SPL for the purchase of 'C.R. Strips'. The same were supplied by SPL as per SRAPL's

request and specifications, on a running account basis. The said commercial dealings between the parties lasted between 1st April, 2019 to 29th December, 2020. While some payment was made, but an amount of INR 15,63,217/- (inclusive of interest @ 18% p.a. till 29th December, 2020 for the delayed payments), is outstanding against the goods which have been already been delivered to and received by SRAPL.

3. Since the liability was not discharged, a legal notice dated 31st December, 2020, was issued by SPL, calling upon SRAPL to make good the amount due or agree to arbitration in accordance with the terms and conditions of the invoices which contained an arbitration clause. The said notice was served on SRAPL at their Delhi office on 6th January, 2021, and also at their Gurugram office on 14th January, 2021, despite which, SRAPL neither made the payment nor replied to the said notice. In these circumstances, SPL has approached this Court seeking the appointment of a Sole Arbitrator by way of the present petition.

4. The petition was taken up and notice was issued on 15th February, 2021 which was returnable on 17th March, 2021. On this date, despite successful service of notice, none appeared for SRAPL. The matter was heard at length on 18th March but again, there was no representation from SRAPL's side. Thus, it can only be surmised that SRAPL has wilfully chosen not to appear before this Court. In these circumstances, the Court has proceeded to decide the present petition *ex-parte* on the basis of the pleadings and the submissions advanced by the counsel for SPL.

5. Mr. Sanjay Jain, learned counsel for SPL argued that in view of the arbitration agreement between the parties, the Court must proceed to appoint an Arbitrator. On a query raised by the Court relating to the existence of a valid arbitration agreement, Mr. Jain contended that the clause contained in the invoice constitutes a valid arbitration agreement in view of the judgments of the Supreme Court in ***Trimex International FZE Ltd. Dubai v. Vedanta Aluminium Ltd., India***,[1] and ***M/s. Caravel Shipping Services Pvt. Ltd. v. Premier Sea Food Exim Pvt. Ltd.***[2] Further, Mr. Jain sought to differentiate the decision of a coordinate bench of this Court in ***Parmeet Singh Chatwal v. Ashwani Sahani***.[3] Additionally, Mr. Jain also relied upon Section 7(4) of the Act and stressed that SRAPL has not denied the existence of the arbitration agreement, notwithstanding the categorical assertion to that effect in the notice of invocation of arbitration, and thus, this Court should not have any hesitation in appointing an Arbitrator.

ANALYSIS AND FINDINGS

6. It is noticed that the arbitration clause is on the same page as the details of the invoice. It is in a readable font size, under the heading "*Remarks: Terms & Conditions*" with two other conditions (viz. interest rate and verification of condition of goods). As per SPL, this term constitutes an arbitration agreement between the parties. It reads as under:

> *"2. All disputes, touching and/or concerning this bill, shall be, solely, resolved by an arbitrator duly appointed by the Hon'ble Delhi High Court under The Arbitration and Conciliation Act, 1996, amended unto date or any repeal thereof. The seat of arbitration shall be Delhi and shall be solely*

[1] (2010) 3 SCC 1
[2] (2019) 11 SCC 461
[3] MANU/DE/0442/2020

and exclusively subject to Delhi jurisdiction. The language of arbitration proceedings shall be English."

7. SPL contends that the goods accompanying the invoices have been duly received by SRAPL under a Goods Receipt, signed and acknowledged by the representative of SRAPL, copies whereof are placed on record. Besides, there are other documents such as e-Way Bills evincing the supply and sale of goods. In view of the above, the transaction between the parties and the resultant dispute arising on account of alleged non-payment of outstanding sums is *prima facie* established.

8. However, concededly, the invoices containing the arbitration agreement are not signed by SRAPL. Therefore, the pertinent question which arises for consideration is whether the terms and conditions appearing on the invoices accompanying a delivery of goods would constitute a valid arbitration agreement between the parties.

