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IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION

ARBITRATION PETITION NO.509 OF 2011

DLF Power Limited,)
now known as Eastern India Powertech)
Limited, DLF Galleria, 12th Floor,)
DLF City, Phase – IV, Gurgaon – 122 001) ...Petitioner

....Versus....

Mangalore Refinery & Petrochemicals)
Limited, Arcadia, 195, N.C.P.A. Marg,)
Nariman Point, Mumbai – 400 021.) ...Respondent

Mr.Zal Andhyarujina with Mr.Harsh Meghani, Mr.Samshed Garud and
Mr.Vishwabhusan Kamble i/b Jaykar & Partners for the Petitioner.

Mr.Kevic Setalvad, Senior Counsel with Ms.Rashna Khan, Ms.Pooja
Garg and Mr.Parikshit B. i/b Mulla & Mulla & C. B. & C. for the
Respondent.

CORAM : R.D. DHANUKA, J.
RESERVED ON : 10TH JUNE, 2016
PRONOUNCED ON : 20TH JULY, 2016

JUDGMENT :-

1. By this petition filed under section 37 of the Arbitration & Conciliation Act, 1996 (for short hereinafter referred to as “the Arbitration Act”), the petitioner has impugned the order dated 2nd February, 2011 passed by the arbitral tribunal accepting the plea of the respondent under section 16 of the Arbitration Act and dismissing the arbitral proceedings on the ground of jurisdiction. It is made clear

in the impugned order that the parties were left to pursue such legal remedies as were available to them for resolution of their dispute arising out of the contracts entered into between the parties. Some of the relevant facts for the purpose of deciding this petition are as under :

2. On 16th April, 1997 and 30th April, 1997, DLF Industries Limited (DIL) signed two contracts with the respondent i.e. contract No.E-10010 for engineering and supply of equipments for 3 x 26.5 MW power project and contract No.E-11011 for civil works for carrying out erection and commissioning of the power plant equipment respectively. It is the case of the petitioner that the said DLF Industries Limited (DIL) undertook the performance and execution of contracts in right earnest.

3. It was the case of the petitioner that the said DLF Industries Limited (DIL) however, could not commission the power plant within the original contractual time on account of various reasons not attributable to the said company but attributable to the defaults of Mangalore Refinery & Petrochemicals Limited in meeting its reciprocal obligations under the contract. The said DLF Industries Limited (DIL) commissioned four units of the Co-generation Power Plant on 30th May, 1999, 23rd July, 1999, 7th August, 1999 and 18th April, 2000 respectively.

4. On or about 19th October, 1999, the High Court of Delhi and Punjab & Haryana High Court approved a scheme of merger by which the Energy System Business of the said DLF Industries Limited (DIL) merged with DLF Universal Limited (DUL) as its energy system

division. The Registrar of Companies, NCT, Delhi and Haryana granted certificates of registration. It is the case of the petitioner that pursuant to the said scheme sanctioned by the Delhi High Court and Punjab & Haryana High Court, the rights and liabilities of DLF Industries Limited (DIL) in the said contracts stood transferred to DLF Universal Limited (DUL) and on such transfer the said DLF Universal Limited (DUL) discharged the rights and liabilities under the contracts.

5. It is the case of the petitioner that the respondent accepted and acknowledged the said DLF Universal Limited (DUL) as a party to the contract in its entirety including the arbitration agreement contained therein and accepted the performance of contract from the said DLF Universal Limited (DUL). It was the case of the petitioner that the said DLF Universal Limited (DUL) had succeeded to the said two contracts executed between DLF Industries Limited (DIL) and the respondent herein and executed them in the capacity of a party to these two contracts and was therefore, entitled to enforce the contracts in its entirety along with the arbitration agreement contained therein.

6. On or about 14th December, 2000, the said DLF Universal Limited (DUL) in its capacity as the contractor under the two contracts requested the respondent to release the pending payment and to execute the bank guarantee. On 3rd January, 2001, the said DLF Universal Limited (DUL) furnished a bank guarantee being BG No.43/2 for a sum of Rs.4,66,58,621/- representing 2.5% of the basic purchase price of the two contracts.

7. On 28th June, 2001, the energy system division of the said

DLF Universal Limited (DUL) was purchased through a memorandum of sale by the petitioner i.e. DLF Power Limited, now known as Eastern India Powertech Limited with effect from 31st March, 2001. It is the case of the petitioner that the petitioner is absolute successor in interest of the DLF Industries Limited (DIL) and DLF Universal Limited (DUL) of the said two contracts which were initially entered into between the DLF Industries Limited (DIL) and the respondent.

8. On 2nd August, 2001, the petitioner requested the respondent for release of the balance payment, extension of contractual completion period, release of bank guarantee, return of excess material, payment of additional expenses incurred by it due to non-release of payment by the respondent within 20 days as provided under the contracts, expenses of Skoda representatives which were not to be borne by the petitioner, as the respondent had directly contracted with them etc.

9. On 24th September, 2001, the respondent admitted that a sum of Rs.523.84 lacs consisting of Rs.362.11 lacs shown as payable against the original contract price and Rs.161.73 lacs against extra work was due and payable by the respondent to the petitioner but failed and neglected to pay the said sum alleged to have been admitted by them.

10. On 24th September, 2001 and 1st October, 2001, the petitioner requested the respondent to release its bank guarantee alleging that the respondent was continuously delaying the performance guarantee tests.

11. On 2nd December, 2003, 29th November, 2004 and 25th November, 2005, the petitioner informed the respondent that its bankers had issued amendment extending the validity and claim period of the bank guarantee.

12. On 28th December, 2002, 17th November, 2003, 25th November, 2004, 29th September, 2005, 24th July, 2006 and 8th March, 2007, the respondent addressed letters to the bankers of the petitioner i.e. Central Bank of India directing them to extend the validity of the bank guarantee for further periods ranging from three to six months. According to the petitioner, the respondent sought 45 extensions by writing letters to the bankers of the petitioner and such extensions had been issued by the bankers of the petitioner.

13. On 25th September, 2004, the respondent informed the petitioner that they were reviewing at their end various issues relating to the contracts and shall be forwarding their comments to their new management for their consideration. The respondent also requested the petitioner to keep the bank guarantee for liquidated damages duly extended and valid.

