

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on : 31.07.2015

Pronounced on: 12.08.2015

C O R A M

The Hon'ble Mr. **SANJAY KISHAN KAUL**, Chief Justice

Original Petition No.823 of 2014

NSK India Sales Company Private Ltd.,
having its registered office at
6th floor, Bannari Amman Towers,
No.29. Dr.Radhakrishnan Salai,
Mylapore, Chennai 600 004.
through its authorised signatory
Mr.Ajit Krishnan, Director ... Petitioner

versus

Proactive Universal Trading Company Private Ltd.,
having its registered office at:
4th floor, State sman House,
Barakhamba Road,
New Delhi 110001. ...Respondent

Prayer : *Petition filed under Section 11 of
the Arbitration and Conciliation Act, 1996,
for appointment of a second Arbitrtor on the
Arbitral Tribunal to be constituted in terms
of Clave 8 of the General Terms of Business
forming part of each of the invoices remaining
unpaid by the respondent to adjudicate upon the
outstanding monetary claims of the petitioner.*

For Petitioner : Mr.Ajit Warriier

For respondent : Mr.S.R.Raghunathan

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O R D E R

The petitioner, a private limited company, is stated to be engaged in the business of supply and sales of automotive and industrial bearings in India. The petitioner claims to have entered into a non-exclusive contractual agreement with the respondent for supply of non-automobile wheel bearings, both imported and indigenous as per the contractual agreement and the respondent was appointed as a non-exclusive intermediary and distributor for supply supplying the aforesaid bearings to the end customers on terms and conditions which would form part and parcel of the invoices raised by the petitioner.

2. The respondent is stated to have placed orders on the petitioner through purchase orders, whereupon the petitioner raised invoices upon the respondent to the extent and value of the products supplied. The respondent acknowledged the receipt of the goods, after affixing the signature and the seal on the consignment note, which is stated to be duly accompanied by the relevant invoices in original. Such invoices in turn are stated to have been accompanied by the terms and conditions as set out in the General Terms of Business (GTB). The consignment note is also stated to have contained a reference to the

corresponding invoices and the respondent used to make payments towards such invoices through cheques and / or RTGS after service, setting out the quality, quantity and specifications of the products.

3. The allegation of the petitioner is that while initially payments were made in time as per invoices, since July 2012, the respondent started failing and neglecting to honour the payments for the supplies made under the relevant invoices. Despite the fact that the delivery of goods was not in dispute, all requests for payments were to no avail.

4. The petitioner seeks to set up a case that there was acknowledgement of outstanding liability by the respondent by e-mail dated 25.09.2013 to the tune of Rs.4,50,31,303, excluding interest as on July, 2013. The total amount stated to have accumulated is Rs.4,50,31,303/- (principal amount) along with interest at 24% per annum as per GTB, totaling to Rs.6,33,29,859/- as on 31.10.2014.

5. The GTB and the invoices raised by the petitioner on the respondent contain the following arbitration clause:

"Arbitration: All disputes, differences and claims arising out of or in connection with this contract shall be referred to the arbitration of two arbitrators, one to be appointed by each party to the dispute and such

arbitration shall be held at Chennai in accordance with the provisions of the Arbitration and Reconcilliation (sic) Act, 1996, for (sic) any statutory modifications or reenactment thereof for the time being in force. The award shall be final and binding on the parties."

6. An Arbitration notice through counsel is stated to have been sent on 30.07.2014, proposing the nominee arbitrator and calling upon the respondent to do likewise. However, the respondent, vide their reply dated 29.09.2014, refused to do so on the plea that there was no valid arbitration clause existing inter se the parties.

7. It is in pursuance to the aforesaid, the present petition has been filed under Section 11 of the Arbitration and Conciliation Act, 1996, seeking to rely on Section 7 of the said Act.

8. The respondents have filed their counter affidavit resisting the petition. The respondents have their own story in respect of transactions, but it is not necessary, in my opinion, to get into that for the reason that while exercising jurisdiction under Section 11 of the said Act, the scope of the scrutiny of this Court has to be limited to (a) the existence of a valid arbitration agreement, (b) disputes having arisen from the arbitration agreement, (c)

this Court having territorial jurisdiction and (d) no claim being ex-facie barred by limitation.

9. Section -7 forming part of Chapter-II of the said Act reads 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."

10. In the course arguments addressed by the learned counsel for the parties, it really could not be said that the goods had not been delivered or the disputes have not

arisen, but the fundamental question was whether there was a valid and binding arbitration agreement inter se the parties and the jurisdiction of the court infact being conferred in terms of that arbitration clause which has been extracted aforesaid.

