



WEB COPY



Arb.O.P.(Com.Div.) No.191 of 2024

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 29.07.2024

CORAM

THE HON'BLE Mr. JUSTICE KRISHNAN RAMASAMY

Arb.O.P (Com.Div.) No.191 of 2024

Larsen & Toubro Limited,
represented by its Manager-Supply Chain Management/PoA,
Mr.V.Sriram ... Petitioner

Versus

M/s.Texmo Pipes and Products Limited,
through its Managing Director,
Mr.Sanjay Agrwal ... Respondent

Prayer:

Arbitration Original Petition filed under Section 11(5) of the Arbitration and Conciliation Act, 1996, praying to appoint an Arbitrator to adjudicate the disputes between the parties arising out of the Purchase Orders mentioned therein.

For Petitioner: Mr.Anirudh Krishnan
assisted by Mr.Ramkishore Karanam
Ms.Rupikaa Srinivasan and
Ms.Samriddhi Sanga

For Respondent: Mr.Arun C.Mohan
asst.by Mr.Advaiddh Neelakantan and
Mr.Avanti Balachander



Arb.O.P.(Com.Div.) No.191 of 2024

ORDER

WEB COPY This Arbitration Original Petition has been filed under Section 11(5) of the Arbitration and Conciliation Act, 1996 (in short, 'the Act') by the petitioner, praying to appoint an Arbitrator to adjudicate the disputes between the parties arising out of the Purchase Orders mentioned therein.

2. Facts in brief, giving rise to the filing of the present Original Petition, are as follows:

3. The petitioner herein is a Public Limited Company, deals with the business of Water Infrastructure Projects across the globe. The petitioner issued Letters of Intent to the respondent for the supply of High Density Polyethylene Pipes for its projects. In pursuant to the Letters of Intent, the petitioner issued as many as 22 Purchase Orders on various dates. Every Purchase Order contains the following Clause:

“Note: The Purchase Order shall be governed by the
“General Conditions of Contract for procurement of
Materials/Equipment” until unless specified”

3.1 According to the petitioner, a harmonious reading of the above



would go to show that the Purchase Orders were evidently issued in pursuant to the Letters of Intent and thereby, the General Conditions of Contract (in short, 'GCC') would govern the Purchase Orders which were issued for the projects.

3.2 While so, according to the petitioner, dispute arose between the parties in relation to the supply of poor quality of pipes for the projects and the petitioner made various claims vide letter dated 13.10.2023 to the tune of Rs.116.33 Crores. The respondent issued a legal notice dated 29.01.2024 and raised 3 counter claims against the petitioner in relation to the projects, which are in the nature of termination payments, alleged outstanding dues and damages.

3.3 The petitioner, invoking Clause 28 of the GCC, issued a notice on 09.02.2024, calling upon the respondent to amicably resolve the dispute. It appears that despite settlement talks held between the parties, no amicable settlement was arrived at. The respondent vide letter dated 18.03.2024 declined to mutually appoint an Arbitrator in accordance with Clause 28.2 of



the GCC and recommended an appointment of the Arbitrator under the provisions of Section 11(6) of the Act. In reply, the petitioner issued a notice of arbitration dated 22.03.2024 under Section 21 of the Act, suggesting a broad-based panel of arbitrators from legal and technical background and requested to confirm the name of any one of them as the Arbitrator. However, the respondent vide letter dated 21.03.2024, reiterated that they recommended the appointment of an independent arbitrator under Section 11(6) of the Act. This was again confirmed by the respondent vide letter dated 23.03.2024. However, according to the petitioner, despite the explicit admission on the part of the respondent to act in accordance with the GCC in relation to the referral of the disputes to arbitration, the respondent denies the very existence of GCC itself. Hence, the petitioner has come forward with the present petition.

4. Resisting the petition, the respondent filed a counter affidavit, wherein, it is stated that the terms and conditions stipulated under GCC do not bind the respondent. There is only a general reference to the same and no specific reference to the arbitral clause. The GCC has not been signed by



either of the parties and the respondent does not have original signed copy of the GCC for any of the Purchase Orders as the same was not signed by the respondent under Clause 30.7 of the GCC, which stipulates that the GCC which forms part of the Contract along with Purchase Orders and Letters of Intent, shall be executed by both the parties and both parties have to retain an original copy of the same. Therefore, both the petitioner and respondent have not signed the GCC and not retained an original copy as per Clause 30.7 of the GCC and as such, the petitioner cannot seek to enforce the terms and conditions of the GCC. Only Letters of Intent and Purchase Orders were issued by the petitioner to the respondent and the GCC has never been provided to the respondent along with Purchase Orders. Merely providing a link to the GCC in the Purchase Orders, does not mean that the respondent has rendered its acceptance to the terms and conditions of the GCC, especially when the GCC itself provides a strict stipulation that the same will have to be signed by both the parties and retaining originals of the same.

