2024:DHC:2123

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

Date of Decision: 12th March, 2024

\+ **ARB.P. 854/2023**

SRF LIMITED ..... Petitioner

Through: Mr Surendra Kumar, Advocate (M: 9910860320).

versus

JONSON RUBBER INDUSTRIES LIMITED ..... Respondent

Through: Mr. Rahul Kripalani, Mr. Aditya Pratap Singh Chauhan, Advs. (M: 9637058812)

CORAM:
JUSTICE PRATHIBA M. SINGH

JUDGMENT

Prathiba M. Singh, J.

1. This hearing has been done through hybrid mode.

Background and Introduction

2. The present petition has been filed by the Petitioner- SRF Ltd. under Section 11(6) of the Arbitration and Conciliation Act, 1996 *(hereinafter, '1996 Act')* seeking appointment of a sole arbitrator to adjudicate upon its disputes with the Respondent- M/s Jonson Rubber Industries Ltd. Recourse to arbitration in the present petition has been taken, pursuant to clause 22 of the terms and conditions specified in the invoices stemming out of purchase orders dated 26th December, 2019 and 27th December, 2019.

3. It is the case of the Petitioner, that the Respondent had approached it to purchase *'Belting Fabric Material'* and placed purchase orders for the same on 26th December, 2019 and 27th December, 2019. The Petitioner

claims that he sold the said material through seven separate invoices in February, 2020 and the collective amount due from the said invoices is Rs. 50,71,455.26/-. The Petitioner also claims an additional amount of Rs. 86,428/- on account of accrued interest and GST liabilities. Further, with respect to the said outstanding bills, the Petitioner issued a legal demand notice on 15th June, 2022. Subsequently, the Petitioner invoked arbitration clause under Section 21 of the 1996 Act on 2nd May, 2023, in terms of clause 22 of the terms and conditions stipulated in the invoices.

Submissions

4. It is submitted by ld. Counsel for the Petitioner that each of the invoices consisted of an arbitration clause and, thus, the dispute deserves to be referred to arbitration. On the other hand, ld. Counsel for the Respondent raises an objection that a valid arbitration agreement in terms of Section 7 of the 1996 Act does not exist between the parties, as the crux of the dispute arises from two purchase orders dated 26th December, 2019 and 27th December, 2019. The said purchase orders contained a jurisdiction clause which reads as under:

> *"Jurisdiction for Arbitration/Dispute – Only Delhi Court shall have jurisdiction to try any dispute concerning in the Purchase Order"*

5. It is the submission of Mr. Rahul Kripalani, ld. Counsel for the Respondent that *consensus ad idem* between the parties existed only *qua* this jurisdiction clause and not the arbitration clause as contained in the invoices. He submits that as per the aforesaid jurisdiction clause, only Courts in Delhi have jurisdiction to adjudicate disputes between the parties that arise from the said purchase orders. Ld. Counsel for the Respondent states that the two

purchase orders which were honoured through seven invoices, were all subsequent in nature. Further, he claims that the invoices which included an arbitration clause in their terms and conditions on the reverse side, were not properly received by the Respondent.

6. Ld. Counsel for the Respondent further states that the Petitioner's conduct itself would prove that he never insisted upon adhering to the terms and conditions of the invoices. He submits that the purchase orders being the agreed upon documents between the parties would take precedence over the invoices subsequently raised by the Petitioner.

7. Ld. Counsel for the Respondent submits that the said invoices clearly suggest that there was nothing written on the back side of the invoices. This is indicated by presence of the words *'Page 1 of 1'* on the top-right corner of the invoices. Further, he submits that there is no signature of the Respondent on the *'general terms and conditions of sales'* which the Petitioner claims, is to be found on the back of the invoices. Thus, the Respondent never agreed to the said terms and conditions and therefore, there is no question about existence of a valid arbitration agreement between the parties in terms of Section 7 of the 1996 Act.

8. It is further submitted by ld. Counsel for the Respondent that the Petitioner failed to adhere to its own stipulated terms and conditions as outlined in the invoices, thereby casting doubt upon the validity of said documentation. The ld. Counsel refers to clause 10- titled 'Overdue Payments', in the *'general terms and conditions of sales'* of the invoices. According to him, the said clause stated that, if payment in terms of the invoices was delayed, the buyer (Respondent), would be obligated to pay the seller (Petitioner) interest and subsequently, the Petitioner will raise a debit

note to that effect along with charging applicable GST. Ld. Counsel submits that the subsequent debit notes raised by the Petitioner, levying interest charges, deviates from the amount that would have accrued to the Petitioner pursuant to clause 10 of the *'general terms and conditions of sales'*.