14. On 20th April, 2007, the petitioner received a letter from the respondent in which the respondent informed the petitioner that it had recovered an amount of Rs.443.20 lacs towards liquidated damages and after adjusting sums of Rs.3,72,92,861/- which according to the respondent was due to the petitioner, sum of Rs.70.28 lacs was claimed as payable by the petitioner to the respondent. By the said letter, the respondent called upon the petitioner to send the demand draft of Rs.70.28 lacs as full and final payment and agreed to return

the bank guarantee No.43/2 of Rs.4,68,58,621/- in return of the said demand draft of Rs.70.28 lacs. The respondent threatened the petitioner that it would encash the bank guarantee against the liquidated damages in the event of failure of the petitioner to pay a sum of Rs.70.28 lacs.

15. The petitioner filed a petition under section 9 of the Arbitration Act in the month of May, 2007 *inter-alia* praying for interim measures of protection against the respondent from encashing the bank guarantee No.43/2 dated 3rd January, 2001 or receiving any moneys thereunder.

16. In the month of June, 2007, the petitioner invoked arbitration clause and appointed its arbitrator. The respondent in turn appointed its arbitrator. The two arbitrators agreed and nominated the presiding arbitrator.

17. On 27th July, 2001, this Court disposed of the said arbitration petition filed by the petitioner with a direction that upon the petitioner depositing a sum of Rs.70.28 lacs in this Court within a period of six weeks, the respondent shall not encash the bank guarantee and it would stand released and discharged.

18. On 20th June, 2008, during the pendency of the arbitral proceedings, the petitioner changed its name to Eastern India Powertech Limited. The Deputy Registrar of Companies, Delhi and Haryana issued a fresh certificate of incorporation consequent upon the change of name of the petitioner.

19. The respondent filed an application under section 16 of the Arbitration Act before the arbitral tribunal raising the plea of jurisdiction of the arbitral tribunal to entertain, try and dispose of the claim filed by the petitioner. The said application was resisted by the petitioner on various grounds. The arbitral tribunal framed the issues including preliminary issue “whether the claimant proves that it has locus to initiate, sustain and pursue the present proceedings”. After recording of evidence, the arbitral tribunal heard the arguments on the said preliminary issue. By an order dated 2nd February, 2011, the arbitral tribunal dismissed the arbitral proceedings on the ground that it had no jurisdiction to entertain the said proceedings. This order of the arbitral tribunal is impugned by the petitioner in the present petition filed under section 37 of the Arbitration Act on various grounds.

20. Mr.Andhyarujina, the learned counsel for the petitioner invited my attention to the contract agreement dated 16th April, 1997 and various provisions of the said contract agreement entered into between the respondent herein and DLF Industries Limited, including clause 19.1 which provided that neither party to the contract shall, except with the explicit prior approval in writing of the other, assign its obligations or any benefit interests in this contract or any part thereof in any manner whatsoever. Reliance is also placed on clause 36.1 which provided for arbitration. The said clause is extracted as under :

“36.1 If at any time any dispute or difference shall arise between the parties hereto as to the interpretation of this Contract or any covenants or conditions thereof or as to the rights, duties or liabilities of any party hereunder or as to any act, matter or thing arising out of or relating to or under

this Contract (even though the Contract may have been terminated) and if said dispute or difference could not be amicably settled through mutual discussions, then the same shall be referred to the decision of two Arbitrators, each party nominating one and in case of difference between the said two Arbitrators, an Umpire to be appointed by the said Arbitrators, prior to entering upon the reference and any such reference shall be subject to and be governed by the provisions of the Indian Arbitration Act, 1940 (Act No.X of 1940) and the Rules made thereunder or any statutory re-enactment, modification or extension thereof for the time being in force.”

21. Reliance is also placed on contract No.E-11011 dated 30th April, 1997 between the respondent herein and DLF Industries Limited. Under clause 37.1 of the said agreement, the arbitration agreement is recorded.

22. Learned counsel for the petitioner invited my attention to the memorandum of sale dated 28th June, 2001 between the petitioner herein and DLF Universal Limited. He submits that under the said memorandum of sale, the petitioner was assigned the entire business undertaking of the said DLF Universal Limited as a going concern together with all its assets, including the benefits of contracts and agreements pertaining to or in any way relating to the said division and also the liabilities as set out therein on the terms and conditions recorded therein. He submits that admittedly after execution of the said document between the said DLF Universal Limited and the petitioner herein, the respondent dealt with the petitioner exclusively under the said contract agreement entered into between the respondent and the said DLF Industries Limited for all purposes all through out, as a party to the contract agreement with

the respondent in place of DLF Universal Limited. In support of this submission, the learned counsel invited my attention to various correspondence exchanged between the parties and would submit that both the parties had acted upon the said agreement dated 28th June, 2001.

23. It is submitted that the entire agreement and all the benefits thereunder accrued to the said DLF Industries Limited under the contract agreement dated 16th April, 1997, including the arbitration agreement were assigned to the petitioner. He submits that in case of any dispute between parties thus, the petitioner was entitled to invoke the said arbitration agreement recorded in the contract agreement dated 16th April, 1997 for resolving the dispute between the petitioner and the respondent. He submits that the arbitration agreement is also assignable. In support of this submission, the learned counsel placed reliance on the judgment of the Court of Appeal in case of **Shayler vs. Woolf (1946) 2 All England Law Reports, 54** and more particularly on a portion of the said judgment at page 58. Reliance is also placed on the judgment of Rajasthan High Court in case of **Aerens Goldsouk International Limited Company vs. Samit Kavadia & Ors. 2008 (2) Arbitration Law Report, 545 (Rajasthan)** and in particular paragraphs 20, 24 and 26. Learned counsel also placed reliance on the judgment of the Calcutta High Court in case of **M/s.Hindustan Steel Works Construction Limited vs. M/s.Bharat Spun Pipe Co. AIR 1975, Calcutta, 8** and more particularly paragraphs 2 to 4. He also placed reliance on the judgment of the Supreme Court in case of **Khardah Company Limited vs. Raymon & Company (India) Private Limited, AIR 1962 SC 1810** and more particularly paragraphs 7, 11 and 12.