4.1 As regards Note contained in Purchase Orders, it is stated that the said Note provides that the execution or performance of purchase order shall



be in terms of GCC, however, the same does not include anything with regard to the arbitration agreement referred in the GCC. Further, the said Purchase Orders were not signed by the respondent and hence, there is no consensus between the parties with regard to the invocation of arbitration.

4.2 As regards the jurisdiction of this Court, it is stated that based on the Clause 29.2 of the GCC, the petitioner invoked the jurisdiction of this Court. However, since the said GCC was not signed by the respondent, it will not bind on the respondent. That apart, the respondent does not have its business within the jurisdiction of this Court. Therefore, there is no territorial nexus, whatsoever, to invoke the jurisdiction of this Court and the present petition is not maintainable and the same is liable to be dismissed *in limine*.

4.3 It is further stated that in all the States, the samples of the respondent were duly passed and cleared both at factory premises and at the external testing labs and hence, there is no question of any arbitration for the present Purchase Orders of the petitioner. It is also stated that in the all



Arb.O.P.(Com.Div.) No.191 of 2024

Invoices issued by the respondent which were accepted by the petitioner, as regards jurisdiction, it is clearly mentioned as 'subject to Burhanpur Jurisdiction' and therefore, since the business of the respondent is located at Burahanpur and as no cause of action arose in Tamil Nadu, this Court has no jurisdiction to entertain the present Original Petition. Hence, the respondent prays this Court to dismiss this petition.

5. Mr.Anirudh Krishnan, learned counsel appearing for the petitioner would contend that the respondent has not disputed the Purchase Orders issued by the petitioner which contain a 'Note' specifically prescribing that *“the Purchase Order shall be governed by the “General Conditions of the Contract for procurement of materials/equipment” until and unless specified*' and the respondent has never questioned this, but acted upon the same and later issued Invoices also. He pointed out that the GCC contains an arbitration Clause 28.2 which provides adjudication of the dispute by way of arbitration and the respondent is well aware of the fact that the GCC can be directly downloaded from the petitioner's web portal. Therefore, the learned counsel would submit that in terms of the express provisions of the



Arb.O.P.(Com.Div.) No.191 of 2024

GCC, the dispute between the parties is arbitrable and this Court has jurisdiction to entertain the petition under Section 11(6) of the Act.

6. The learned counsel would also point out that in fact, the respondent, vide their letters 23.03.2024, 18.3.2024 and 21.03.2024, has explicitly agreed for reference to arbitration before an independent Arbitrator to be appointed by the Hon'ble High Court, however, having agreed as such, now, unfortunately, the respondent denies the existence of the GCC and resists appointment of the Arbitrator.

7. He pointed out that admittedly, the Letters of Intent were accepted and counter signed by the respondent and even though the Purchase Orders were not signed, it has to be construed that after acceptance of the Letters of Intent, the petitioner issued Purchase Orders wherein, the Note has clearly mentioned that the purchase order shall be governed by the GCC, wherein, Clause 28 provides 'Dispute Resolution' by way of amicable settlement and arbitration and venue of arbitration, and therefore, it is *prima facie* established that the respondent is *ad idem* to the arbitration, any dispute



arises between the parties, the same shall be subject to the arbitration by a

WEB COPY Sole Arbitrator to be chosen from the panel of arbitrators to be furnished by the purchaser.

8. The learned counsel would also contend that though the Purchase Orders were not signed by the respondent, however, the respondent has downloaded the same and acted upon the same. He referred to the legal notice dated 29.01.2024, wherein, the respondent mentioned that they downloaded the Purchase Orders from the petitioner's portal by using login and password provided by the petitioner. Therefore, the learned counsel would argue that once the respondent downloaded the purchase orders and the GCC and gone through the same, which contained Note clarifying that the purchase order shall be governed by the GCC, the same would bind on the respondent and even by way of exchange of letters and legal notices by the parties, an inference could be drawn that there is arbitration agreement. Therefore, he would contend that there would be no need to sign the arbitration agreement. In this regard, the learned counsel would rely upon the decisions of the Hon'ble Supreme Court reported in (2020) 12 SCC 767

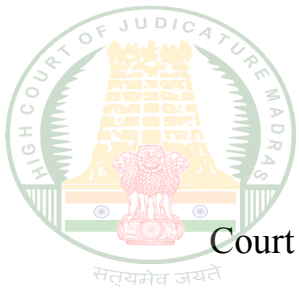


Arb.O.P.(Com.Div.) No.191 of 2024

(Mahanagar Telephone Nigam Limited versus Canara Bank and others”

WEB COPY and (2015) 13 SCC 477 (***Govind Rubber Limited versus Lois Dreyfus Commodities Asia Private Limited***).