9. Section 7 of the Act stipulates what constitutes a valid arbitration agreement. The said provision reads as under:

*"**7. Arbitration agreement**. — (1) In this Part, "arbitration agreement" means an agreement by the parties to submit to arbitration all or certain disputes which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not.*
(2) An arbitration agreement may be in the form of an arbitration clause in a contract or in the form of a separate agreement.
(3) An arbitration agreement shall be in writing.
(4) An arbitration agreement is in writing if it is contained in—
(a) a document signed by the parties;
(b) an exchange of letters, telex, telegrams or other means of telecommunication [including communication through electronic means] which provide a record of the agreement; or
(c) an exchange of statements of claim and defence in which the existence of the agreement is alleged by one party and not denied by the other.

> *(5) The reference in a contract to a document containing an arbitration clause constitutes an arbitration agreement if the contract is in writing and the reference is such as to make that arbitration clause part of the contract."*

10. As can been seen, Section 7(3) provides that the arbitration agreement shall be in writing, which is, undeniably, a mandatory requirement. Section 7(4)(a) stipulates that an arbitration agreement shall be in writing if it is contained in a document signed by all the parties. However, sub-clauses (b) and (c) of Section 7(4) show that the legislative intent is also to include a written document not signed by the parties, within the ambit of a valid arbitration agreement, as Section 7(4)(b) provides that an arbitration agreement can be in the nature of exchange of communication, which provides a record of the agreement in writing. Taking into consideration the language deployed in the aforesaid provision, there can be no doubt that, the signature of either party on the Arbitration Agreement is not mandatory. Moreover, the provision noted above manifests that an arbitration agreement need not be in a particular form, and a valid agreement can be constituted if it has all the necessary attributes.

11. For any agreement, the real intent of the parties is germane. In the event the written arbitration agreement is not signed by the parties, it is essential to ascertain if there is an intention on the part of the parties to settle their disputes through arbitration. Since the terms and conditions printed on an invoice are generally inserted unilaterally by the party issuing the invoice, the Court had called upon SPL to validate the mutual intention of the parties to settle the disputes through arbitration. In fact, this precise question of inference of arbitration agreement on the touchstone of true

intention of the parties or '*consensus ad idem*' has engaged the Courts often. Let us briefly examine the legal position that emerges from the case-laws on the subject:

a) In ***Caravel Shipping*** *(supra)*, a suit was filed in which a Bill of Lading was expressly stated to be a part of the cause of action. The Defendant filed an application under Section 8 of the Act, relying upon the arbitration clause included in the printed terms annexed to the Bill of Lading. The court rejected the application, holding that the arbitration clause, being a printed condition, showed no intention to arbitrate and there was nothing to show that the clause was brought to the notice of the other party. The same reasoning was also affirmed by the High Court. The Supreme Court, however, set-aside the order of the High Court, by holding that the respondent therein has expressly agreed to be bound by the arbitration clause despite the fact that it is a printed condition annexed to the Bill of Lading. The Bill of Lading itself was not in dispute, and the Supreme Court specifically observed that since respondent had itself relied upon the Bill of Lading (though unsigned) as part of its cause of action in the suit, it cannot blow hot and cold and contend that, for the purpose of arbitration, the arbitration clause should be signed. The Court also reiterated the legal position noted above that the only pre-requisite to validity is that the arbitration agreement should be in writing, but Section 7(4) could not be rigidly construed to imply that in all cases an arbitration agreement needs to be signed.

b) In ***Trimex International*** *(supra)*, the Supreme Court dealt with a petition under Section 11(6) of the Act, wherein, appointment of an

arbitrator was sought as per the arbitration agreement contained in a Commercial Offer (Purchase Order) and also in a formal agreement that was exchanged between the parties. The respondent therein contested the petition on the ground that there was no concluded contract, and there was no *ad idem* of various essential features of transaction. The Supreme Court, after examining voluminous communications, including e-mails placed on record forming part of the text of the judgment, concluded that basic and essential terms had been accepted by the Respondent. The parties had arrived at a concluded contract, and accordingly, referred them to arbitration. In the said case, the Court held that in the absence of a signed agreement between the parties, the existence of the arbitration agreement can be inferred from various documents duly approved and signed by the parties in the form of exchange of e-mails, letters, telex, telegrams and other means of telecommunication.

c) A Division Bench of this Court in ***Scholar Publishing House Pvt. Ltd v. Khanna Traders***,[4] while deciding an appeal against the order of a Single Judge deciding objections under Section 34 of the Act, dealt with the question of whether the award rendered on a dispute referred to arbitration by the Respondent/Claimant was legal and binding, inasmuch as, did the parties enter into an arbitration agreement. The arbitration clause was contained in the invoice. The Court, relying upon the decision of Bombay High Court in ***Lewis W. Fernadez v.***

[4] 2013 (3) Arb. LR 105 (Delhi). Leave to Appeal from the same has been granted by the Supreme Court, and the same is pending by way of S.L.P.(C.) No. 6243/2014 titled ***Scholar Publishing House Pvt. Ltd. v. M/s Khanna Traders***.