24. It is submitted by the learned counsel that the arbitration agreement is also assignable just as other contract as a matter of law. He submits that if the obligations are assigned under any agreement, consent of the other party is required, however rights if any, under the contract are fully assignable without a prior consent of a party. He submits that the arbitration agreement is not of a personal nature which cannot be assigned without a specific prior consent of a party. He submits that the arbitration agreement which is a part of the contract agreement cannot be an impediment in the assignment of the entire contract. He submits that the respondent did not dispute the existence of the arbitration agreement in the contract agreement dated 16th April, 1997 to which the assignor of the said contract was a party. It is submitted that section 7 of the Arbitration Act has no application to the facts of this case.

25. It is submitted by the learned counsel for the petitioner that in view of the conduct of the respondent in accepting the petitioner as successor to a party to the contract dated 16th April, 1997 i.e. DLF Industries Limited and for all purposes including submission of the bank guarantee, payments etc., the respondent had acquiesced to all the provisions mentioned in the said contract agreement dated 16th April, 1997 having extended to the memorandum of sale agreement entered into between the said successor and the petitioner. In support of this submission, the learned counsel also invited my attention to the bank guarantee submitted by the respondent in favour of the petitioner.

26. It is submitted by the learned counsel for the petitioner that

the arbitration agreement is a right and not an obligation. Severality of the arbitration agreement from the contract is a legal fiction for the purpose of arbitration. The consent is not necessary for assignment of arbitration agreement. The arbitration agreement survives even if the main contract is terminated or if such contract does not survive or even it comes to an end. He submits that the consent of the respondent to assign the contract as a whole was proved by the petitioner before the arbitral tribunal. Requisites of the arbitration agreement described under section 7 of the Arbitration Act thus would have no application to the arbitration agreement assigned in favour of the petitioner. The respondent had already accepted the contractual relation with the petitioner as assignee of the contract. The respondent had acted upon the contract. The memorandum of sale agreement has to be read with the agreement dated 16th April, 1997.

27. It is submitted by the learned counsel for the petitioner that the arbitral tribunal has rendered a perverse finding that no arbitration agreement existed between the petitioner and the respondent and have taken an erroneous view that the arbitral tribunal did not have jurisdiction to entertain and try the claims filed by the petitioner. He submits that the impugned order passed by the arbitral tribunal shows patent illegality and thus deserves to be set aside.

28. Mr.Setalvad, learned senior counsel for the respondent on the other hand invited my attention to the statement of claim filed by the petitioner and also to the provisions of the agreement dated 16th April, 1997 between the respondent and DLF Industries Limited. He

submits that under clause 19.1 of the said agreement, it was clearly provided that neither party to the contract except with the explicit prior approval in writing of the other, assign its obligations or any benefit, interests in this contract or any part thereof in any manner whatsoever. He submits that the said DLF Industries Limited, who has entered into an agreement with the petitioner did not admittedly obtain any prior approval of the respondent in writing with the petitioner. The said agreement entered into between the said DLF Industries Limited and the petitioner thus was not binding upon the respondent.

29. It is submitted by the learned senior counsel for the respondent that the said DLF Industries Limited was party to the said agreement dated 16th April, 1997, including the arbitration agreement. He submits that only a party to the arbitration agreement could invoke the arbitration agreement and not any third party. In support of this submission, the learned senior counsel placed reliance on the definition of a “party” defined under section 2(1)(h). He also placed reliance on the arbitration clause recorded in clause 36.1 of the said agreement and would submit that it was clearly provided therein that for any dispute or difference, the parties thereto could refer the same to the arbitration. He submits that since the petitioner herein was neither a party to the said agreement nor the said agreement was assigned with prior consent of the respondent in writing in favour of the petitioner, the petitioner had no locus to invoke the alleged arbitration agreement recorded in agreement dated 16th April, 1997.

30. Learned senior counsel placed reliance on paragraph 2 of the statement of claim filed by the petitioner and would submit that

the said statement of claim is not filed by authorized representative of DLF Industries Limited or the successor of the contract dated 16th April, 1997. He submits that even in the statement of claim, there is no averment made by the petitioner alleging assignment of the entire contract to the petitioner. My attention is also invited to the written statement filed by the respondent in the arbitral proceedings raising an issue of jurisdiction of the arbitral tribunal on the ground that no arbitration agreement existed between the petitioner and the respondent. Reliance is also placed on the averments made in the rejoinder filed by the petitioner in the arbitral proceedings. He submits that in none of the correspondence annexed to the proceedings, the petitioner has referred to the assignment of the arbitration agreement as a remedy or otherwise.

31. Learned senior counsel placed reliance on clause 6 of the memorandum of sale dated 28th June, 2001. It is submitted that under the said clause, it was clearly agreed between the petitioner and DLF Universal Limited that subject to and in accordance with the terms and conditions contained in the said agreement, the said DLF Universal Limited had constituted the petitioner as its lawful attorney to do various acts or to refer to the arbitration and otherwise to do things for the purposes mentioned therein. He submits that even if there was any cause of action against the respondent, the petitioner could not have filed any arbitration claim in its name, but could have exercised such power by representing the aid DLF Universal Limited as lawful attorney and could not have filed any independent proceedings as if the successor of the contract, including the arbitration agreement.

32. It is submitted that there was a separate arbitration agreement recorded between the petitioner and the said DLF Universal Limited more particularly in clause 14 thereof. He submits that under the said memorandum of sale dated 28th June, 2001, the contract entered into between the respondent and the said DLF Industries Limited was not assigned to the petitioner but there was a sale of the entire division, however sale of the entire business with all its assets and liabilities of the said DLF Universal Limited in favour of the petitioner herein.

33. It is submitted by the learned senior counsel that the arbitration agreement being an independent and separate agreement is not assignable. Reliance is placed on the judgment of the Supreme Court in case of **M. Dayanand Reddy vs. A.P. Industrial Infrastructure Corporation Limited & Ors. (1993) 3 SCC 137** and in particular paragraph 8 thereof. He submits that even if obligations under the main contract were to be performed by the petitioner, there was no separate agreement for transfer of the arbitration agreement which was between the respondent and the said DLF Industries Limited. Learned senior counsel also placed reliance on the judgment of the Supreme Court in case of **Enercon (India) Limited & Ors. vs. Enercon GMBH & Anr., (2014) 5 SCC 1** and more particularly paragraph 83 in support of his submission that the arbitration agreement is separate and independent agreement. He also placed reliance on the judgment of the Supreme Court in support of this submission in case of **M.R. Engineers & Contractors Private Limited vs. Som Datt Builders Limited, (2009) 7 SCC 696** and in particular paragraph 33 thereof.