9. The learned counsel would further contend that in fact, the respondent vide letters dated 18.03.2024, 21.03.2024 and 23.03.2024, has accepted that the dispute to be resolved by an independent Arbitrator appointed by the Hon'ble High Court under the provisions of Section 11(6) of the Act. However, the respondent, relying upon Invoices, would insist upon the dispute to be resolved within the jurisdiction of Burhanpur. The learned counsel would point out that mere specification in the invoice of a contrary jurisdiction clause will not override the jurisdiction/arbitration clause that was already existing the GCC. In this regard, the learned counsel would rely upon a decision of the Hon'ble Supreme Court reported in 2023 SCC OnLine Bom 1942 (***Parekh Platichem Distributors LLP versus Simplex Infrastructure Limited***). Therefore, the learned counsel would submit that there is a clear jurisdiction clause in the GCC and the dispute is arbitrable by virtue of Clause 28.2 of the GCC and hence he would urge this



Arb.O.P.(Com.Div.) No.191 of 2024

Court to entertain the present application and appoint an independent Arbitrator for adjudication of the dispute between the parties.

10. On the other hand, Mr.Arun C.Mohan, learned counsel appearing for the respondent would contend that the parties have entered into six Letters of Intent with regard to supply of HDPE pipes, which were only the documents signed and executed by both the parties and the said Letters of Intent contained no reference to the GCC. He would point out that the petitioner has deliberately suppressed the Invoices issued by the respondent which were acted upon and accepted by the petitioner, wherein, the jurisdiction refers to 'Burhanpur' Madhya Pradesh where the business of the respondent is located, as such, this Court does not have jurisdiction to entertain the present petition. He would further contend that the respondent never accepted the GCC and the terms contained therein are not binding on the respondent including the arbitration clause since the respondent has not signed the same. He pointed out that even the provisions of the GCC stipulate that every contract shall be signed by the parties and each party shall be provided with one signed original copy, but in the present case,



admittedly, both parties have not signed and this makes it clear that there

was no consensus *ad idem* with respect to the terms of the GCC including the arbitration clause and exclusive jurisdiction contained therein. Therefore, he would submit that when the respondent has not consented to the arbitration clause, the dispute cannot be referred to the arbitration. In this regard, he relied upon a decision of the Hon'ble Supreme Court in “**NBCC (India) Limited versus Zillion Infraprojects Pvt.Ltd.**” 2024 SCCd OnLine SC 323. According to the learned counsel, the present case is a clear example of two contract case, viz., the Letters of Intent is the fulcrum of the relationship pursuant to which, the Purchase Orders were issued and Clause 30.7 of the GCC mandates the signature of the parties which has not been done so or waived in the present case and therefore, it is clear that there is no conscious acceptance of the GCC by the respondent and thereby there is no consensus *ad idem* between the parties with respect to the arbitration clause or exclusive jurisdiction and since there is no specific reference made to the arbitration clause in the Purchase Orders, the same is not binding on the respondent.

11. The learned counsel for the respondent would also contend that



the present petition is not maintainable since it is tainted with material suppression. He pointed out that the respondent issued Invoices which specifically mentioned that the Invoices will be subject to Burhanpur jurisdiction and the same was never disputed by the petitioner and hence when once, the petitioner has consciously accepted the invoices, the petitioner ought not to have to invoked the jurisdiction of this Court and further, this aspect has been suppressed by the petitioner.

