

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Dated 30.08.2017

CORAM

THE HONOURABLE DR.JUSTICE ANITA SUMANTH

Original Petition No.186 of 2017

M/s.Gobins India Engineering Pvt. Ltd.,
By its Managing Director Binu S.Gopinath .. Petitioner

vs

M/s.SBQ Steels Ltd.,
Chennai-600 028. .. Respondent

Petition filed under Section 11(6) of the Arbitration and Conciliation Act, 1996 to appoint an independent Arbitrator for settlement of disputes between the petitioner and the respondent with a direction for time bound decision or to appoint an Arbitrator for settlement of disputes from the side of respondent as the petitioner has already proposed name of Arbitrator Shri R.Amizhdhu, Advocate, High Court, Chennai from their side and the proposal has not been made by the respondent from their side so as the third Arbitrator can be appointed by the two Arbitrators, one by the petitioner and another as proposed by this Court on behalf of the respondent with a direction for time bound decision or to resume the proceedings of the Arbitral Tribunal and to re-instate Shri R.Amizhdhu as Sole Arbitrator for the Arbitration Proceedings with a direction for time bound decision.

For petitioner : Mr.Dhassaiya
For respondent : Mr.S.K.Raghunathan for
Mr.V.Anilkumar

ORDER

This Petition prays for the appointment of an Arbitrator for adjudication upon disputes inter se the parties arising out of Agreement dated 03.08.2009.

2. Clause 10 of the aforesaid Agreement provides for Arbitration and the same is extracted hereunder:

'10.If any differences or disputes arise between contractor and purchaser in relation to or out of this contract, the same shall be referred to the arbitration of two arbitrators, one each to be appointed by the contractor and the purchaser. The provisions of the Indian Arbitration and Conciliation Act 1996 shall apply for such Arbitration. The decision so given shall be final and binding upon the parties hereto.'

3. The facts in brief are as follows:

(i)An offer was made by the petitioner dated 03.08.2009 for supply of equipment and carrying out of piping jobs for a Rolling Mill Project at Gudur. The offer was accompanied by the technical and commercial bid, the price

bid and the general terms and conditions containing inter alia the clause for Arbitration.

(ii) A Letter of Intent dated 25.09.2009 was issued by the respondent followed by a Work Order on 17.08.2010 specifying the description of works to be executed. The terms and conditions in the Work Order did not include a clause for resolution of disputes by way of Alternate Dispute Resolution.

(iii) Disputes arose between the parties in the course of execution of the work and the petitioner, after issuance of legal notice dated 25.10.2013 and several unsuccessful attempts at persuading the respondent to meet its demands, invoked the Arbitration Clause contained in the offer letter dated 04.04.2014.

(iv) The respondent however, vide letter dated 24.07.2014 rejected the request for arbitration, pointing out that the Work Order issued by the respondent did not contain any clause for arbitration. Incidentally all the claims made were also denied.

(v) A reply dated 23.09.2014 was then sent by the petitioner reiterating its claims as well as its request for resolution of the disputes through arbitration. The letter was followed by the appointment of one Mr. Amizhdhu, Advocate, as an arbitrator by the petitioner on 26.12.2014 and the consent of the respondent in that regard was sought.

(vi) Mr.Amizhdu, vide letter dated 25.2.2015 commenced proceedings for arbitration and fixed the date of first hearing on 15.6.2015, communicating the same to the parties by letter dated 18.5.2015. His appointment was however not accepted by the respondent who conveyed its dissent by letter dated 10.06.2015 denying the existence of an Arbitration Agreement between the parties.

4.Mr.Dhassaiya, learned counsel appearing for the petitioner would place great reliance on the Clause extracted at para 2 herein above to show that the offer made by the petitioner clearly contained a clause for arbitration. He would refer to letter dated 25.09.2009 issued by the respondent stating that '*a formal work order with all the technical and commercial terms and conditions to follow*'. The submission was to the effect that the reference to the terms and conditions was to those terms and conditions that had accompanied the offer dated 03.08.2009 that included a clause for arbitration and that accordingly, the clause stood incorporated in the subsequent work orders as well.