Jivatlal Partapshi,[5] held that the conduct of the parties was the relevant and determinative test. It was noted that there is no strait-jacket formula to say whether condition on invoices can amount to binding arbitration clauses. An arbitration agreement could be inferred through a series of correspondences, or even on demur of one of the parties to an arbitration proceeding, who can otherwise object to it on the ground of absence of agreement. In other words, if such party does not urge the contention of non-existence of an arbitration agreement in its reply to the claim, then the arbitration agreement is deemed to exist.

d) That said, the Court must note that there are a few cases wherein, on facts, the arbitration clauses printed on the invoices have not been held as valid. In the specific facts of such cases, the Court could not conclude that the parties were *ad idem* to render the arbitration clauses binding and enforceable. [See: ***Parmeet Singh Chatwal*** *(supra)*, ***Taipack Ltd. v. Ram Kishor Nagar Mal***,[6] ***Alupro Building Systems Pvt. Ltd. v. Ozone Overseas Pvt. Ltd.***,[7] ***IMV India Pvt. Ltd. v. Stridewel International,***[8] and ***Kailash Nath Aggarwal v. Aaren Exports***.[9]].

12. Under Section 7(4)(c) of the Act, an arbitration agreement can also be inferred from the exchange of statement(s) of claim and defence in which

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[5] AIR 1947 Bom 65.
[6] 2007 (3) Arb. L.R. 402 (Delhi) : MANU/DE/8199/2007.
[7] 2017 (162) DRJ 412 : MANU/DE/0495/2017
[8] MANU/DE/1620/2018.
[9] 2009 SCC Online Del 3691.

existence of the agreement is alleged by one party and not denied by the other. What constitutes as statement of claim and defence has been explained by the Supreme Court in the case of ***S. N. Prasad v. M/s. Monnet Finance Ltd. & Ors***.[10] Therein, the Court while deciding an appeal arising out of the order deciding objections under Section 34 of the Act, was faced with a question as to whether a guarantor, who is not a party to a Loan Agreement containing the arbitration agreement, can be made a party to a reference to arbitration. While deciding this question, the Court also examined the contention whether an arbitration agreement could be inferred from the exchange of statements of claim and defence as contemplated under Section 7(4)(c) of the Act. The Court delved into the meaning of the expression "statements of claim and defence" occurring in Section 7(4)(c) of the Act and held that it cannot be given a restrictive meaning. It would thus be apposite to note the views of the Supreme Court, which read as under:

> "*10. But the words, 'statements of claim and defence' occurring in section 7(4)(c) of the Act, are not restricted to the statement of claim and defence filed before the arbitrator.* ***If there is an assertion of existence of an arbitration agreement in any suit, petition or application filed before any court, and if there is no denial thereof in the defence/counter/written statement thereto filed by the other party to such suit, petition or application, then it can be said that there is an "exchange of statements of claim and defence" for the purposes of section 7(4)(c) of the Act. It follows that if in the application filed under section 11 of the Act, the applicant asserts the existence of an arbitration agreement with each of the respondents and if the respondents do not deny the said assertion, in their statement of defence, the court can proceed on the basis that there is an arbitration agreement in writing between the parties.*** "
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> (Emphasis Supplied)"

13. As held by the Supreme Court, the existence of the arbitration agreement can also be inferred from the stand taken by the parties in the

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[10] AIR 2011 SC 442.

pleadings filed under the petition under Section 11 of the Act. In the instant case, although there is no exchange of statements of claim and defence, in the sense that there is no reply from SRAPL, but the fact remains that the existence of the arbitration agreement specifically alleged by SPL with the narration of transaction, has not been refuted by SRAPL. Pertinently, the existence of the arbitration agreement between the parties has also been categorically asserted in the precursor to the present petition, being the notice invoking arbitration, which was duly served upon SRAPL at two of its addresses in terms of the tracking reports annexed with the petition, but there was no response from SRAPL and thus, the assertion stood not-denied.