9. Ld. Counsel for the Petitioner on the other hand pointed out that in the invoice, the phrase *'general terms and conditions given overleaf'* is contained. The same would show that all the terms and conditions were contained in the invoice, including the arbitration clause upon which the Petitioner is relying to refer the present matter to arbitration.

10. Ld. Counsel for the Petitioner further relies upon the following decisions to make a case that the arbitration clause mentioned in the invoices is valid and the present matter ought to be referred to arbitration:

i. ***Swastik Pipe Ltd. v. Shri Ram Autotech Pvt. Ltd. (MANU/DE/1183/2021, paragraph nos. 6, 8, 10, 11, 12, 13, 14 and 15)*** *(hereinafter, 'Swastik Pipe I')*

ii. ***Swastik Pipe Ltd. v. Dimple Verma (MANU/DE/2889/2022, paragraph nos. 11 and 12)*** *(hereinafter, 'Swastik Pipe II')*

iii. Order dated 13th October, 2023 in ***ARB.P. 845/2023*** titled ***SRF Ltd. v. Manipal Netech-Through It Proprietor-Mr. Alexander***

iv. ***Civil Appeal No. 7858/2023*** titled ***Concrete Additives and Chemicals Pvt. Ltd. v. S.N. Engineering Services Pvt. Ltd.***

11. It is argued by ld. Counsel for the Petitioner, that after ***Vidya Drolia v. Durga Trading Corporation [(2021) 2 SCC 1]***, the clear legal position is that the Court ought to refer the parties to arbitration, even if it has a doubt as to the existence of the arbitration clause. He further bases this submission on two decisions of this Court in ***Swastik Pipe I (supra)*** and ***Swastik Pipe II***

(supra) where under similar circumstances parties have been referred to arbitration.

12. Ld. Counsel for the Petitioner also places reliance upon a decision of the Bombay High Court in ***Bennett Coleman & Co. Ltd v. Mad (India) Private Limited [(2022) SCC OnLine Bom 7807)]*** to argue that ***Swastik Pipe II (supra)*** and other decisions have also been referred in the said decision by the Bombay High Court to refer parties to arbitration in a similar factual circumstance. The relevant portion of the aforesaid judgement has been extracted hereinunder:

> *"By relying upon the aforesaid observation, the Delhi High Court with reference to the tax invoices raised against which the payments were made, held* ***that it amounted to an arbitration clause, particularly when the petitioner has not disputed receipt of the tax invoices****. Holding that the respondent cannot disown the clear stipulation in the tax invoice with regard to any dispute being referred to arbitration, an arbitrator came to be appointed"*

13. He further submits that the decision referred to by the Respondent i.e., ***Concrete Additives and Chemicals Pvt. Ltd. v. S.N. Engineering Services Pvt. Ltd. [(2022) SCC OnLine Bom 8034]*** has been set aside by the Supreme Court vide order dated 28th November, 2023 in ***Civil Appeal No. 7858/2023*** titled ***Concrete Additives and Chemicals Pvt. Ltd. v. S.N. Engineering Services Pvt. Ltd***.

14. *Per Contra*, ld. Counsel for the Respondent has relied upon the following decisions:

i. Rameshwar Dass & Sons (HUF) v. Caravel Logistics Pvt. Ltd. & Anr. [(2015) SCC OnLine Del 6698, paragraph nos. 6 & 7]

ii. ***Concrete Additives and Chemicals Pvt. Ltd. v. S.N. Engineering Services Pvt. Ltd. [(2022) SCC OnLine Bom 8034, paragraph nos. 4 and 5]***

iii. ***Hetampuria Tax Fav v. Daksh Enterprises [(2022) SCC OnLine Del 3895, paragraph Nos.- 12,13,14 and 21]***

iv. ***IMV India Pvt. Ltd. v. Stridewel International [(2018) SCC OnLine Del 8687, paragraph Nos.- 9,10,13,15 and 16]***

v. ***Priknit Retails Ltd. & Ors. v. Aneja Agencies [(2018) SCC OnLine Del 13424, paragraph Nos.- 27, 28 and 34]***

vi. ***Grammy Communications Pvt. Ltd. v. B.P.L. Telecom Pvt. Ltd. [(2007) SCC OnLine Del 1123, paragraph no.- 6]***

15. It is submitted by ld. Counsel for the Respondent that in ***Hetampuria Tax Fav (supra),*** the arbitration clause contained in a delivery challan was held to be a unilateral clause, which would not constitute an agreement between the parties. This led to dismissal of the appeal on the ground that the tribunal had proceeded without jurisdiction. In addition, reliance is placed upon ***IMV India Pvt. Ltd. (supra)*** and ***Priknit Retails Ltd.(supra)*** to argue that whenever there is a doubt regarding existence of consensus *ad idem* between parties, in the context of documents such as proforma invoices or delivery challans, the Court has not accepted the arbitration clause.

