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

\+ ARB.P. 100/2021

SWASTIK PIPE LTD ..... Petitioner
Through: Mr. Sanjay Jain, Adv.

versus

MS. DIMPLE VERMA ..... Respondent
Through: Mr. Alok Sharma, Adv.

CORAM:
HON'BLE MR. JUSTICE V. KAMESWAR RAO

O R D E R

% 06.07.2022

1. This petition has been filed by the petitioner with the following prayers:

> *"It is, therefore, most respectfully prayed that this Hon'ble Court may be pleased to:-*
>
> *(a) Appoint a Sole Arbitrator for adjudicating the dispute(s) arising out of the business transactions between the parties herein;*
>
> *(b) Pass such other and further order(s), as this Hon'ble Court may deem fit and proper in the facts and circumstances of the present case."*

2. It is the case of the petitioner that pursuant to the business dealings and relations, C.R. Sheets & C.R. Strips, Solar Module Mounting Structure, ERW Precision Tube and Galved Steel Tube were being purchased by the respondent on a running account basis and on the basis of tax invoices, part payments were subsequently being made by the respondent. That the business dealings between the parties for the period April 1, 2019 to February 28, 2020 were for an amount of ₹10,07,109/- which has not been

paid by the respondent.

3. It is the case of the petitioner that the petitioner vide notice dated March 3, 2020 had invoked the arbitration clause contained in Clause 2 of the terms and conditions of the tax invoice which reads as under:

> *"2. All disputes, touching and/or concerning this bill, shall be, solely, resolved by an arbitrator duly appointed by the Han 'ble Delhi High Court under the Arbitration and Conciliation Act, 1996, as amended unto date or any repeat thereof The seat of arbitration shall be Delhi and shall be solely and exclusively subject to Delhi jurisdiction. The language of arbitration proceedings shall be English."*

4. It is the case of the respondent that though the notice was not served to her and the same was returned back, the petitioner has filed the present petition seeking appointment of the Arbitrator.

5. However, reply has been filed to the petition wherein an objection has been taken that there exists no arbitration agreement as provided under Section 7 of the Act between the parties herein. The stand of the respondent as contended by its counsel is that in the absence of any agreement there is no Dispute Resolution Mechanism between the parties for it to be referred to arbitration.

6. The learned counsel for the respondent has relied upon the Judgment of the Bombay High Court in the case of ***Concrete Additives and Chemicals Pvt. Ltd. v. S.N. Engineering Services Pvt. Ltd., Arbitration Appl. (L) No. 23207/2021,*** to submit that tax invoice cannot be construed as an agreement between the parties as the same is unilateral and not signed by the respondent.

7. In rejoinder submission, learned counsel for the petitioner would contest the submission made by the learned counsel for the respondent by

drawing my attention to the Judgment of the Coordinate Bench of this Court in the case of ***Swastik Pipe Ltd. v. Shri Ram Autotech Pvt. Ltd., Arb. P. 241/2021*** to contend that invoices duly signed containing an arbitration clause having been received by the respondent and under similar invoices payment having been made, the same is binding between the parties. He has also referred to the Judgment of the Division Bench of this Court in the case of ***Scholar Publishing House Pvt. Ltd. v. M/s. Khanna Traders, 2013 (3) Arb. LR 105 (Delhi)***. Similarly, in his submissions, by relying upon the Judgment passed by the Hon'ble Supreme Court, in the case of ***MTNL v. Canara Bank, Civil Appeal Nos. 6202-6205/2019,*** decided on August 8, 2019 in support of his submission that in terms of Section 7(4)(b) of the Arbitration and Conciliation Act, 1996 ('Act of 1996', for short), it is clear that arbitration agreement can be derived from exchange of letters / telex / telegram or other means of communication including through electronic means and if it is shown that the parties are at ad-idem even though the other party may not have signed a formal contract, it cannot absolve the other party from the liability under the agreement. According to him, respondent has not contested the claim of the petitioner that the tax invoice is not payable. Hence, he seeks the appointment of an Arbitrator by this Court.

8. Having heard the learned counsel for the parties, the issue which arises is, whether the tax invoice stipulating an arbitration clause as referred to above can bind the parties and consequently the dispute inter-se be referred to arbitration. The issue is no more *res-integra* in view of the Judgment of the Division Bench of this court in the case ***Scholar Publishing House Pvt. Ltd. (supra)***, wherein this Court in paragraphs 5 and 6 held as under:

"5. Learned Senior Counsel for the respondents submitted that the appeal lacks in merit. He relied on the observations in Newsprint Sales Corporation (supra), as well as the decisions reported as Lewis W. Fernandez v Jivatlal Partapshi & Ors AIR 1947 Bom 65 and Ram Chandra Ram Nag Ram Rice & Oil Mills Ltd v Howrah Oil Mills Ltd. and Anr. AIR 1958 Cal 620. The respondent/claimants also urge that the history of transactions between the parties clearly showed that the appellant had accepted by his conduct, the invoices which contained the arbitration clause, and on most occasions honored them. It was therefore, not open for him to contest the existence of an arbitration agreement. Reliance was also placed on the findings and observations of the arbitrator in the award published by him.