11. Learned counsel for the petitioner sought to bring the case within Clause(4) subsection (b) of Section-7 of the said Act, as it was admitted that as such there is no clear agreement inter se the parties which contained the arbitration clause. The manner in which learned counsel for the petitioner sought to put forth his case was that the purchase order was placed by the respondent on the petitioner and the goods were delivered and acknowledged as per the goods delivered receipt which in turn was accompanied by the "Company's Invoice" raised by the petitioner. It is admitted that the receipt of the goods was duly signed by the respondent, but the company's invoices were not so signed; they inturn referred to the purchase orders and the delivery aspect. The arbitration clause is actually contained as part of this unsigned document which provides for declaration in the General Terms of Business at the back of the document. The signature of the purchasing dealer is not also appended to the declaration nor this document is acknowledged in writing by the respondent. It is this document which

contains Clause-8 as arbitration clause which has been extracted aforesaid, apart from clauses 9 and 10, which read as under:

"9.Jurisdiction:

The contract and/or other and/or all terms thereof shall be governed by the Indian law and courts at Chennai which will have exclusive proceedings in relation to the contract or any matter arising therefrom.

10.Other Terms and Conditions:

The seller cannot accept any terms and conditions mentioned in an order, other than what has been stipulated above. The buyer is required to waive the other clauses, mentioned in the tender/order and issue amendment to that effect within 10 days of the quotation/indent/order acknowledgment failing which it will be deemed that the waiver has already been affected."

12. The submission of the learned counsel for the petitioner was that Clause -10 specifically stipulates that the seller cannot accept any terms and conditions mentioned in the order other than what is stipulated above which was accepted by the respondent.

13. On the other hand, learned counsel for the respondent sought to submit that in the only document which contains this Clause, there is no signature of the respondent and there cannot be an arbitration clause by implication.

14. In order to support the respective stands, reliance was placed on certain Judgements.

15. The petitioner relied upon the following Judgements:

(a) ***Scholar Publishing House Pvt. Ltd., vs. M/s. Kanna Traders reported in (ILR (2013) 5 Del 3343)***, wherein the appellant used to receive the papers supplied by the respondent and the invoices contained the clause for sole arbitration through "Paper Merchants Association (regd.) Delhi". The clause also mentioned that the Civil Suit at Delhi could also be filed at the option of the seller. The Division Bench found that there was wealth of material in the form of more than a decade of commercial relationship, during which identically phrased invoices containing arbitration stipulations were accepted and acted upon and not that the disputed invoices were the only documents containing stipulations. Section -7 of the said Act was relied upon to conclude that arbitration can be inferred through a series of correspondance or even on demur of one of the parties to the arbitration proceedings, and even in

the reply to the claim, there was no such contest raised on the issue of resolution of disputes through arbitration.

(b) **Shri Kailash Nath Agarwal vs. M/s.Aaren Exports in FAO.No.59/2002 and Cross Objections**, wherein the learned Single Judge of the Delhi High Court held that the appellant sold cloth on credit to the respondents and bills were raised. Only part payment was alleged to be made, which was on the basis of the documents on record to disclose invoices containing the arbitration clause, which resulted in a finding that disputes were liable to be resolved through arbitration. The invoices were accepted by the respondents.

16. On the other hand, learned counsel for the respondent has relied upon the following Judgments:

(a) **Yogi Agarwal vs. Inspiration Clothes and U and Others reported in (2009(1) SCC 372)**: A reference to this Judgment was made by the learned counsel for the respondent only with the object of clarifying the issue whether the document containing an arbitration need not be signed by all the parties to constitute a valid agreement question was left open as stated in paragraph-6. It may however be noted that the proposition sought to be propounded was that if an invoice signed by the seller is acknowledged or accepted or acted upon by the buyer, the term in the

invoice providing for arbitration will be an "arbitration agreement" as between the seller and the buyer.

(b) ***M.R.Engineers and Contractors Private Ltd., vs. SOM DATT Builders Ltd., reported in (2009) 7 SCC 696***), wherein the relevant discussion in respect of Section -7 of the said Act is extracted as under:

"14.The wording of Section 7(5) of the Act makes it clear that a mere reference to a document would not have the effect of making an arbitration clause from that document, a part of the contract. The reference to the document in the contract should be such that shows the intention to incorporate the arbitration clause contained in the document, into the contract. If the legislative intent was to import an arbitration clause from another document, merely on reference to such document in the contract, sub section(5) would not contain the significant later part which reads: "and the reference is such as to make that arbitration clause part of the contract", but would have stopped with the first part which reads:

"7.(5). The reference in a contract to a document containing an arbitration clause constitutes an arbitration agreement if the contract is in writing...."

15. Section 7(5) therefore requires a conscious acceptance of the arbitration clause from another document, by the parties, as a part

of their contract, before such arbitration clause could be read as a part of the contract does not contain any indication or guidelines as to the conditions to be fulfilled before a reference to a document in a contract, can be construed as a reference incorporating an arbitration clause contained in such document, into the contract. In the absence of such statutory guidelines, the normal rules of construction of contracts will have to be followed.

16. There is a difference between reference to another document in a contract and incorporation of another document in a contract, by reference. In the first case, the parties intend to adopt only specific portions or part of the referred document for the purposes of the contract. In the second case, the parties intend to incorporate the referred document in entirety, into the contract. Therefore when there is a reference to a document in a contract, the court has to consider whether the reference to the document is with the intention of incorporating the contents of that document in entirety into the contract, or with the intention of adopting or borrowing specific portions of the said document for application to the contract."

