

**IN THE HIGH COURT OF GUJARAT AT AHMEDABAD****R/FIRST APPEAL NO. 5216 of 2019**

**With  
CIVIL APPLICATION (FOR STAY) NO. 1 of 2019  
In R/FIRST APPEAL NO. 5216 of 2019**

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LEEPEE ENTERPRISE  
Versus  
MEHUL INDUSTRIES

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Appearance:

VASIM MANSURI(8824) for the Appellant(s) No. 1  
MR BB GOGIA(5851) for the Defendant(s) No. 1  
NOTICE SERVED BY DS for the Defendant(s) No. 2

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**CORAM: HONOURABLE MR. JUSTICE A.G. URAIZEE**

**Date : 03/03/2022**

**ORAL ORDER**

1. The present appeal under section 37 of the Arbitration and Conciliation Act 1996 (“*Arbitration Act*” for short) is preferred to assail the judgment and order passed by learned 13<sup>th</sup> Additional District Judge, Rajkot in Regular Civil Appeal No.29 of 2017 whereunder lower appellate court dismissed the application preferred by the appellant under section 34 of the Arbitration Act to set aside the arbitral award dated 24.8.2015.

2. I have heard Mr.Vasim Mansuri, learned advocate for the appellant and Mr.B.B.Gogia, learned advocate for respondent No.1. Respondent No.2 – Arbitrator is a formal party.

3. Mr.Mansuri vehemently submits that there was no valid bipartite arbitration agreement between the appellant and respondent No.1. It is his submission that the appellant had purchased the goods

from respondent No.1 on the basis of delivery challan wherein no arbitration clause is stipulated. He submits that arbitration clause is unilaterally incorporated in the invoice. He submits that invoice is signed by respondent No.1 or its authorized representative, but the same is not signed by the appellant or its authorized representative. He submits that bare reading of arbitration clause contained in invoice makes it clear that such clause is in respect of particular invoice alone. He, therefore, submits that arbitration proceedings on the basis of such unilateral arbitration clause contained in invoice was without jurisdiction and not binding to the appellant. He further submits that common arbitration proceedings for various invoices was also not competent, as, if it is assumed for the sake of argument that arbitration clause in the invoice is valid then separate arbitration proceedings ought to have been initiated in respect of each invoice. He emphatically submits that as the appellant has not signed the invoice, parties were not consensus *ad idem* regarding appointment of Arbitrator. He further submits in reply to legal notice dated 21.10.2014 issued by respondent No.1, the appellant has clearly stated that there is no agreement regarding appointment of Arbitrator for the dispute regarding accounts and goods between the parties. He further submits that the issue of jurisdiction of the Arbitrator is a legal issue which can be raised at any stage of the proceedings, hence, non-raising or not participating in the arbitral proceedings cannot debar the appellant from raising the issue of jurisdiction in an application under section 34 of the Arbitration Act or in the present appeal. He further submits that as the arbitral award is without jurisdiction, the same is null and void and nonest and is not binding to the appellant. In respect of his contention that unilateral condition in invoice does not constitute valid arbitration agreement between the parties, he has relied upon the decisions of the Delhi High Court in the cases of *Alupro Building Systems Pvt Ltd Vs Ozone Overseas Pvt Ltd*, reported in *MANU/DE/0495/2017*, *Rameshwar Dass & Sons (HUF) Vs M/s Caravel Logistics Pvt Ltd*, reported in *2015*

**Lawsuit (Del) 256, IMV India Pvt Ltd Vs Stridewel International**, reported in **MANU/DE/1621/2018** and **Divya Shivilaks Impex Vs Shantilal Jamnadas Textiles Pvt Ltd**, reported in **1999 Lawsuit (Bom) 130**. He, therefore, submits that the appeal requires consideration.