12. He also contended that in the present case, Letters of intent are the only documents signed by both parties, pursuant to which, Purchase Orders have been issued which contains a mere reference to another contract, i.e. the GCC, which was admittedly, never signed by the respondent. He referred to the decisions of the Hon'ble Supreme Court in ***“Padia Timber Company Private Limited versus Board of Trustees of Vishakapatnam Port”*** (2021) 3 SCC and ***“Deokar Exports Private Limited versus New India Assurance Company Limited”*** (2008) 14 SCC 598 and submitted that when the acceptor puts a new condition while accepting the contract, the contract is not complete until the prosper accepts



that condition. He pointed out that in the present case, the respondent never

accepted the arbitration clause contained in the GCC and hence, the present petition is liable to be dismissed as not maintainable before this Court. He also submitted that there is no part of cause of action arose within the jurisdiction of this Court since no supply of pipes were made in the state of Tamil Nadu and even on the basis of correspondence exchanged between the parties, the petitioner cannot invoke the jurisdiction of this Court since the respondent disputes the existence and validity of the GCC. He referred to a decision of the Hon'ble Supreme Court in “**BGS SGS Soma JV versus NHPC Limited**” (2020) 4 SCC 234, wherein, it is held that when the parties have not agreed upon seat/venue of arbitration, the Court where the cause of action arose, will have the jurisdiction, while so, in the present case, the parties have not agreed to 'seat'/'venue' of the arbitration in the correspondence exchanged by them and also as no cause of action arose in state of Tamil Nadu, the petitioner cannot invoke the jurisdiction of this Court. With these contentions, the learned counsel for the respondent sought for dismissal of the present petition.

13. Heard the learned counsel for the petitioner and the learned



Senior Panel Counsel for the respondent and perused the entire materials

WEB COPY available on record.

14. Now the point that arises for consideration is whether the petitioner has made out a case for appointment of a Sole Arbitrator for adjudication of the dispute between the parties?

15. To constitute an arbitration agreement, there must be an agreement between the parties, viz., the parties must be *ad idem*. Section 7(4)(b) of the 1996 Act, states that an arbitration agreement can be derived from exchange of letters, telex, telegram or other means of communication, including through electronic means. The 2015 Amendment Act inserted the words “including communication through electronic means” in Section 7(4)(b). If it can *prima facie* be shown that parties are *ad idem*, even though the other party may not have signed a formal contract, it cannot absolve him from the liability under the agreement.

16. It is well settled law that, in order to consider whether there is



Arb.O.P.(Com.Div.) No.191 of 2024

any arbitration agreement between the parties and also in order to

WEB COPY

consider what is the arbitration agreement, the intention of the parties

is paramount. The reason for this is obvious that Arbitration is a consensual form of dispute resolution which, barring a few exceptions, can be resorted to only if parties have consented to the same.

17. In the light of this settled position in law, in the present case, it would have to be considered as to whether the parties intended to be bound by the Arbitration Clause by virtue of GCC contained in the Purchase Orders issued by the petitioner or by the Arbitration Clause contained in the Invoices raised by the respondent.

Purchase Order vis-a-vis Invoice:

18. In the present case, admittedly, both parties have entered into six Letters of Intent with respect of supply of HDPE pipes, which contain the following:

“Please treat this as FIRM COMMITMENT and send us the copy of the LOI duly signed with seal as a token of



WEB COPY



Arb.O.P.(Com.Div.) No.191 of 2024

acceptance. Formal Purchase Order with detailed terms and conditions will be released shortly.”

19. It is not in dispute that the Letters of Intent have been countersigned and sent by the respondent and pursuant to which, the petitioner issued Purchase Orders from their office at Chennai. The purchase orders contain the 'Note' which reads as under:

“Note: The Purchase Order shall be governed by the “General Conditions of Contract for procurement of Materials/Equipment” until unless specified. It is important that seller confirms acceptance of this Purchase Order within 7 days of receipt. Failure to return the acceptance does not diminish the responsibilities as set forth herein, but may result in a delay to any payments that may be due and may be a cause of termination of this Purchase Order. In case of any clarification required, please contact the Purchase Order Issuing Authority.

“For any issue, payment or otherwise, relating to this PO/WO, please raise a grievance request by logging into the Partner Grievance Redressal Portal available in the Partner Portal mentioning the PW/WO number, the reason for the grievance a brief description of the same



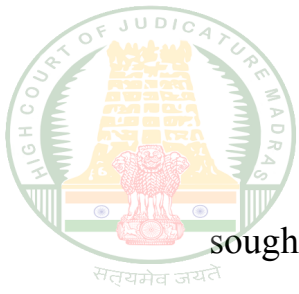
WEB COPY



Arb.O.P.(Com.Div.) No.191 of 2024

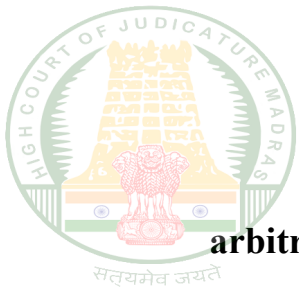
along with the necessary attachments. E-mails to individuals will not be responded to. Line for the portal: <https://partners.Intecc.com/PartnerMgmtApp/home.>”