34. Learned senior counsel for the respondent placed reliance on the judgment of the Delhi High Court in case of **M/s.Delhi Iron & Steel Company Limited vs. U.P. Electricity Board & Anr., 2002(61), DRJ 1280** and in particular paragraphs 2 to 6 and 14 to 19.

35. Reliance is also placed on the judgment of King's Bench Division in case of **Cottage Club Estates Limited vs. Woodside Estates Company (Amersham) Limited, 463** and in particular the relevant paragraphs on pages 463 and 466. He placed reliance on the judgment of the Supreme Court in case of **Indowind Energy Limited vs. Wescare (India) Limited & Anr., (2010) 5 SCC 306** and in particular paragraphs 15, 17, 18 and 20 in support of the submission that the petitioner has to show that he was a party to the arbitration agreement, which was contained in the original contract.

36. It is submitted by the learned senior counsel that for the purpose of invoking an arbitration agreement, the petitioner had to demonstrate that the arbitration agreement within the meaning of section 7 of the Arbitration Act existed between the parties. The petitioner had failed to demonstrate or produce any arbitration agreement between the petitioner and the respondent. He submits that the arbitral tribunal thus was justified in rejecting the claims made by the petitioner on the ground that there existed no arbitration agreement between the parties and thus they had no jurisdiction to entertain and try the claims made by the petitioner. Learned senior counsel placed reliance on the judgment of this Court in case of **Pramod Chimanbai Patel vs. Lalit Constructions & Anr., 2002(6) Bom.C.R. 72** and in particular paragraphs 7 to 9.

37. Learned senior counsel also placed reliance on the judgment of this Court in case of **M/s.Gill & Company Private Limited vs. M/s.Patodia Ginning Factory** delivered on 20th April, 2016 in Arbitration Appeal No.40 of 2015 and more particularly paragraph 26. Learned senior counsel placed reliance on the judgment of the Court of Appeal in case of **Baytur S.A. vs. Finagro Holding S.A. (1992) (Court of Appeal) 610 (QB)**. Learned senior counsel for the respondent distinguished various judgments relied upon by the learned counsel for the petitioner on the ground that none of those judgments are applicable to the facts of this case.

38. Mr.Andhyarujina, the learned counsel for the petitioner in re-joinder invited my attention to some of the paragraphs of the impugned order passed by the arbitral tribunal and would submit that it was not the case of the respondent that that the contract dated 16th April, 1997 stood assigned to the petitioner or not. He submits that the entire order passed by the arbitral tribunal proceeds on the premise that the said contract was assigned to the petitioner. He submits that the entire contract would include arbitration agreement which also stood assigned to the petitioner.

39. Insofar as reliance on Article 6 of the memorandum of sale by the learned senior counsel for the respondent is concerned, it is submitted by the learned counsel for the petitioner that in the said clause, additional safeguard is provided to the petitioner to adopt proceedings as constituted attorney of the said party. He submits that the said agreement has to be read with the main contract agreement entered into between the respondent and DLF Industries Limited and that also in a business like manner. He submits that the arbitral

tribunal has neither dealt with the arguments based on clause 6 of memorandum of sale nor any reliance thereon can be placed by the respondent at this stage to justify the order passed by the arbitral tribunal.

40. Reliance is also placed on section 4 of English Arbitration & Conciliation Act and it is submitted that the said provision is in pari-materia with the amended section 8 of the Indian Arbitration Act. He submits that the judgment of the Court of Appeal in case of **Baytur S.A. vs. Finagro Holding S.A.** (supra) relied upon by the petitioner has been followed and accepted by various Courts in India. He submits that the arbitration agreement is not obligation but is a benefit under the contract which can be assigned. Learned counsel for the petitioner distinguished various judgments referred to and relied upon by Mr.Setalvad, the learned senior counsel for the respondent on the ground that none of those judgments are applicable to the facts of this case and in any event are clearly distinguishable.

REASONS AND CONCLUSIONS :

41. The question that arises for consideration of this Court is whether an arbitration agreement can be assigned.

42. A perusal of the correspondence exchanged between the parties and the execution of the bank guarantee by the petitioner in favour of the respondent and the respondent addressing various letters to the bankers of the petitioner to extend the period of the bank guarantee and the fact that the remaining obligation of DLF Industries Limited and thereafter DLF Universal Limited were complied with by

the petitioner and accepted by the respondent would clearly indicate the intention of the parties in implementation of the rights, obligations, duties and benefits of the said contract dated 16th April, 1997. In my view the respondent cannot be allowed to say that all other rights, obligations and benefits under the said contract could be accepted by the respondent from the petitioner as successor of DLF Industries Limited and DLF Universal Limited however the benefit of the arbitration agreement could not be claimed by the petitioner.

43. A perusal of the impugned order passed by the arbitral tribunal clearly indicates that even the respondent herein had accepted the assignment and rights and liabilities flowing out of the said two contracts. It is held that the contention of the respondent however, was that they could not be compelled to go to arbitration as there was no meeting of minds on that point between any of the successors of DLF Industries Limited and the respondent herein. It is held by the arbitral tribunal that there was no dispute that DLF Universal Limited had sold its power transmission business to DLF Power Limited the petitioner herein and by the said merger and sale, both the contracts were taken over by the petitioner herein. It is held that it has become legal successor of DLF Industries Limited which was the initial contracting party in relation to contract No.E-10010 and E-10011. It is held that there was no dispute that under both the contracts, rights of the parties were assignable however, same must be with the consent of other side.

44. In paragraph 16 of the impugned award rendered by the arbitral tribunal it is held that the stipulation in the contracts that the assignment should have approval of the respondent obviously cannot

render an assignment void for want of consent, however the question would remain whether after such assignment could it be said that there was meeting of mind or agreement between the assignees of DLF Industries Limited and the respondent regarding reference to arbitration in the event of dispute. It is held by the arbitral tribunal that the said meeting of mind or agreement is essential as will be seen from the language of section 7 of the Arbitration & Conciliation Act, 1996. It is held by the arbitral tribunal that none of the successors of DLF Industries Limited were parties to the arbitration agreement.