4. Mr.Gogia, learned advocate for respondent No.1 has supported the arbitral award and the impugned order of the lower appellate court. He submits that the appellant has never raised the dispute and has accepted the goods under the invoice which contained arbitration clause. He further submits that the appellant has never disputed the receipt of goods. According to his submission, the appellant has taken stand in its reply to legal notice that entire amount is paid and nothing is outstanding to respondent No.1. He submits that now it does not lie in the mouth of the appellant to contend that there was no bipartite arbitration agreement between the parties. In support of his submissions, Mr.Gogia has placed reliance on the decision of the Bombay High Court in the case of **Louis Dreyfus Commodities Asia Pte Limited Vs Govind Rubber Limited**, reported in **2013(0) AIJ-MH 164722** and the judgment of the Delhi High Court in the case of **National Highway Authority of India Vs R.N.Shetty**, reported in **2014 (0) AIJ-DL 1367871** to contend that view taken by the Arbitrator if plausible cannot be substituted by the appellate court with another plausible view. He, therefore, submits that the appeal does not warrant admission.

5. I have considered the rival submissions.

6. It is undisputed fact that the appellant did not respond to the notice dated 27.1.2015 issued on behalf of respondent No.1 under section 11 of the Arbitration Act for appointment of Arbitrator in terms of invoice. It is also undisputed fact that after initially appearing before the Arbitrator, the appellant did not participate in the arbitration proceedings

except seeking time. It is further eminently clear that such conduct of the appellant cannot be ignored while considering the submissions of Mr.Mansuri regarding nature of arbitration clause contained in invoice.

7. It appears that in the first legal notice issued by respondent No.1 for payment of outstanding amount, there was no specific reference to the arbitration clause contained in any of the invoice. It was generally stated in the said notice dated 21.10.2014 that if the payment is not made, then respondent No.1 would be constrained to refer dispute to the sole Arbitrator. The appellant responded generally to such assertion by stating that there is no agreement between the parties for appointment of Arbitrator for settlement of the accounts or dispute regarding goods in reply to the aforesaid notice. Further, it appears that admittedly, the appellant has not responded to the notice dated 27.1.2015 issued by respondent No.1 under section 11 of the Arbitration Act for appointment of the Arbitrator and objected that there is no agreement bypartite for appointment of Arbitrator and clause in the invoice is unilateral which is not binding to the appellant.

8. The appellant, therefore, as noted in the foregoing paragraph, did not participate in the proceedings of arbitration and raised the issue of jurisdiction of the Arbitrator on the basis of so called unilateral clause in the invoice. Such conduct on the part of the appellant speaks volume. The appellant, in my considered view, ought to have raised the issue of jurisdiction of Arbitrator at the first available opportunity. In the instant case, the first available opportunity was when the notice under section 11 of the Arbitration Act was served upon the appellant. Be that as it may. Thereafter also, the appellant showed lackadaisical approach and took the arbitration proceedings very casually and except taking date, did not participate in the arbitration proceedings. In the backdrop of this, the Arbitrator has recorded that on the basis of the clause contained in the



invoice and on the basis of the notice served by respondent No.1 under section 11 of the Arbitration Act on the appellant, appointment of sole Arbitrator made by respondent No.1 is legal and valid.

9. Learned lower appellate court has also while not accepting the submissions of the existence of valid arbitration agreement between the appellant and respondent No.1 has taken note of the fact that the appellant has not raised the issue before the Arbitrator.

10. The scope of application under section 34 of the Arbitration Act for setting aside arbitral award is very limited. The sole ground on which the appellant has tried to assail the arbitral award is lack of jurisdiction of the Arbitrator on account of not valid arbitration agreement between the parties. As per section 34(2)(a)(i), such plea is valid plea to set aside the arbitral award. However, as discussed hereinabove, the party has to raise such issue at the first available opportunity. However, as the appellant has not raised this issue by responding to the notice under section 11 of the Arbitration Act nor has participated in the arbitral proceedings to raise such dispute, on such plea that the issue of jurisdiction being the legal issue can be raised at any stage cannot be a ground to set aside the arbitral award.

11. For the foregoing reasons, I am of the view that the appeal lacks merits and deserves to be dismissed at the threshold and accordingly, the appeal is dismissed. Notice is discharged.

12. In view of the above, the Civil Application does not survive and the same stands disposed of accordingly.

H.M. PATHAN

**(A.G.URAIZEE, J)**