6. In the award, while dealing with the question of whether the parties had entered into an arbitration agreement, the arbitrator held as follows:

"……..The bills filed with the petition clearly show that there is an arbitration clause between the parties and the claimant is the member of the Paper Merchant Association. The bills/invoices issued by the claimant have been duly received and acknowledged by the defendants. The claimant and defendants are working together since 1996 and the opposite party has made payment against the supplies made by the claimant prior to the arising of the present controversy. From 1996 when the business dealings were started the claimant and defendants were duly placing orders and were receiving goods and was making the payments. The bills issued were having arbitration clause as per which this Arbitrator has got power to adjudicate the dispute.The rates and terms mentioned on all the bills have been acknowledged and accepted by the defendants. The statements of accounts have been signed by the Director and confirmed by the defendants. The Debit Notes for interest issued by the claimant were accepted and the required TDS was deducted and TDS certificates were issued. The defendants have never made any objection with regard to the bills, rates and terms or the adjudication of

the dispute by this tribunal, thus, it can be easily said that defendants have nothing to say in their defence……."

9. Similarly, the Division Bench has in that case while referring to a Judgment of the Bombay High Court in the case of ***Lewis W. Fernandes v. Jivatlal Partapashi & Ors. AIR 1947 Bom 65*** in paragraph 8 has held as under:

"8. The Bombay High Court, dealing with an identical question in Lewis. W. Fernandez (supra) about existence of an arbitration agreement contained in a contract note issued after delivery of the goods, agreeing to submit disputes to arbitration in terms of Bye laws of an association, held that the conduct of the parties was relevant and determinative in that case. The court observed that:
"It is also clear that up to June 30, 1944, and some time later there was no dispute whatever raised by the plaintiff as regards the transactions effected by the defendants for and on behalf of the plaintiff in accordance with the instructions conveyed by the plaintiff through the sub-broker and in effect the plaintiff accepted the contract notes. It was only when the contract note in respect of the closing transaction of June 30, 1914, was sent by the defendants to the plaintiff and a demand for the sum of Rs. 11,112-8-0 was made by the defendants upon the plaintiff by their letter dated July 18, 1944, that the plaintiff came out by his letter in reply of July 20, 1944, stating that the amount shown as due by him to the defendants, viz, Rs. 11,112-80 was not correct inasmuch as it did not show the statement of his sale of 500 bales of September 1944 delivery. It is admitted that this statement as regards 500 bales of September 1944 delivery was a mistake on the part of the plaintiff and that really it ought to have been a sale of 1,000 bales of September 1944 delivery which according to the plaintiff was outstanding on that date. The plaintiff by his letter called upon the defendants to send to him a complete statement of his account with the defendants showing separately the transactions for the month of July and September settlements after which he stated that he would settle the account of the defendants. It is significant to note that in that letter the plaintiff did not state that he

had not received all the contract notes or all the statements of account in respect of the several transactions which the defendants entered into for July 1944 and September 1944 settlements as he seems to have done in the subsequent correspondence. The defendants wrote to the plaintiff on July 21, 1944, expressing their surprise at the attitude taken up by the plaintiff and referred the plaintiff to the contracts and weekly statements which had been submitted by them to the plaintiff as usual. The defendants stated that on perusing the same the plaintiff would be convinced that there was no outstanding business in his account and that the total amount of Rs. 11,112-8-0 shown by the defendants to his debit was correct. The plaintiff replied by his letter dated July 25, 1944, where he disingenuously stated that he had not been receiving the defendants' contracts and weekly statements regularly and that he had to rely upon verbal information from the sub-broker who he considered was the agent and subbroker of the defendants for information regarding his position. The plaintiff, therefore, called upon the defendants to send to him a complete statement of account showing separately the July and September transactions. He further expressed his astonishment to learn that he had no outstanding business with the defendants and called upon the defendants to let him know under whose instructions the outstanding sale of 1,000 bales of September had been cut off, again repeating the mistake as to 500 bales instead of 1,000 bales of September 1944 settlement. It is significant, however, to note that in this letter also he did not deny that he had received the contract notes and the weekly statements of account which the defendants alleged they had been sending to him as usual, the only allegation made by him being that he had not been receiving the same regularly. The statements made by Jivatlal Partapshi, the partner of the defendants' firm in paragraph 3 of his affidavit in support of this notice of motion dated september 30, 1944, in that behalf were also denied in that affidavit of the plaintiff dated October 11, 1944, in the same vague and indefinite manner by stating:

"I further deny that the defendants had submitted all the contract notes and statements of accounts as falsely alleged in the said affidavit or that I have acknowledged receipts in respect of contract notes and statements of accounts in respect of all my transactions in the office despatch book of the defendants."