45. It is held that there is neither any agreement in writing, nor any record of arbitration agreement by means of any correspondence between the petitioner herein and the respondent. It is held that it is not the case of the petitioner that existence of arbitration is alleged by the petitioner in the statement of claim which remained undenied in reply. The arbitral tribunal has held that the provisions of sections 7(3) and 7(4) are not satisfied and thus there is no arbitration agreement between the petitioner and the respondent. It is held that it would not be possible in law to treat the petitioner herein a party to the arbitration agreement because it is the assignee of the main commercial contract. Finally it is held by the arbitral tribunal that the petitioner had no locus to initiate, sustain and pursue the present proceedings because there was no arbitration agreement as contemplated by section 7 of the Act in existence and thus the proceedings are liable to be dropped for total lack of jurisdiction of the arbitral tribunal for want of arbitration agreement.

46. The arbitral tribunal distinguished the judgments of the Supreme Court in the following cases :-

- 1). **M/s.Shakti Bhog Foods Limited vs. Kola Shipping Limited**, reported in **AIR 2009 SC 12**,
- 2). **Unissi (India) Pvt. Limited vs. Post Graduate Institute of Medical Education And Research**, reported in **(2009) 1 SCC 107**,
- 3). **Smita Conductors Limited vs. Euro Alloys Limited**, reported in **AIR 2001 SC 3730**, and
- 4). **Trimex International FZE Limited vs. Vedanta Aluminium Limited**, reported in **MANU/SC/0057/2010**,

on the ground that none of the aforesaid judgments of the Supreme Court speaks conduct of the parties but has held that the meeting of minds to arbitrate on a dispute arising out of a contract can be inferred or evidenced through correspondence between those parties. It does not refer to the conduct of any party.

47. The arbitral tribunal has further noted that in this case the respondent had refused to go to arbitration for any dispute arising out of a contract with the successors of the DLF Industries Limited because they never agreed to arbitrate with any of the successors of DLF Industries Limited. It is not in dispute that various findings recorded by the arbitral tribunal to the effect that there was no dispute that the respondent had accepted the assignment and rights and liabilities flowing out of that contract, are not challenged by the

respondent herein.

48. The short question that arises for consideration of this Court is whether a separate arbitration agreement was required to be entered into between the petitioner and the respondent for adjudication of the disputes arising between the parties having arisen under the original contracts dated 16th April, 1997 between the respondent herein and DLF Industries Limited or assignment of the said contracts dated 16th April, 1997 accepted by the respondent would include the assignment of arbitration agreement also recorded in the said contracts by conduct or otherwise.

49. The respondent did not dispute before this Court that all the rights and obligations under the said contracts which were to be performed by DLF Industries Limited or DLF Universal Limited were performed by the petitioner and that the respondent had called upon the petitioner to comply with such obligations.

50. A perusal of the record clearly indicates that the respondent had not disputed various factual aspects indicating the fact that the petitioner had stepped in the shoes of DLF Industries Limited and DLF Universal Limited and had complied with various obligations under the said contracts dated 16th April, 1997. The respondent had also credited the amount payable to the said DLF Industries Limited or DLF Universal Limited for the various extra works done, in the account of the petitioner.

51. The Supreme Court in case of **Enercon (India) Limited & Ors.** (supra) has considered section 16 of the Arbitration &

Conciliation Act, 1996 and in that context has held that under the said provision of the Arbitration & Conciliation Act, 1996, the concept that the main contract and the arbitration agreement formed two independent contracts. Commercial rights and obligations are contained in the underlying, substantive, or the main contract. It is followed by a second contract, which expresses the agreement and the intention of the parties to resolve the disputes relating to the underlying contract through arbitration. A remedy is elected by parties outside the normal Civil Court remedy.

52. The Supreme Court in the said judgment i.e. **Enercon (India) Limited and others** (supra) has also adverted to its earlier judgment in case of **Reva Electric Car Co. (P). Limited vs. Green Mobil, (2012) 2 SCC 93** in which it was held that under section 16(1) (b), it is provided that even if the arbitral tribunal concludes that the contract is null and void, it should not result as a matter of law, in an automatic invalidation of arbitration clause. By virtue of section 16(1) (b) , it continues to be enforceable notwithstanding a declaration of contract being null and void. The judgment of the Supreme Court in case of **Reva Electric Car Co. (P) Limited** supra) has been approved by the two Judge Bench of the Supreme Court in case of **Today Homes and Infrastructure (P) Limited vs. Ludhiana Improvement Trust (2014) 5 SCC 68**, and it is held that under section 16(1), the Legislature makes it clear that while considering any objection with regard to the existence or validity of the arbitration agreement, the arbitration clause, which form the part of the contract, had to be treated as an agreement independent of the other terms of the contract. There is no automatic invalidation of arbitration clause even if the arbitral tribunal concludes that the contract is null and

void.

53. It is held that by virtue of section 16(1)(b) of the Arbitration & Conciliation Act, the arbitration clause continues to be enforceable, notwithstanding a declaration that the contract was null and void. Courts have to adopt a pragmatic approach and not a pedantic or technical approach while interpreting or construing an arbitration agreement. Under section 7(2) of the Arbitration & Conciliation Act, it is provided that the arbitration agreement could be in the form of arbitration clause in a contract or in the form of a separate agreement. It is thus clear that the arbitration agreement can also be part of the main contract.

54. A perusal of the contracts dated 16th April, 1997 clearly indicates that there is no provision in the said contracts that even if the said contracts were assigned in favour of a third party by any of the party to the said contracts, the same could be of the entire contract however, excluding the arbitration agreement. No separate writing is contemplated under the said two contracts for execution of a fresh arbitration agreement between the assignee of the contracts by one of the party to the said contracts and other party to the said contracts.