Analysis and Findings

16. Heard. Section 2(1)(b) of the 1996 Act, defines an arbitration agreement to mean an agreement referred to in Section 7 of the 1996 Act, which *inter alia* lays down that an arbitration agreement is borne out of consensus between parties, to submit all or certain disputes to arbitration. The nature of disputes that can be submitted to arbitration ought to arise out

of a defined legal relationship. Further, Section 7(2) of the 1996 Act stipulates that the arbitration agreement may be in the form of an arbitration clause in a contract or in the form of a separate agreement. Sections 7(2) and (3) of further lays down that the arbitration agreement shall be in writing and must be contained in a document signed by parties, an exchange of letters, telex or other means of communication which essentially provide a record of the communication. Section 7 of the 1996 Act does not mandate any particular form for the arbitration clause. It requires the Court to ascertain whether the parties have agreed to refer the disputes between them to arbitration. This proposition was settled by the Supreme Court in ***Rukmanibai Gupta v. Collector, Jabalpur [(1980) 4 SCC 556].*** The relevant portion is extracted hereinunder:

> *"6. ……Arbitration agreement is not required to be in any particular form. What is required to be ascertained is whether the parties have agreed that if disputes arise between them in respect of the subject-matter of contract such dispute shall be referred to arbitration, then such an arrangement would spell out an arbitration agreement."*

17. Section 8 of the 1996 Act mandates that a judicial authority before whom an action is brought, which is the subject of an arbitration agreement between the parties, shall refer the parties to arbitration. The provision carves out a singular exception, stipulating that only if it is apparent prima facie, that no valid arbitration agreement exists, the Court shall refrain from directing the parties to arbitration.

18. A perusal of the decision of the Supreme Court in ***Vidya Drolia (supra)*** clearly shows that under Section 8 or Section 11 of the 1996 Act, unless a party has established a *prima facie* case of non-existence of a valid

arbitration agreement, the parties are to be referred to arbitration. Thus, onus is on the person alleging that there is no valid arbitration agreement. The relevant portions of the said judgement is extracted hereinunder:

> *"244.3. 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 non-existence of valid arbitration agreement, by summarily portraying a strong case that he is entitled to such a finding.***
> *244.4. The court should refer a matter if the validity of the arbitration agreement cannot be determined on a prima facie basis, as laid down above i.e.* ***"when in doubt, do refer".***

19. Accordingly, as per the said decision, the Respondent has to show a strong case-that despite the presence of an arbitration clause in the invoices, the said agreement would not be valid and binding on parties.

20. ***Vidya Drolia (supra)*** was followed in ***Swastik Pipe Ltd. I (supra)*** and ***Swastik Pipe Ltd. II (supra)*** by the ld. Single Judges of this Court. In ***Swastik Pipe Ltd.-I (supra),*** the parties were maintaining a running account. The challenge was on the ground that the invoices were not signed by the parties. The Court, after reviewing the entire case law, came to the conclusion that the invoices have been paid partly and the parties have been in transaction with each other for some time, hence, the disputes are liable to be referred to arbitration. In this judgement, most of the decisions which are relied upon by the Respondent are also considered. The relevant part of the said judgement has been extracted hereinunder:

> *"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"*
>
> *"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."*

21. In ***Swastik Pipe Ltd.-II (supra)***, a similar dispute pertaining to arbitrability of the dispute wherein the arbitration clause existed in the invoices was raised. The Court held that the Respondent, by accepting the tax invoices explicitly containing the arbitration clause and without raising any dispute concerning it, is legally bound by the arbitration clause. The relevant portion of the said judgement is extracted hereinunder:

> *"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***

> ***<u>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"</u>***

22. The Bombay High Court in the judgement of ***Bennett Coleman (supra)*** followed the decision given in ***Swastik Pipe Ltd.-II,*** and referred the parties to arbitration. The Court further held that the judgement of ***Concrete Additives (supra)*** has been passed based on peculiar facts of the said case. Moreover, a perusal of the order passed by the Supreme Court, in ***Concrete Additives (supra)*** would show, that the Supreme Court has observed as under:

> *"Office report records that notice has been served to the sole respondent in the year 2022. No one has put in appearance.*
> *Leave granted.*
> *Heard the learned counsel appearing appellant for the appellant.*
> *By the impugned judgment, the High Court has rejected the application made by the appellant under Section 11 of the Arbitration and Conciliation Act, 1996 for appointment of an Arbitrator on the ground that the Arbitration Agreement was not in existence.*
> *We have perused the invoices annexed as Annexure P2 to IA No.34944 of 2022 filed for production of additional documents. In the invoices, terms and conditions have been incorporated. The invoices were issued by the appellant and acknowledgements of receipt of the invoices by the respondent also appear thereunder. Clause (1) of the terms and conditions printed on the invoices reads thus:*
> *"(1). All or any disputes or differences that may arise between the parties hereto shall be referred to the arbitration of a sole arbitrator to be appointed by CONCRETE ADDITIVES & CHEMICALS PVT. LTD.*

> *The arbitration proceedings shall be governed by the provisions of the Arbitration & Conciliation Act, 1996. The venue arbitration shall be at Mumbai."*
> ***Hence, we do not agree with the High Court that there was no arbitration clause. All issues canvassed by the respondent, while opposing the petition under Section 11 of the Arbitration Act can be always canvassed before the Arbitral Tribunal in accordance with law****.*
> *Therefore, we allow the appeal. The impugned order is set aside and the Arbitration Application (L) No.23207 of 2021 is hereby allowed. The disposed of Arbitration Petition shall be listed before the roster Judge of the High Court taking up Section 11 petitions under the Arbitration Act only for the purposes of appointing an arbitrator.*
> *A copy of this order shall be immediately forwarded by the Registry to the Bombay High Court."*

23. In the aforesaid case, the Supreme Court observed that invoices were issued by the Petitioner, terms and conditions of the invoice was incorporated in to subsequent invoices and receipt of the invoices was not disputed. Based on these grounds the Supreme Court set aside the view of the Bombay High Court in ***Concrete Additives (supra)***.

24. In the present case, the parties have a running account which is not in dispute. Two purchase orders may have been placed by the Respondent and various invoices may have been issued by the Petitioner. These invoices clearly state that the terms and conditions listed at the back are applicable. Considering that the parties are in regular business dealings with each other, it cannot be said *prima facie* that the rear of the invoice was not supplied to the Respondent.

25. Moreover, the two purchase orders also contain a jurisdiction clause

which had the heading **'*Jurisdiction for Arbitration/Dispute'***. The title of this clause shows that arbitration was contemplated even in the purchase orders. Further, the above clause shows that the intention of the parties is to clearly have the disputes adjudicated in Delhi and nothing more. It does not show an intention NOT to arbitrate. The intention is to the contrary that for arbitration, the jurisdiction would be Delhi. Further the invoices explicitly incorporate an arbitration clause which cannot be disputed. The same reads as under:

> *"**22. ARBITRATION AND GOVERNING LAW***
> *In case of any dispute or difference arising out of this transaction, either Party may refer the dispute for resolution to a Sole Arbitrator to be appointed by Seller in accordance with the provisions of Arbitration and Conciliation Act, 1996, or any statutory modification or re-enactment thereof for the time being in force. Buyer does hereby unequivocally consent to appointment of such Arbitration and is barred from raising any objection for referring the matter to Arbitration, appointment of Sole Arbitrator by Seller or any other matter or thing connected therewith or incidental thereto.* ***All proceedings in such Arbitration shall be conducted in English and place of arbitration shall be New Delhi.*** *All disputes of the terms and conditions relating to this order or otherwise arising there from between the Seller and Buyer shall be subjected to and referred to the court Competent Jurisdiction within the limits of New Delhi only.*"

26. The invoices with the arbitration clause have been acknowledged and part payment has been made. The question as to whether the part-payments were towards these very invoices or not would become a question of evidence.

27. Under these circumstances, the objections of the Respondent are not

tenable. The matter is accordingly referred to the Delhi International Arbitration Centre (*'DIAC'*) for appointment of the arbitrator in accordance with the rules applicable. The arbitration shall take place under the aegis of the DIAC. The fee of the Arbitrator shall be paid in terms of the Fourth Schedule as amended by the DIAC Rules, 2023. The petition is allowed with costs of Rs.25,000/- in favour of the Petitioner. All objections of the parties are left open. All pending applications are disposed of.

28. Let a copy of the present order be emailed to Secretary, DIAC on email id- delhiarbitrationcentre@gmail.com.

PRATHIBA M. SINGH
JUDGE

MARCH 12, 2024
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