5.Mr. S.K.Raghunathan, learned counsel appearing for Mr.V.Anilkumar, learned counsel for the respondent, on the other hand, would vehemently oppose the existence of an arbitration agreement. He would rely on the decision of the Supreme Court in *M.R.Engineers and Contractors Private*

Limited vs Som Datt Builders Limited 2009 (7) SCC 696 and a decision of this Court in O.P. No.823 of 2014 dated 12.08.2015 in *NSK India Sales Company Private Ltd. vs. Proactive Universal Trading Company Private Ltd.*, specifically the following paragraphs in the latter decision:

'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.

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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.'

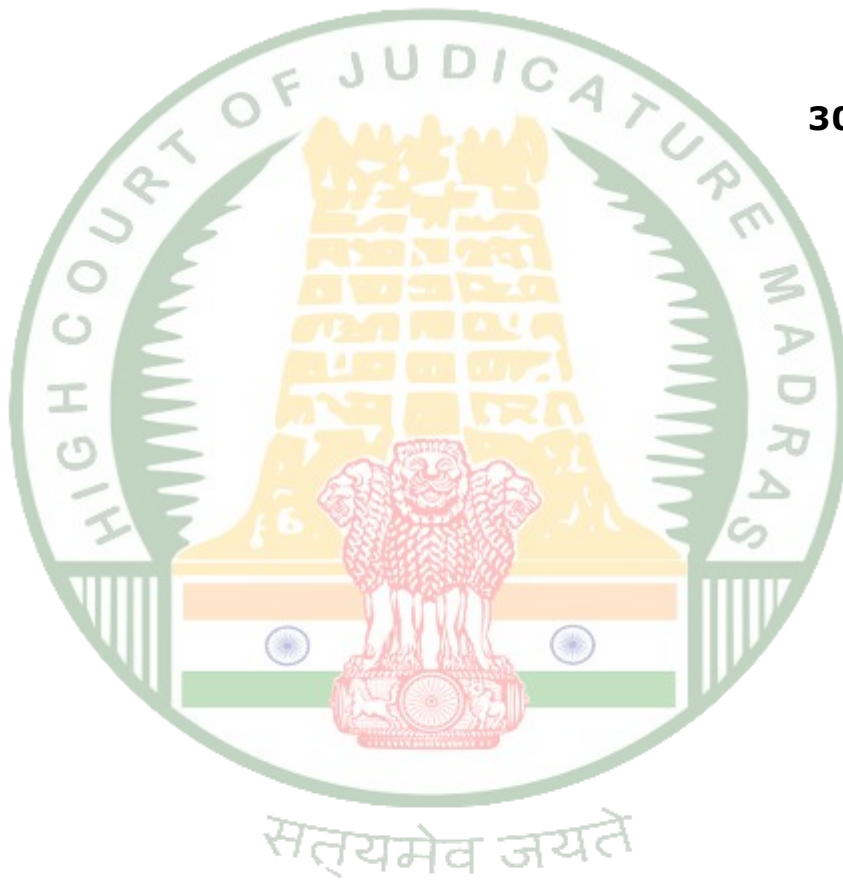
6. Thus, according to him, there was no reference to or incorporation of the arbitration clause in the work order and as such no arbitration agreement between the parties.

7. Heard both learned counsel. The sine qua non for a reference to arbitration is the existence of an arbitration agreement. This is lacking in the present case. No doubt, the offer made by the petitioner contains inter alia an arbitration clause. The document is however unilateral and has nowhere been accepted or ratified by the respondent. In fact the respondent in its letter dated 25.09.2009 confirms that a formal work order will be issued along with technical and commercial terms and conditions. The reference to technical and commercial terms and conditions is clearly the fresh set of terms and conditions executed along with the work order and cannot refer to the terms and conditions accompanying the offer as was sought to be made out by the learned counsel for the petitioner. Work Order dated 17.08.2010 does not contain an arbitration clause and it is pursuant to the said work order that the petitioner has executed various works. I also find no reference to or any understanding between the parties to take recourse to ADR mechanisms in any of the communications between the parties to lead me to the conclusion that the arbitration clause set out in offer dated 03.08.2009 has been incorporated by reference to the transaction as between the parties. The basis of proceedings has to be consensus ad idem or a meeting of the minds that the parties have consciously decide to adopt an Alternate Dispute Resolution Mechanism for resolution of disputes. This is conspicuous by its absence in the present matter.

8. In view of my finding above to the effect that there is no valid agreement for arbitration between the parties, the question of appointment of an Arbitrator does not arise. The petition is thus dismissed leaving the parties to bear their own costs.

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DR. ANITA SUMANTH,J.

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