55. The Supreme Court in case of **M.R. Engineers & Contractors Pvt. Limited** (supra) has held that an arbitration clause though an integral part of the contract, is an agreement within an agreement. It is a collateral term of a contract, independent of and distinct from its substantive terms. The Supreme Court in the said judgment was considering the case of doctrine of incorporation under

section 7(5) of the Arbitration & Conciliation Act, 1996. It is held that there is a difference between the reference to another document in a contract and incorporation of another document in a contract by reference. In the first case, the parties intended to adopt only specific portions and part of referred document for the purpose of contract. In the second case, the parties intend to incorporate referred document in entirely into the contract. The facts of this case are totally different. It is not the case of the petitioner assignee in the memorandum of sale entered into between the petitioner and DLF Universal Limited that the arbitration agreement recorded in the contracts dated 16th April, 1997 stood incorporated under section 7(5) of the Arbitration & Conciliation Act, 1996. In my view, the judgment of the Supreme Court in case of **M.R. Engineers & Contractors (P) Limited** (supra) is clearly distinguishable in the facts and circumstances of this case and would not assist the case of the respondent.

56. Insofar as the judgment of the Supreme Court in case of **Indowind Energy Limited** (supra) relied upon by the learned senior counsel for the respondent is concerned, the issue before the Supreme Court in the said judgment was whether the arbitration clause found in the document (agreement) between the two parties, could be considered as a binding arbitration agreement on a person who was not a signatory to the said agreement. Another issue for consideration before the Supreme Court in the said judgment was whether a company could be said to be a party to the said contract containing an arbitration agreement, even though it did not sign the agreement containing an arbitration clause, with reference to its subsequent conduct.

57. The issue in the said judgment was whether existence of common shareholders or common Board of Directors, will make the two companies a single entity and whether an inference can be drawn and even one company can be bound by the acts of others. In this case, the case of the petitioner was that DLF Industries Limited had assigned its rights, obligations and duties in favour of DLF Universal Limited and DLF Universal Limited had assigned its rights in favour of the petitioner and after such assignment, the respondent accepted the petitioner in place of the said DLF Universal Limited for all purposes and had insisted the petitioner to carry out all rights, obligations and duties of the successors in favour of the respondent herein.

58. Be that as it may, in that case, there was no letter or correspondence sent by a sister company of a party to the agreement which referred to the agreement, either as an agreement executed by it or as an agreement binding on it. In this case the respondent had exchanged number of correspondence with the petitioner and had insisted the petitioner to renew the bank guarantees and had also given credit of the amount for the extra work done by the successors of the contract in favour of the petitioner. In my view, the said judgment of the Supreme Court also thus does not assist the case of the respondent.

59. The judgment of the Court of Appeal in case of **Baytur S.A.** (supra) relied upon by the learned senior counsel for the respondent also would not assist the case of the respondent. In my view the facts before the Court of Appeal in the said judgment are totally different and are distinguishable with the facts of this case.

60. Insofar as the judgment of this Court in case of **Pramod Chimanbhai Patel** (supra) relied upon by the learned senior counsel for the respondent is concerned, the issue before this Court in the said judgment was that if an arbitration agreement is in writing, whether it must be signed by both the parties. This Court while considering the provisions of section 7(4) held that the arbitration agreement is required to be in writing and signed by both the parties. In this case, there is no dispute that the arbitration agreement which was recored in the contracts dated 16th April, 1997 was in writing and the said contracts were admittedly signed by the respondent herein and the DLF Industries Limited. The respondent has admittedly accepted the assignment of the said contract in favour of the petitioner and has acted upon the said agreement. The findings recorded by the arbitral tribunal on this issue are not challenged by the respondent. In my view, the judgment of this Court in case of **Pramod Chimanbhai Patel** (supra) thus would not assist the case of the respondent.

61. Insofar as the judgment of the Delhi High Court in case of **M/s.Delhi Iron & Steel Company Limited** (supra) relied upon by the learned senior counsel for the respondent is concerned, a perusal of the said judgment indicates that the facts before the Delhi High Court in the said judgment were totally different. In this case, the respondent has accepted the assignment of the contracts dated 16th

April, 1997 but has only contended that there was no separate assignment of the arbitration agreement in favour of the petitioner by the respondent.

62. A perusal of the opening paragraph of the contracts clearly indicates that the said paragraph has described the parties to the contract i.e. "Owner" and "Contractor" which includes its legal successors and permitted assigns. Though prior approval in writing of the respondent was not obtained by the assignor under clause 19.1 of the said two contracts before assigning its rights, obligations and duties in favour of the petitioner, the fact remains that the respondent has accepted the said assignment in favour of the petitioner and has acted upon it. The arbitral tribunal has recorded such finding in the impugned award in favour of the petitioner.

63. The Supreme Court in case of **Smita Conductors Limited vs. Euro Alloys Limited, (2001) 7 SCC 328** has held that one of the party had in his mind those contracts while opening the letters of credit and while addressing the letters to the bank in that regard and had also invoked force majeure clause in those contracts which would obviously mean that the parties had in their mind those two contracts which stood formed by those letters of credit. It is held by the Supreme Court that if two contracts stood affirmed by reason of conduct of the parties as indicated in the letters exchanged, it must be held that there was an agreement in writing between the parties in that regard. The said judgment of the Supreme Court in case of (supra) **Smita Conductors Limited** (supra) was specifically approved by the Supreme Court in its judgment in case of **Trimex International FZE Limited vs. Vedanta Aluminium Limited, (2010)**.

3 SCC 1 and in case of **Unissi (India) Pvt. Limited vs. Post Graduate Institute of Medical Education And Research, (2009) 1 SCC 107.** These judgments were cited by the petitioner before the arbitral tribunal, clearly considering the conduct of the parties while determining the issue whether their existed arbitration agreement or not. The arbitral tribunal however, in paragraph 26 of the impugned award though referred to these judgments, has taken an erroneous view that none of those judgments of the Supreme Court spoke about the conduct of the parties. In my view, the impugned order shows patent illegality on the face of award.

64. This Court in case of **Ingram Micro India Limited vs. Micro Max Media Private Limited** in an unreported judgment delivered on 5th November, 2012 in Arbitration Application (Lodging) No.874 of 2012 has while considering the arbitration agreement recorded in the printed invoices and while dealing with section 7 of the Arbitration & Conciliation Act, 1996 has held that the respondent having accepted the invoices and had acted upon the same without any protest, the contract between the parties clearly contemplated a provision for arbitration. This Court in an unreported judgment in Arbitration Petition No.76 of 2012, in case of **POL India Projects Limited, vs. Aurelia Reederei Eugen Friederich GmbH Schiffahrtsgesellschaft & Company KG,** delivered on 8th April, 2015 has taken a view that if the arbitration agreement recorded in a contract in writing though not signed but has been acted upon by the parties, it would be an arbitration agreement within the meaning of section 7(4) of the Arbitration & Conciliation Act, 1996 in view of the conduct of the parties. The aforesaid two judgments of this Court would squarely apply to the facts of this case. I am respectfully

bound by those judgments.