20. It is pertinent to note that having acknowledged the above and gone through the contents of the Purchase Orders, the respondent, in turn, raised respective Invoices. In fact, in the Invoices raised by the respondent and sent to the petitioner for payment, the respondent has referred to the said respective Purchase Orders. Therefore, by virtue of the this correspondence exchanged between the petitioner and the respondent, it can be easily ascertained that the respondent has virtually agreed to the terms and conditions mentioned in the Purchase Orders which specifically refers that the Purchase Orders shall be governed by the “General Conditions of Contract” (GCC). If at all the respondent has any grievance or not acceptable to the terms of the Purchase Order, the respondent ought to have raised a query or addressed to the Purchase Order Issuing Authority since in the above referred Note, it has been categorically stated that ***'in case of any clarification required, please contact Purchase Order Issuing Authority'***. Admittedly, the respondent has not raised any query nor



WEB COPY

sought for any clarification, but issued Invoices having acted upon the purchase orders. Therefore, by virtue of acceptance of the Purchase Order which contain reference to the GCC, it would clearly indicate the intention of the respondent that they are inclined to go for the terms mentioned in the Purchase Order. Therefore, when the parties have acted upon the Purchase Order, it would clearly establish that the parties were *ad idem* and even though the respondent has not signed the formal contract, it cannot absolve them from the liability under the agreement. It is settled law that arbitration agreement need not be in any particular form or required to be signed by the parties and mere intention of the parties to settle their disputes through arbitration, is sufficient. **When such being the situation, in the present case, having consciously accepted and acted upon the Purchase Orders including the terms and conditions contained therein including GCC and consequently, based on such Purchase Orders, the respondent raised Invoices, this Court is of the considered view that the Purchase Orders would certainly constitute a main agreement between the parties and as such, the Purchase Orders will prevail over the Invoices. Therefore, the respondent cannot dispute that there is no agreement of**



arbitration between the parties.

WEB COPY

21. However, on one hand, while even denying the very existence of GCC and the terms contained therein will not apply to the present dispute, the learned counsel for the respondent, on the other hand, curiously would rely upon Clause 30.7 of the GCC and contend that as per this Clause, the contract has to be necessarily signed in (2) two originals and each party shall be provided with one signed original copy, which, had not taken place and as such, there is no conscious acceptance of the GCC by the respondent. This argument, in my opinion, is hyper technical and cannot be sustained for more than one reason. Firstly, it is not in dispute that in the Purchase Orders, there is reference to the Note (extracted supra), which specifically indicates that the Purchase Order shall be governed by the 'GCC". Here it is pertinent to note that the purchase orders were issued based upon the Letters of Intent which were admittedly signed by the respondent. Secondly, as already discussed supra, upon placing the Purchase Orders by the petitioner, the respondent raised Invoices having



Arb.O.P.(Com.Div.) No.191 of 2024

accepted the terms and conditions of the Purchase Orders by which, it is clear that the respondent has consciously acted upon the Purchase Orders, which specifically referred to GCC which contains arbitration clause. Thirdly, the respondent has mentioned the Purchase Orders in the Invoices raised by them. Therefore, having accepted and acted upon the Purchase Orders, the respondent cannot rely upon the Clause contained in the Invoices which states that the Invoices will be subject to Burhanpur jurisdiction since the said clause contained the Invoices, in the opinion of this Court, is unilateral and mere making payment by the petitioner pursuant to the Invoices, would not *ipso facto* be construed as consent or agreement to the terms of the Invoices by the petitioner. As rightly contended by the learned counsel for the petitioner that the petitioner has made payment towards Invoices raised by the respondent under bona fide impression that the respondent had agreed to the terms and conditions of the Purchase Orders including GCC and issued Invoices. In fact, the respondent is nothing but trying to supersede the Purchase Orders by virtue of the Invoices, by technically contending that there is no arbitration agreement at all



WEB COPY

between the parties as the parties have not signed any arbitration agreement. It is to be noted that the Invoices raised by the respondent are only consequent to the Purchase Orders and this Court, as already discussed supra, held that the Purchase Orders would constitute a main agreement between the parties since both parties were *ad idem* to the terms contained in the Purchase Orders and also acted upon the same.