5. This denial, in my opinion, is not honest and leads me to the conclusion that the plaintiff in fact received all the contract notes and the statements of accounts as alleged by the defendants in the usual course at the address given by the plaintiff to the defendants in that behalf and in effect accepted the contract notes which had been so sent by the defendants to him. I am satisfied on these materials that the contract notes in respect of all the transactions except the last disputed one of the purchase of 1,000 bales of September 1944 settlement on June 30,1944, were sent by the defendants to the plaintiff and were in effect accepted by the plaintiff by his conduct, with the result that in respect of all of the contracts except the last disputed one which I have mentioned above there were arbitration agreements within the meaning of the Indian Arbitration Act of 1940."

The Calcutta High Court, in the decision Ram Chandra Ram Nag and Ram Rice & Oil Mills Ltd echoed the views of the Bombay High Court, and held as follows:

"2……The first point raised by Mr. Mukherjee is that it cannot be said that there was any arbitration agreement between the plaintiff and the defendant No. 1 and consequently the courts below acted without jurisdiction in making an order of stay under Section 34 of the Indian Arbitration Act. The contract in this case was entered into by the delivery and acceptance of bought and sold notes to the buyer and seller respectively. The bought notes delivered by the broker to me defendant No. 1 have been produced by them but the sold notes, though produced by the plaintiff in the Gaya Court, have not been produced in the Howrah Court, and both the Courts have drawn an adverse inference against the plaintiff for the non-production and have held that the sold notes, if produced would have shown that they are the counter parts of the bought notes which have been produced by the defendant No. 1. The bought notes which have been produced by the defendant No. 1 contain an arbitration clause which runs as follows: "All disputes regarding the contract are to be settled by two Arbitrators one nominated by buyers and one nominated by sellers respectively in accordance with the Indian Arbitration Act in Calcutta". The bought notes which have been produced by the defendant No. 1 also show that they are signed by the broker only and so it may be inferred that the sold notes were

similarly signed by the broker only. From this fact Mr. Mukherjee at one stage sought to argue that the acceptance of these bought and sold notes by the buyer and seller respectively at best created a contract between the buyer and the broker on the one hand and the seller and the broker on the other, and that it did not create any privity of contract between the buyer and the seller. When, however, it was realised that this argument would strike at the very foundation of the plaintiff's claim against the defendant No. 1, it was abandoned. It was, however, still argued that the contract did not create an arbitration agreement between the plaintiff and the defendant No. 1 within the meaning of the Arbitration Act. Reliance was placed on the definition of "arbitration agreement" as given in Section 2(a) of the Indian Arbitration Act, and it was argued that in order to constitute an arbitration agreement, the agreement must be signed by both the parties. This view FAO(OS)184/2013 Page 10 was taken in certain English cases which were followed by Page, J., in the case of John Batt and Co. v. Kanoolal and Co. (A). This view, however, was expressly dissented from by a Division Bench presided over by Rankin, C. J., in the case of Radha Kanta Das v. Bearlien Brothers Ltd. AIR 1929 Cal 97 . After referring to the view taken by Page, J. in John Batt's case (A), Sir George Rankin observed as follows :

"In my judgment, the law is the other way. The Arbitration Act of 1889 and the Indian Arbitration Act, for the best of good reasons have not required that the agreement to submit should be signed by both parties."

The same view was taken in the case of Sankar Lal Lachmi Narain v. Jainey Brothers : AIR1931All136 . In the case of Keshoram Cotton Mills v. Kunhyalal Bagwani 44 CWN 607 (D), Panckridge, J. also followed this view."

10. Even the Hon'ble Supreme Court in the case of ***MTNL (supra)*** has in Para 9 to 9.5 has held as under:

"9. <u>THE EXISTENCE OF A VALID ARBITRATION AGREEMENT</u>

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 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 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 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."*

11. In the case in hand, it is not disputed by the learned counsel for the respondent that it had earlier received similar tax invoices from the petitioner against which the payments have been made to the petitioner. Leaned counsel for the petitioner has not disputed that the tax invoices for which claim has been made has not been received by the respondent. If that be so, respondent cannot disown the clear stipulation in the tax invoice with regard to any dispute being referred to arbitration. Even the Coordinate Bench of this Court in ***Swastik Pipe Ltd. (supra)*** in a very detailed Judgement by referring to the various judgments including ***Scholar***

Publishing House Pvt. Ltd. (supra), ***Lewis W. Fernandes (supra)*** and other judgments has in Para 16 held as under and refer the matter for arbitration by appointing an arbitrator:

> *"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."*

12. In so far as the Judgment of the Bombay High Court relied upon by the learned counsel for the respondent in the case of ***Concrete Additives and Chemicals Pvt. Ltd. (supra)*** is concerned, the same does not appeal to me in view of the judgments of the Supreme Court, Division Bench and the Coordinate Bench of this Court, accordingly this Court appoints Mr. Aditya Vijay Kumar, Adv. (Mobile No. 9717622082) as the Sole Arbitrator, who shall adjudicate the disputes between the parties through claims and counter-claims, if any.

13. The fee of the Arbitrator shall be as per Schedule IV under the Act of 1996. He shall give his disclosure in terms of Section 12 of the Act of 1996.

14. Let a copy of this order be sent to the learned Arbitrator.

15. The petition is disposed of.

V. KAMESWAR RAO, J.

JULY 6, 2022*/jg*