65. The Court of Appeal in case of **Shayler vs. Woolf** (supra) has held that the arbitration clause is assignable in its nature unless the nature of the contract is such that it is incapable of assignment due to its personal nature. It is held that once a contract is assigned by a party in favour of another party, the benefit of the contract of law is now vested in the assignee and he is entitled to sue upon it. In the said judgment, the Court of Appeal distinguished the judgment in case of **Cottage Club Estates vs. Woodside Estates Co. (Amersham) Limited (1928) 2 K.B. 463** which was cited by the learned senior counsel for the respondent.

66. It is not the case of the respondent that the contract between the respondent and the DLF Industries Limited was not assignable. Clause 19.1 of the General Conditions of Contract appended to the said contract dated 16th April, 1997 provided for assignment of the obligation or any benefit or interest in the said contract or any part thereof, however explicit prior approval in writing of the other party. A perusal of the said contract dated 16th April, 1997 clearly indicates that the DLF Industries Limited which was a party to the said contract as a contractor included its legal successor and permitted assigns. The intention of the party to the said contract dated 16th April, 1997 is clear from the provisions of the said contracts that the said contracts were assignable in toto. In my view the judgment of the Court of Appeal in case of **Shayler vs. Woolf** (supra) would assist the case of the petitioner.

67. Supreme Court in case of **Khardah Company Limited** (supra) has quoted the judgment of the Court of Appeal in case of

Shayler vs. Woolf (supra) with approval and held that the arbitration clause does not take away the right of a party to a contract to assign it if it is otherwise assignable. It is held that there is a clear distinction between assignment of rights under a contract by a party who has performed his obligations thereunder and assignment of a claim for compensation which one party has against the other for breach of contract. The latter is a mere claim for damages which cannot be assigned in law, the former is a benefit under an agreement, which is capable of assignment. There is no dispute between the parties that the arbitration agreement was recorded in clause 36 of the contracts dated 16th April, 1997 between the respondent herein and DLF Industries Limited and the said agreement existed all throughout. It was also not the case of the respondent that the said contracts dated 16th April, 1997 became null and void or in-operative for any reasons whatsoever prior to the date of the successor of the said DLF Industries Limited having entered into an agreement with the petitioner herein. In my view the judgment of the Supreme Court in case of **Khardah Company Limited** (supra) would apply to the facts of this case and would assist the petitioner. In my view the arbitration agreement in a contract is a benefit which can be assigned along with the main contract or even otherwise.

68. The Rajasthan High Court in case of **Aerens Goldsouk International Limited Co.** (supra) has quoted the treatise of RUSSEL on Law of Arbitration, 19th Edition with approval in which the said author on the law of arbitration had stated that an arbitration agreement would bind not only the actual parties to it, but also an assignee of a contract containing it, the personal representative of a deceased party, a trustee in bankruptcy who adopts a contract

containing it, and generally all persons claiming under a party to it but not stranger to the agreement. In the said case before the Rajasthan High Court one of the party had purchased the property in question after publication of the notice in the newspapers. It was held that it would be deemed that the said party had knowledge about the MOU and the agreement to sell between the petitioner company and the other two respondents. It is held that since the purchaser had stepped in the shoes of the respondent nos. 1 and 2, it would not be said that they were not bound by the arbitration agreement entered between the original parties to the said agreement.

69. In the facts of this case, admittedly the respondent had all throughout after execution of the agreement between the successor of DLF Industries Limited and the petitioner herein had treated the petitioner herein as a lawful successor in all respect in respect of the said contracts dated 16th April, 1997 and had dealt with this petitioner exclusively in respect of all the benefits, obligations, rights and duties under the said contracts dated 16th April, 1997. In my view the respondent had accepted the fact that the petitioner had stepped in the shoes of DLF Industries Limited and DLF Industries Limited and was entitled to all rights, obligations and benefits including the arbitration agreement forming part of the said agreement dated 16th April, 1997. The correspondence and the execution of subsequent documents such as bank guarantees between the parties would clearly indicate that the respondent had accepted the petitioner as assignee of the said contracts dated 16th April, 1997 in place of DLF Industries Limited and DLF Universal Limited. In my view the judgment of Rajasthan High Court in case of **Aerens Goldsouk International Limited Co.** (supra) applies to the facts of this case. I

am in agreement with the views expressed by the Rajasthan High Court in case of **Aerens Goldsouk International Limited Co.** (supra).

70. Calcutta High Court in case of **M/s.Hindustan Steel Works Construction Limited** (supra) has adverted to the judgment of Supreme Court in case of **Khardah Company Limited** (supra) and has held that a contract in the nature of a personal covenant cannot be assigned. The rights under a contract can be assigned, but the obligations under a contract lawfully cannot be assigned. The intention about assignability would depend upon, the terms and the language used in a contract. It is held that the existence of an arbitration clause *per-se* does make neither the contract non-assignable or assignable. It is held that the existence of an arbitration clause does not affect either the rights or the assignability of the contract if it is otherwise assignable. In my view, the contracts dated 16th April, 1997 entered into between the respondent herein and DLF Industries Limited was not of a personal nature. It was for the performance and supply of various items. The respondent continued to accept the performance of the rights, duties, obligations and benefits of DLF Industries Limited and DLF Universal Limited in the said contracts dated 16th April, 1997 from the petitioner herein and vis-a-versa. Clause 19.1 of the contracts dated 16th April, 1997 clearly indicated that the assignment of the said contract was permissible however on certain conditions. In my view the judgment of Calcutta High Court in case of **M/s.Hindustan Steel Works Construction Limited** (supra) squarely applies to the facts of this case. I am in agreement with the views expressed by the Calcutta High Court which would assist the case of the petitioner.