22. The learned counsel for the respondent heavily relied upon a decision in “*Aviagen India Poultry Breeding Company Private Limited versus R.Geetha Ranjani*” (Arb.O.P.(Com.Div.) No.24 of 2023), wherein, a learned single Judge (Myself) of this Court, has categorically held that the arbitration Clause contained in the Invoices, would be binding on the parties. Therefore, the learned counsel for the respondent would contend that since the Invoices raised by the respondent specifically contained arbitration clause, the same would be binding on the petitioner. This decision, in the opinion of this Court, would not improve the case of the respondent since taking note of the fact that there was no arbitration clause contained in the Purchase Order, this Court held

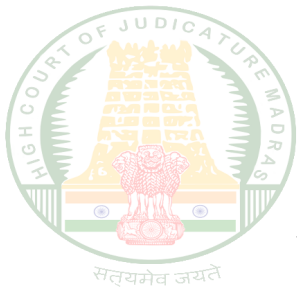


WEB COPY

that the Invoices which contained arbitration clause, would be binding on the parties. But in the present case, in the purchase orders, there is specific reference to GCC which contained arbitration clause and hence, the Invoices even though contained arbitration clause, which were raised subsequent to the Purchase Orders and as the said arbitration clause is unilateral, the same would not be binding upon the petitioner. Therefore, it can be safely concluded that the Purchase Orders would prevail over the Invoices and the parties shall abide by the terms and conditions mentioned in the Purchase Orders.

23. It is worthwhile to refer a decision relied upon by the learned counsel for the petitioner, reported in “*Mahanagar Telephone Nigam Limited versus Canara Bank and others*” (2020) 12 SCC 767, wherein, it has been held as under:

“9. The existence of a valid Arbitration Agreement: A valid arbitration agreement constitutes the heart of an arbitration. An arbitration agreement is the written agreement between the parties, to submit their existing, or future disputes or differences, to arbitration. A valid arbitration agreement is



WEB COPY



Arb.O.P.(Com.Div.) No.191 of 2024

the foundation stone on which the entire edifice of the arbitral process is structured. A binding agreement for disputes to be resolved through arbitration is a sine~qua~non for referring the parties to arbitration.

9.1 Section 7 defines arbitration agreement and reads as follows :

'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 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) There 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.

9.2. The arbitration agreement need not be in any particular form. What is required to be ascertained is the



WEB COPY



Arb.O.P.(Com.Div.) No.191 of 2024

intention of the parties to settle their disputes through arbitration. The essential elements or attributes of an arbitration agreement is the agreement to refer their disputes or differences to arbitration, which is expressly or impliedly spelt out from a clause in an agreement, separate agreement, or documents/correspondence exchanged between the parties.

9.3. Section 7(4)(b) of the 1996 Act, states that an arbitration agreement can be derived from exchange of letters, telex, telegram or other means of communication, including through electronic means. The 2015 Amendment Act inserted the words including communication through electronic means in Section 7(4)(b). If it can prima facie be shown that parties are ad idem, even though the other party may not have signed a formal contract, it cannot absolve him from the liability under the agreement.

9.4. Arbitration agreements are to be construed according to the general principles of construction of statutes, statutory instruments, and other contractual documents. The intention of the parties must be inferred from the terms of the contract, conduct of the parties, and correspondence exchanged, to ascertain the existence of a binding contract between the parties. If the documents on record show that the parties were ad idem, and had actually



WEB COPY



Arb.O.P.(Com.Div.) No.191 of 2024

reached an agreement upon all material terms, then it would be construed to be a binding contract.

The meaning of a contract must be gathered by adopting a common sense approach, and must not be allowed to be thwarted by a pedantic and legalistic interpretation.

9.5. A commercial document has to be interpreted in such a manner so as to give effect to the agreement, rather than to invalidate it. An arbitration agreement is a commercial document inter partes, and must be interpreted so as to give effect to the intention of the parties, rather than to invalidate it on technicalities.

24. From the above, it is clear that if it is proved that the parties are *ad idem* even though the other party may not have signed a formal contract, it cannot absolve him from the liability under the agreement. In the present case, as already stated supra, the respondent was *ad idem* to the terms and conditions of the Purchase Orders, which refer that the purchase orders will be governed by the GCC which includes arbitration Clause. Clause 28 of the GCC provides 'dispute resolution', which reads as under:

“28. DISPUTE RESOLUTION:



28.1. Amicable Settlement

If any dispute of any kind whatsoever shall arise between the Purchaser and the Supplier, in connection with or arising out of the Contract, including without prejudice to the generality of the foregoing, any question regarding its existence, validity, termination, or execution, during term of the Contract, and whether before or after the termination, abandonment or breach of the Contract ("Dispute"), the Parties shall seek to resolve the Dispute in good faith by mutual consultation. If the Parties fail to resolve the Dispute by mutual consultation within [30 (thirty)] days after notice of the Dispute by one Party to the other Party then the provisions of Clause 28.2 (Arbitration) shall apply.

