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IN THE HIGH COURT OF JUDICATURE AT BOMBAY

BENCH AT AURANGABAD

CIVIL REVISION APPLICATION NO.134/2015

Indus Towers Limited,
a Company incorporated under the
Companies Act I of 1956 having its
Branch Office situate at 501 & 504,
5th Floor, Pentagon-1, Magarpatta
Cyber City, Hadapsar, Pune,
Maharashtra – 411 028.
Through its authorized signatory,
Ramesh Eknath Salvekar,
age 50 yrs., occu.service.
...Petitioner..

Versus

Sow.Ashatai w/o Bapurao Kagne,
age 32 yrs., occu.business,
Proprietor of OM Telecom Services,
Office Address – Indu-Ganga Arcade,
Plot No.1, N-2, Cidco, Aurangabad.
...Respondent...

.....

Shri Sachin S. Deshmukh, Advocate for petitioner.
Shri S.V. Mundhe, Advocate for respondent.

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CORAM: T.V. NALAWADE, J.

DATE: 18.11.2015

ORAL JUDGMENT :

1] Rule. Rule made returnable forthwith. By
consent, heard both the sides for final disposal of the

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revision application.

2] Present proceedings are filed to challenge the order dated 10.12.2013 made on Exhibit 9 in Special Civil Suit No.349/2012 by learned VIth Joint Civil Judge, Senior Division, Aurangabad. The application at Exhibit 9 was filed by present petitioner – defendant under the provision of Order VII Rule 10 of the Code of Civil Procedure and he had prayed for return of the plaint. The said application is rejected by the learned trial Court.

3] The suit is filed in respect of the amount, which is due to plaintiff from defendant in respect of supply of diesel. It is the case of the plaintiff that as per the purchase order dated 23.7.2008, the plaintiff had supplied diesel during contract period to the defendant, but only some amount is paid by the defendant and the suit amount is still outstanding against the defendant. It is contended that even after making of demand of this amount by the plaintiff, the defendant has not made payment and so the suit is required to be filed.

4] By filing application at Exhibit 9, the defendant contended that there is arbitration clause in

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the agreement, which was entered into by the parties and in view of that agreement, the matter needs to be referred to Arbitrator and the matter is not tenable in Civil Court.

5] The trial Court has observed that the document of contract does not show that the plaintiff had consented to refer the dispute to Arbitrator as there is no signature of the plaintiff on the so called written agreement.

6] In the plaint paragraph no.3, the plaintiff has made a mention that on the basis of purchase order, the supply of diesel was made by her. The contents of this paragraph further show that alongwith the purchase order, there was annexure like 'A' sent by the defendant to the plaintiff. Alongwith the plaint, the plaintiff has produced copy of the purchase order and first page of Annexure 'A'. The purchase order shows that there was verbal talk between the parties and on that basis, the purchase order was sent by the defendant. In the purchase order, the terms and conditions of the contract are mentioned and they include the particulars like rate of the diesel, the quantity and the period during which

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the diesel was to be supplied. The payment in respect of the supply was to be made after the delivery. The general terms and conditions of the contract are appearing on the purchase order and there is also mention that the terms and conditions quoted in Annexure 'A' are also the terms and conditions of the contract.

7] Clause 16 of Annexure 'A' contains the arbitration clause and it runs as under:-

"16. DISPUTES / ARBITRATION

In the event of any dispute arising between the two Parties relating to the various terms and conditions set forth in the contract, the two Parties undertake to resolve the differences by mutual consultation. In the event of their inability to resolve the disputes, all questions, disputes and differences arising under or in relation to this Agreement shall be referred to two Arbitrators. Each Party to appoint his own Arbitrator by giving notice to other Party. Two appointed Arbitrators with the consent of each other will appoint the third Arbitrator. The award of the Arbitrators so appointed shall be final, conclusive and binding on all the Parties to the Agreement and provisions of the Arbitration & Conciliation Act, 1996 or any statutory modification or re-enactment thereof and the Rules made thereunder and for the time

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being in force shall apply to the arbitration proceedings under this clause. Venue of the arbitration shall be at Mumbai."

8] At Clause 13 of Annexure 'A', there is a mention about the documents, which can be referred to ascertain the terms and conditions of contract and Clause 13 runs as under:-

"13. ENTIRE AGREEMENT

This Agreement and the Schedule and Annexure hereto constitute the entire understanding between the parties concerning the subject matter hereof and supercede all prior discussions, agreements and representations, whether oral or written and whether or not executed by and between the parties."