The submission thus made was that a mere reference to a document would not have the effect of making an arbitration clause from that document, a part of the contract.

Reference to the document in the contract should be such that shows intention to incorporate the arbitration clause contained in the document, into the contract.

(c) **Taipack Limited and Others vs. Ram Kishore Nagar Mal (2007(3) ARB.L.R. (402) (Delhi)**, was a case of a purchase order in a given facts of the case on terms and conditions printed on the reverse on the invoices and the delivery documents were exchanged. The invoices provided for arbitration by the Paper Merchants Association (regd) Delhi. The learned single Judge of the Delhi High Court concluded that there was no arbitration agreement which is said to be contained in a document signed by the parties in terms of Section 7(4) (a) of the said Act, and thus turned to the provisions of Section 7(4) (b) of the said Act, since "arbitration agreement" is a species of the genus, that is "Agreement". It was held that first and foremost, there has to be an agreement and the parties should agree to the same thing in the same sense. The mere printing of the conditions on the reverse of the invoice was, at the highest, an offer made by the respondent to the petitioner therein. Unless the offer was accepted by the petitioner the same could not result in a binding and enforceable contract. Such unilateral condition while effecting delivery of goods in terms of the purchase order would not bind the petitioner. In fact, the making of the payment in

pursuance of the invoice was held not to be capable of being called, steps taken by the petitioner to indicate its acceptance of the conditions mentioned by the respondents on the reverse of the '**invoice**' even if the respondent's copy of the invoice was signed by the petitioner's agent. The submission thus was that the facts in the present case were identical or infact more favourable to the respondent as the document was not signed by any one on behalf of the respondent.

(d) Inspiration Cloths & U vs. Yash Traders in (Manu/WB/1031/2014), wherein it was held that the arbitration agreement was contained in the bills of invoices raised by the respondent on the petitioner providing for all disputes to be resolved through Bharat Merchants' Chamber. The bills were received by the petitioner and acted upon since the bills and invoices were not signed or executed by the petitioner nor they confirmed the existence of the arbitration agreement, it was held that there was no exchange of documents on the part of the petitioner to show acceptance of these terms of clause. Section -7 is an expressed acceptance of the arbitration agreement by means of telecommunication or by traditional methods of communication like letters, telex and telegram. Acceptance of the bills by the petitioner was held not as

part of the method of communication expressed under Section 7(4) (b) of the said Act.

17. On consideration of the matter, I am of the view that the Judgment of the learned Single Judge of the Delhi High Court in **Taipack Limited and Others vs. Ram Kishore Nagar Mal (2007(3) ARB.L.R. (402) (Delhi)** and the Judgment of the Calcutta High Court **Inspiration Cloths & U vs. Yash Traders in (Manu/WB/1031/2014)**, set forth the correct legal position with which I am in full agreement, especially in the given facts of the case. An arbitration agreement has to be in writing. This is mandatory. One of the methods by which an arbitration agreement can be construed to be in writing is set out in Clause(b) of sub-section (4) of Section 7 of the said Act. It is specifically provided that the same can be by exchange of letters, telex, telegrams or other means of telecommunication which provide a record of the agreement. There are thus specific modes provided by which the agreement can be construed to be in writing. There is no reference to a method whereby such an arbitration clause can be incorporated by implication - from a collective set of documents of trade where one such contained the arbitration clause.

18. In the sequence of documents issued, it is the respondent who first issued the purchase order. This does not contain an Arbitration Clause. The document of delivery of goods also does not contain an arbitration clause. It is stated to be signed by the 'gate keeper' of the respondent. It is only the invoice issued to the petitioner which contains the arbitration clause and it is stated to have been simultaneously issued in view of the factum of the same being interlinked to the goods received. This document neither contains the declaration in the prescribed form duly signed at the back nor is there any other endorsement so as to consider it as an acceptance on the part of the respondent. There is in fact thus no agreement whatsoever inter se the parties on the issue of the mode of resolution of the dispute through arbitration and there cannot be an arbitration clause by implication in any other document. In fact, the very fact that the respondent has not signed this document would show the unwillingness of the respondent to accept the arbitration as a mode of resolution of dispute, to which the petitioner had never protested.

19. The petitioner cannot confuse the issue of there being a valid transaction inter se the parties through the documents, keeping in mind the provisions of "the Sales of

Goods Act, 1930," as the goods were retained by the respondent, not returned and not paid for. This may show that the sale was complete subject to any objection which may be raised by the respondent. No doubt, in the present proceedings, I am not concerned with the resolution of the merits of the controversy, but whether there was a valid and binding arbitration agreement providing for resolution of the dispute through the mode of arbitration? The answer to this is in the negative and thus, the petitioner would have to approach the Civil Court in accordance with law.

20. In view of the finding that there is no valid and binding arbitration agreement inter se the parties, the question of appointment of arbitrator does not arise and thus the petition is dismissed, leaving the parties to bear their own costs.

sd/. (S.K.K., CJ.)
12.08.2015

//Certified to be a true copy//
Dated this the day of 2015.

R.s/26.08.2015

COURT OFFICER

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