28.2. Arbitration

28.2.1 If any Dispute is not resolved by the Parties the Dispute, Clause 28.1 (Amicable Settlement) within (30 (thirty) days) of the notice of the Dispute, then either Party may, within [15 (fifteen) days of such reference, provide not the other Party, of its intention to commence arbitration, as hereinafter provided, as to the matter in Dispute.

28.2.2 Any Dispute in respect of which a notice of intention to commence arbitration has been provided in accordance with Clause 28.2.1 above, shall be finally settled by arbitration.

28. 2. 3 Any Dispute Submitted by a Party to arbitration shall be heard by a sole arbitrator to be chosen from the panel of arbitrators to be furnished by the Purchaser.

Clause 28.2. 4 Arbitration proceedings under this clause 28.2 shall be conducted pursuant to the (Indian) Arbitration and Conciliation Act, 1996 as may be amended, modified, or supplemented from time to time.



WEB COPY



Arb.O.P.(Com.Div.) No.191 of 2024

28.2.5 The decision of the arbitrator shall be final and binding and shall be enforceable in any court of competent jurisdiction as decree of the court. The Parties hereby waive any objections to or claims of immunity from such enforcement.

28.2.6 The venue and seat for the arbitration will be [Chennai, Tamil Nadu] and the language for conduct of the arbitration proceedings shall be English."

Clause 29 provides the venue of arbitration, which reads as under:

"29. GOVERNING LAW AND JURISDICTION

29.1 Governing Law

The Contract shall be governed by and be interpreted in accordance with the laws of India.

29.2 Jurisdiction

The Courts at Chennai shall have exclusive jurisdiction in respect of all matters relating to or arising out of the Contract."

25. Therefore, a reading of the above two Clauses, it is explicit that if any dispute of any kind whatsoever arises between the Purchaser and the Supplier, the parties shall, at the first instance, seek to resolve the dispute in good faith by mutual consultation, failing which, to get the dispute resolved through arbitration and the venue of arbitration is at Chennai.

26. In fact, both the parties have tried to resolve the dispute amicably by conducting meetings on 16.02.2024 and 02.03.2024, but unfortunately,



the same ended in failure. Thereafter, the petitioner, vide letter, dated

09.03.2024, brought to the knowledge of the respondent of their intention to

get the dispute adjudicated by way of arbitration. In reply to this letter, the respondent, vide their letter dated 18.03.2024, while denying the existence of agreement for arbitration, have fairly agreed that a dispute has arisen between the parties with respect to the supply of pipes made by them and payments thereof withheld by the petitioner and the same requires to be finally adjudicated by an independent authority. Further, the respondent has advised the petitioner to get an independent Arbitrator being appointed by the High Court under Section 11(6) of the Act. The relevant portion is extracted as under:

“Therefore, we would advise you to get an independent Arbitrator appointed by the Hon'ble High Court under the provisions of Section 11(6) of the Arbitration & Conciliation Act, 1996.”

27. Therefore, the respondent though denying the execution of the agreement for arbitration *vis-a-vis* existence of the GCC, consciously reported no objection to get the dispute resolved through an independent Arbitrator to be appointed by the High Court.



WEB COPY 28. Thereafter, the petitioner issued notice of arbitration under Section 21 of the Act on 22.03.2024 invoking Clause 28.2.1 of the GCC, suggesting to get the dispute resolved by an Arbitrator from a broad-based panel of Arbitrators who had legal and technical background and requested the respondent to confirm the name of any one of them to act as an Arbitrator.

29. However, in reply to the notice of arbitration, vide letter dated 23.3.2024, the respondent once again admitted by reiterating that the dispute can be resolved through an independent Arbitrator. The relevant portion is extracted as under:

“... Our client admits that there is a dispute due to withholding of payments of our client for supply of pipes to various projects of your client and therefore, in exclusion of the applicability of GCC and arbitration agreement contained therein, our client agrees to refer all the disputes pertaining to all the projects on pan India to an Independent Arbitrator to be appointed by Hon'ble High Court exercising powers conferred under Section 11(6) of the Arbitration and Conciliation Act, 1996...”



WEB COPY

30. Therefore, though disputing the existence of the GCC, the respondent has expressed their intention to get the dispute resolved through an independent Arbitrator to be appointed by the High Court under Section 11(6) of the Act, which prompted the petitioner to come forward with the present petition. The only apprehension of the respondent as could be seen from their correspondence is that an Arbitrator suggested by the petitioner from their panel, would be unilateral and to avoid award being passed on bias and partition, they sought an independent Arbitrator to be appointed by the High Court under Section 11(6) of the Act.