14. Besides, the Court at this stage has to only form a *prima facie* view regarding the existence of the arbitration agreement in terms of Section 11 (6A) of the Act. Detailed examination and final determination regarding the existence of the arbitration agreement is in the domain of the Arbitral Tribunal. The Supreme Court, in the case of ***Vidya Drolia & Ors. v. Durga Trading Corporation***,[11] has observed that *"the rule for the Court is 'when in doubt, do refer'"*. Therein, Justice Ramana, in his concurring opinion, has clarified the role of this Court in a Section 11 petition, as follows:

> *"75. Before we part, the conclusions reached, with respect to question no. 1, are:*
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> *a. Sections 8 and 11 of the Act have the same ambit with respect to judicial interference.*
>
> *b. Usually, subject matter arbitrability cannot be decided at the stage of Sections 8 or 11 of the Act, unless it's a clear case of deadwood.*
>
> *c. The Court, under Sections 8 and 11, has to refer a matter to arbitration or to appoint an arbitrator, as the case may be, unless a party has established a prima facie (summary findings) case of nonexistence of valid arbitration agreement, by summarily portraying a strong case that he is entitled to such a finding.*
>
> *d. The Court should refer a matter if the validity of the arbitration agreement*

[11] (2021) 2 SCC 1.

cannot be determined on a prima facie basis, as laid down above, i.e., 'when in doubt, do refer'.

e. The scope of the Court to examine the prima facie validity of an arbitration agreement includes only:

a. Whether the arbitration agreement was in writing? or

b. Whether the arbitration agreement was contained in exchange of letters, telecommunication etc.?

c. Whether the core contractual ingredients qua the arbitration agreement were fulfilled?

d. On rare occasions, whether the subject matter of dispute is arbitrable?"

15. It must also be noted that the commercial dealing between the parties is demonstrated from the documents placed before this Court by SPL. Copy of the ledger of SPL, as placed on record, exhibits that the parties have been transacting with each other for some time, and some of the invoices raised by SPL have been paid by SRAPL during the same time period as well. Now, if there is sufficient material on record to establish that the condition/clause in the invoices were accepted and acted upon, the parties would be *ad idem*, and arbitration agreement could be safely inferred. However, in the opinion of the Court, this aspect has to be conclusively decided on the basis of evidence that the parties would lead as well as the surrounding facts and circumstances. However, the same cannot be done at this stage, having regard to the limited jurisdiction exercised by this Court under Section 11 of the Act.

16. As noted above, SRAPL has elected to stay away from the present proceedings. Despite service of notice, they have chosen not to appear, for reasons best known to them. They have not filed a reply to deny the assertion, both in response to the legal notice invoking arbitration, as well as to the present petition. The consequence of such non-appearance is that the assertion of existence of the arbitration agreement is unrebutted. Thus, *prima*

facie, it can be inferred that the arbitration agreement exists between the parties.

17. Accordingly, the present petition is allowed. Ms. Kanika Sinha, Advocate (Contact No. 9818431291), is appointed as the Sole Arbitrator to adjudicate the disputes arising between the parties.

18. The parties are directed to appear before the learned Arbitrator, as and when notified. This is subject to the learned Arbitrator making the necessary disclosure under Section 12(1) of the Act and not being ineligible under Section 12(5) of the Act.

19. The learned Arbitrator will be entitled to charge their fees in terms of the provisions of the Fourth Schedule appended to the Act.

20. It is clarified that the Court has not examined any of the contentions of the parties on merit, and both the parties shall be free to raise their claims/counter-claims before the learned Arbitrator in accordance with law. All rights and contentions of the parties are left open. SRAPL shall be free to raise all objections as are available under law, including but not limited to the existence of the arbitration agreement before the learned Arbitrator. As and when such a plea is raised, the learned Arbitrator would be competent to rule on their own jurisdiction and decide as to whether there exists an arbitration agreement or not, uninfluenced by the observations made by this Court which are only *prima facie* in nature.

21. In view of the above, the present petition is allowed and stands disposed of.

SANJEEV NARULA, J

JULY 5, 2021
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