

IN THE HIGH COURT OF JUDICATURE AT MADRAS**DATED: 07.08.2017****CORAM****THE HONOURABLE DR. JUSTICE ANITA SUMANTH****O.P.No.188 of 2017**

The Supreme Industries Ltd.,
represented by Mr. Rajendra Jugalkishore
Saboo, the AVP (Corporate Affairs) &
Company Secretary and its
Authorised Signatory,
612, Raheja Chambers, Nariman Point,
Mumbai 400 021. Petitioner

Vs

GMMCO LIMITED,
represented by its Managing Director,
53A, Hoota Gali, Industrial Area,
Belavadi, Mysore 570 001 ... Respondent

Original Petition filed under Section 11 of the Arbitration and Conciliation Act 1996 praying to appoint an Arbitrator as provided under the Arbitration Agreement contained in the Commercial Agreement of the Proposal dated 26.07.2010.

for Petitioner : Mr. P.R. Raman, Senior Counsel

for Respondent : Mr. Rahul Balaji

ORDER

This petition under section 11 of the Arbitration and Conciliation Act seeks an appointment of Arbitrator in terms of the

following clause which forms part and parcel of the Proposal for supply of Caterpillar brand Gas Genset Engine 500 K.W.415 V and associated accessories.

'Arbitration And Law Applicable: Any dispute whatsoever arising out of the contract unless amicably settled shall be referred to two arbitrators residing in Chennai each holding a responsible position in a firm or a company which is a Member of the Tamil Nadu Chamber of Commerce and Industry, one to be appointed by each party to the dispute, unless otherwise agreed, the contract shall be governed by Law of Chennai Jurisdiction.'

2. Heard Mr. P.R. Raman, Senior Counsel for the petitioner and Mr. Rahul Balaji, learned counsel appearing for the respondent.

3. Mr. Rahul Balaji appearing for the respondent would contest the petition on the basis that there exists no arbitration agreement as between the parties and as such the present petition is misconceived. The provisions of section 7 of the Arbitration and Conciliation Act 1996 (in short 'Act') require an agreement to be signed by both parties. This condition is, according to him, not satisfied in the present case, since proposal dated 26.07.2010 containing the arbitration clause has been signed only by the respondent.

4. He would further draw the attention of the Court to an e-mail issued by the respondent modifying the price as stated in the proposal and commercial bid to a figure of Rs.81 lakhs as against Rs.87,58,200/- originally suggested. Thus the original proposal had not been accepted by the petitioner and stood modified pursuant to discussions between the parties. The revised terms between the parties had been captured in a purchase order dated 6.8.2010 that did not contain a clause for arbitration. This, according to him, constitutes the agreement between the parties and in the absence of an arbitration clause therein, the present petition is not maintainable.

5. In response, learned counsel for the petitioner would refer to the reply to legal notice issued by the respondent herein dated 13.06.2013 specifically admitting the acceptance of 'terms and conditions set out in the offer letter'. He would also point out letter of indent issued by the petitioner dated 5.8.2010 referring to the acceptance of the offer made by the respondent which contained the clause for Arbitration. Thus, according to him, there is an incorporation by reference, of the clause for arbitration contained in proposal dated 26.7.2010.

6. It is apparent that disputes exist interse parties that call for resolution. Having heard the parties, I am of the view that the question of the existence/validity or otherwise of an Arbitration agreement could well be decided by the learned Arbitrator in terms of section 16 of the Act as extracted below;

'16. Competence of arbitral tribunal to rule on its jurisdiction – (1) *The arbitral tribunal may rule on its own jurisdiction, including ruling on any objections with respect to the existence or validity of an arbitration agreement, and for that purpose,-*

(a) an arbitration clause which forms part of a contract shall be treated as an agreement independent of the other terms of the contract; and

(b) a decision by the arbitral tribunal that the contract is null and void shall not entail ipso jure the invalidity of the arbitration clause.

7. The provisions of section 7 of the Act dealing with Arbitration agreement provide for various situations in which the existence of an agreement can be demonstrated. Section 7 states as follows:-

7. Arbitration agreement – (1) *In this Part, "arbitration agreement" means an agreement by the parties to submit to arbitration all or certain disputes which have arisen or which may arise between them in respect of a defined legal relationship, whether*

contractual or not.

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

(3) An arbitration agreement shall be in writing.

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

- (a) a document signed by the parties;*
- (b) an exchange of letters, telex, telegrams or other means of telecommunication which provide a record of the agreement; or*
- (c) an exchange of statements of claim and defence in which the existence of the agreement is alleged by one party and not denied by the other.*

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

8. The determination of whether the parties have entered into a binding Arbitration agreement thus calls for examination of all documents including correspondences exchanged between the parties. This exercise may be undertaken by the learned Arbitrator in terms of section 16 of the Act.

9. Accordingly, I refer the disputes to arbitration leaving open the question relating to validity of arbitration agreement to be decided by the Arbitrator on priority.

10. By consent of the parties, I appoint Justice T.Somasundaram, Retired Former Judge of this Court at No.1, Old No.1686, 15th Street, 'H' Block, Anna Nagar West, Chennai 600 040 (Phone 26124552) as a sole arbitrator to enter upon the reference, issue notice and hear the parties. He may, after issuing notice to the parties and upon hearing them, endeavour to pass an award as expeditiously as possible, preferably within a period of six months from the date of receipt of this order. The learned Arbitrator is at liberty to fix his remuneration and other incidental expenses. The proceedings may, as agreed to by the parties, be conducted under the aegis of the Madras High Court Arbitration Centre and in accordance with the Madras High Court Arbitration Rules.

11. The Original Petition is, accordingly, allowed, leaving the parties to bear their own costs.

07.08.2017

Index:Yes/No

Speaking order/non-speaking order
msr

DR. ANITA SUMANTH, J.

msr



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