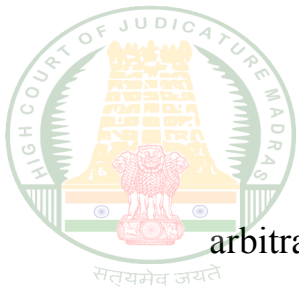
31. It is pertinent to note that while making the petitioner constrained to approach the Court of law for appointment of an independent Arbitrator for adjudication of the dispute between the parties, the respondent resisted the petition on the ground that this Court lacks jurisdiction to appoint the Arbitrator as no cause of action arose in the State of Tamil Nadu and by referring to the Invoices issued by the respondent, it has been mentioned that the Invoices will be subject to the Burhanpur jurisdiction and hence the petitioner has to approach the Courts at Burhanpur. It is relevant to mention



Arb.O.P.(Com.Div.) No.191 of 2024

here that nowhere in the correspondence of letters, notice, etc., the respondent has never raised the issue of jurisdiction, but only insisted upon to get the dispute resolved through an independent Arbitrator to be appointed by the High Court under Section 11(6) of the Act. In fact, as could be seen from the legal notice dated 29.01.2024 issued by the respondent to the petitioner, it appears that the respondent also made claim to the tune of Rs.65 Crores towards the supply of pipes made by them, for the pipes ordered by the petitioner lying with the respondent, towards cost of grinding of the pipes already manufactured and towards damages, etc. However, surprisingly, all along, while denying the existence of GCC including the agreement for arbitration and declining to accept the appointment of any Arbitrator by the petitioner, advised the petitioner to get the appointment of an independent Arbitrator under Section 11(6) of the Act. But no steps have been taken by the respondent to refer the dispute in respect of their claim to the Arbitrator by invoking the jurisdiction of the Courts at Burhanpur.

32. In interpreting or construing an arbitration agreement or



arbitration clause, it would be the duty of the Court to make the same

WEB COPY

workable within the permissible limits of the law. In “*Enercon (India) Ltd.*

v. Enercon GmbH [Enercon (India) Ltd. v. Enercon GmbH, (2014) 3 SCC

(Civ) 59, the Hon'ble Supreme Court held that if the documents on record

show that the parties were *ad idem*, and had actually reached an agreement

upon all material terms, then it would be construed to be a binding contract.

The meaning of a contract must be gathered by adopting a common sense

approach, and must not be allowed to be thwarted by a pedantic and

legalistic interpretation. In the present case, from the documents available on

record, it can safely be inferred that there had been meeting of mind between

the parties and they were *ad idem* to the terms of the Purchase Orders

which clearly indicated that the Purchase Orders shall be governed by the

GCC which contains the arbitral clause.

33. In the light of the above discussion, this Court is of the considered view that the petitioner has made out a case for appointment of the Arbitrator for adjudication of the dispute between the parties.



34. Accordingly, this Court feels it appropriate to pass the following

WEB COPY order:

i) **The Hon'ble Mr.Justice Sanjay V.Gangapurwala, Former Chief Justice, Madras High Court, residing at Durga Mata Mandira Samor, House No.2-2-278, Govardhanagiri, Kharakuwa, Aurangabad – 431 001, Mobile No.9960812300** is appointed as sole Arbitrator to enter upon reference and adjudicate the disputes *inter se* the parties

ii) The learned Arbitrator appointed herein, shall, after issuing notice to the parties and upon hearing them, pass an award as expeditiously as possible, preferably within a period of six months from the date of receipt of the Order. The learned Arbitrator is requested to decide the matter without being influenced by any of the observations made by this Court in the present order.

iii) The learned Sole Arbitrator appointed herein, shall be paid fees and other incidental charges, as per Schedule IV of the Act and the same shall be borne by the parties equally. In the event of non-appearance of the respondent, the petitioner shall bear the entire remuneration and other expenses and



WEB COPY



Arb.O.P.(Com.Div.) No.191 of 2024

thereafter, the petitioner can recover the same directly from the respondent and vice versa.

35. With the above directions, this Arbitration Original Petition stands allowed. No costs.

Suk

29.07.2024



WEB COPY



Arb.O.P.(Com.Div.) No.191 of 2024

KRISHNAN RAMASAMY, J.

suk

Arb.O.P.(Com.Div.) No.191 of 2023

29.07.2024