71. Delhi High Court in case of **Bestech India Private Limited** (supra) considered the conduct of the parties post assignment of the contract and rejected the submissions of the original party that the assignee had no *locus standi* to file arbitration application for appointment of an arbitrator or that the assignee had no privity of the contract with the original party. In my view the judgment of Delhi High Court in case of **Bestech India Private Limited** (supra) applies to the facts of this case and would assist the case of the petitioner. I am in respectful agreement with the views expressed by the Delhi High Court in case of **Bestech India Private Limited** (supra).

72. Supreme Court in case of M. Dayanand Reddy (supra) while dealing with the provisions of the Arbitration Act 1940, has held that the arbitration clause is quite distinct from the other clauses of the contract. Other clauses of the agreement impose obligation which the parties undertake towards each other but arbitration clause does not impose on any of the parties any obligation in favour of the other party. Such arbitration agreement embodies an agreement between the parties that in case of a dispute, such dispute shall be settled by arbitrator, or umpire of their own constitution or by an arbitrator to be appointed by the Court in an appropriate case or according to the agreement. Supreme Court in the said judgment adverted to the judgment of Court of Appeal in case of **Heyman vs. Darwins Limited (1942) 1 All E.R. 337** and other judgments in which it was held that the arbitration agreement in no way classifies the right of the parties under the contract but it relates wholly to the mode of determining the rights. The Court has to decide whether the existence

of an agreement to refer the dispute to arbitration can be clearly ascertained in the facts and circumstances of the case which depends on the intention of the parties to be gathered from the relevant documents and the surrounding circumstances.

73. Insofar as the submission of the learned senior counsel for the respondent that there was a separate arbitration agreement recorded between the petitioner and the successors and thus the petitioner could not have invoked the arbitration agreement in the contracts dated 16th April, 1997 is concerned, a perusal of the record indicates that the petitioner has not invoked arbitration agreement recorded in the agreement between the petitioner and the successors but has invoked arbitration agreement recorded in the contracts dated 16th April, 1997 on the premise that the said contracts stood assigned in favour of the petitioner and the petitioner having stepped in the shoes of the assignors.

74. Insofar as the submission of the learned senior counsel for the respondent that under clause 6 of the said Memorandum of Sale entered into between the petitioner and the said assignor, the petitioner was only granted powers to act as a constituted attorney of the assignor and thus the petitioner could not have invoked the arbitration agreement or could not have filed the statement of claim in its own name is concerned, in my view Mr. Andhyarujina, learned counsel for the petitioner is right in his submission that the said clause provided an additional safeguard to the petitioner to represent the original successors. In this case the respondent has accepted the obligations of the petitioner and in substitution of the assignors and had insisted for compliance of rights, duties and obligations under the

said two contracts from the petitioner who had stepped in the shoes of the said successors. There is thus no merit in this submission of the learned senior counsel for the respondent.

75. Insofar as the submission of the learned senior counsel for the respondent that for the purpose of invoking arbitration agreement, the petitioner had to demonstrate that the arbitration agreement within the meaning of section 7 had existed between the parties is concerned, there is no dispute that the arbitration agreement existed between the respondent herein and DLF Industrial Limited. In my view, since the petitioner has stepped in the shoes of the said DLF Industrial Limited and DLF Universal Limited, the said two contracts entered into between the said DLF Industrial Limited and the respondent including the arbitration agreement recorded therein stood assigned in favour of the petitioner.

76. In my view, there is no substance in the submission of the learned senior counsel for the respondent that even if the two contracts were assigned in favour of the petitioner, the arbitration agreement forming part of such contracts was not assigned. The judgments relied upon by the learned senior counsel for the respondent interpreting section 16 of the Arbitration & Conciliation Act, 1996 are not relevant to decide whether arbitration agreement can be assigned or not. Under section 16 of the Arbitration & Conciliation Act, 1996, it is provided that an arbitration clause which forms part of a contract shall be treated as an agreement independent of the other terms of the contract. It is provided that the arbitral tribunal has power to rule on its own jurisdiction including ruling on any objections with respect to the existence or validity of the

arbitration agreement and for that purpose, the arbitration clause which forms part of a contract shall be treated as an agreement independent of the other terms of the contract. Merely because a party has appointed an arbitrator or has participated in the appointment of an arbitrator, he is not precluded from raising a plea of jurisdiction in the arbitral proceedings. The scheme of section 16 permitting a party to raise such an objection of jurisdiction though he had participated in the appointment of an arbitrator in an arbitration, without intervention of the Court is totally different and is limited only for that purpose. In my view, the judgments interpreting section 16 of the Arbitration Act would not apply in case of an assignment of a contract including arbitration agreement.

77. A perusal of the record indicates that the arbitral tribunal has not accepted the case of the respondent that in view of clause 6 of the Memorandum of Sale entered into between the petitioner and DLF Universal Limited, the petitioner could act only as a constituted authority on behalf of the said assignors in case of any dispute between the petitioner and the respondent. It is not in dispute that the said assignors did not file any separate proceedings against the respondent nor the respondent filed any separate proceedings against the said assignors in respect of the dispute arising under the said two contracts dated 16th April, 1997.

78. In my view, no separate execution of the arbitration agreement was required to be executed between the petitioner and the respondent, in view of the fact that the said two contracts containing arbitration agreement was already assigned in favour of the petitioner and the entire contracts were acted upon by both the

parties herein.

79. In view of the assignment of the said two contracts in favour of the petitioner, the arbitration agreement contained therein also stood assigned in favour of the petitioner. The petitioner had thus *locus standi* and had rightly invoked the said arbitration agreement. The impugned order holding that arbitration agreement was not assigned in favour of the petitioner shows patent illegality.

80. I therefore, pass the following order :-

a). Arbitration Petition No.509 of 2011 is allowed in terms of prayer clause (a). The impugned order dated 2nd February, 2011 passed by the arbitral tribunal is set aside. There exists an arbitration agreement between the petitioner and the respondent in view of the contracts dated 16th April, 1997 having been assigned in favour of the petitioner, including the arbitration agreement.

b). The parties are directed to proceed with the arbitral proceedings expeditiously. No order as to costs.

(R.D. DHANUKA, J.)

At this stage learned counsel appearing for the respondent seeks stay of the operation of this order, which is vehemently opposed by the learned counsel for the petitioner. He however, submits that for a period of four weeks, his client will not apply for execution of this order by addressing any letter to the arbitral tribunal. The statement is accepted.

(R.D. DHANUKA, J.)