9] Learned counsel for the respondent - plaintiff submitted that only the first page of Annexure 'A' was sent by the defendant alongwith the purchase order and so it cannot be said that there was agreement between the parties to refer such dispute to Arbitral Tribunal. This contention is not acceptable. Even Clause No.1.1(d) appearing on first page of Annexure 'A' is not complete. It does not look viable that without ascertaining the

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terms and conditions of the contract, the plaintiff had made supply of the diesel when the amount was to be paid after the delivery. It needs to be presumed for the present purpose that only after going through all the terms and conditions of the contract, the supply was made by the plaintiff.

10] Learned counsel for the respondent – plaintiff further submitted that in view of Section 7 of the Arbitration and Conciliation Act, 1996, unless and until the written document is signed by both the sides, arbitration agreement cannot come into existence. This proposition is not at all acceptable. The provision of Section 7 of the Arbitration and Conciliation Act, 1996, is as under:-

"7. Arbitration agreement -

(1) In this Part, "arbitration agreement" means an agreement by the parties to submit to arbitration all or certain disputes which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not.

(2) An arbitration agreement may be in the form of an arbitration clause in a contract or in the form of a separate agreement.

(3) An arbitration agreement shall be in

writing.

(4) An arbitration agreement is in writing if it is contained in-

(a) a document signed by the parties;

(b) an exchange of letters, telex, telegrams or other means of telecommunication which provide a record of the agreement; or

(c) an exchange of statements of claim and defence in which the existence of the agreement is alleged by one party and not denied by the other.

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

11] Section 7(1) of the Act gives the meaning of arbitration agreement. In Section 7(2), it is mentioned that arbitration agreement may be in the form of a clause in the contract itself or it may be in a separate form or a separate agreement. Section 7(3) shows that arbitration agreement needs to be in writing. Thus, it can be said that in Section 7(3), it is made clear that arbitration agreement should be in writing but this sub-section does not show that unless and until it is signed by both the sides, the agreement will not come into existence.

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Section 7(4) gives the meaning of written agreement. Sub-section 4(a) shows that it can be inferred that it is an written agreement if a document is signed by the parties. Sub-section 4(b) shows that written agreement can come into existence by exchange of letter, telex, telegrams or other means of telecommunication which provide a record of the agreement. Sub-section 4(c) shows that arbitration agreement can come into existence by exchange of statements of claim and defence also. Thus, when the purchase order is placed, as in the present case, the matter will fall u/s 7(4)(b). This sub-section does not show that there needs to be signature of other party. In the present matter, written order like purchase order was given by the defendant to the plaintiff and the order provided that it was upto the plaintiff either to accept or not to accept this proposal. As the supply was made by the plaintiff as per this order and there is specific admission in that regard in the plaint, it needs to be presumed that the offer given by the defendant was accepted by the plaintiff and this acceptance was for all the terms and conditions of the contract. It is already observed that the terms and

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conditions of the contract can be found in the purchase order and in Annexure 'A'.

12] The aforesaid position of law and facts and circumstances of present case show that the trial Court has committed error in observing that signature of the plaintiff was necessary on this document and as signature is not there, there was no agreement to refer the dispute to arbitrator. This objection was taken prior to filing of written statement as provided in Section 8 of the Arbitration and Conciliation Act, 1996 by the defendant. In view of these circumstances, it is necessary for the parties to refer the dispute to Arbitral Tribunal as provided in the aforesaid clauses of the contract. It is not possible for Civil Court to directly refer the matter to arbitrator as the procedure as laid down in the aforesaid clauses need to be followed by the parties to the contract. Thus, there is no other alternative than to return the plaint for referring the matter to arbitrator.

13] The learned counsel for the respondent – plaintiff placed reliance on *Karam Chand Thapar & Bros. (Cs) v. Akaljot Singh Sekhom* reported at **2005 (3)**

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Mh.L.J., 797. The facts and circumstances of this case are altogether different. This case is of no help to the respondent – plaintiff.

14] In the result, the civil revision application is allowed. The order dated 10.12.2013 made on Exhibit 9 in Special Civil Suit No.349/2012 by learned VIth Joint Civil Judge, Senior Division, Aurangabad, is hereby set aside. The application filed at Exhibit 9 by the defendant is hereby allowed. The plaint be returned to the plaintiff for following the procedure for appointment of Arbitral Tribunal.

(T.V. NALAWADE, J.)