IN THE HIGH COURT OF JUDICATURE AT MADRAS

(ORDINARY ORIGINAL CIVIL JURISDICTION)

WEDNESDAY, THE 06TH DAY OF JUNE 2018

THE HON'BLE DR. JUSTICE C.V.KARTHIKEYAN

A.No.4534 of 2017
in
C.S.No.473 of 2017

M/s.Kamachi Industries Ltd.,
Formerly known as
M/s.Kamachi Sponge & Power Corporation Ltd.,
Rep., by its Office Executive - Legal,
Mr.P.Baskaran,
No.39, ABC Trade Centre III Floor,
Inside Devi Theatre Complex,
Anna Salai, Chennai 600 002

..Plaintiff

-Versus-

M/s.Simplex Infrastructures Limited,
New No.48, Old No.21,
Casa Major Road, Egmore,
Chennai 600 008.

..Defendant

A.No.4534 of 2017

M/s.Simplex Infrastructures Limited,
New No.48, Old No.21,
Casa Major Road, Egmore,
Chennai 600 008
Represented by its authorised signatory
Mr.R.Swaminathan

...Applicant

vs

M/s.Kamachi Industries Ltd.,
Formerly known as
M/s.Kamachi Sponge & Power Corporation Ltd.,
Rep., by its Office Executive - Legal,
Mr.P.Baskaran,
No.39, ABC Trade Centre III Floor,
Inside Devi Theatre Complex,
Anna Salai, Chennai 600 002

....Respondent

Application praying that this Hon'ble Court be pleased to refer the disputes that have arisen between the

Applicant/Defendant and Respondent/Plaintiff from the purchase orders dated 08.03.2016 and 08.06.2016 to arbitration in terms of the arbitration in terms of the arbitration agreement as contained in Clause 23 of the Terms and Conditions of the said purchase orders.

This application coming on this day before this court for hearing and the court made the following order:

This application has been filed to refer the disputes that had arisen between the Applicant/ Defendant and the Respondent/ Plaintiff with respect to the purchase orders, dated 08.03.2016 and 08.06.2016 to arbitration in terms of the arbitration agreement, as contained in clause 23 of the terms and conditions of the said purchase orders.

2. CS.No.473 of 2017 had been filed under Order 37 of CPC, by the Plaintiff, M/s.Kamachi Industries Limited, formerly known as M/s.Kamachi Sponge and Power Corporation Limited, against M/s.Simplex Infrastructures Limited, for a judgement and decree for a sum of Rs.1,16,23,105/- together with interest at the rate of 24% p.a. on Rs.1,09,92,209/- from the date of filing of the plaint till the date of payment and/or realisation and for costs.

3. The Plaintiff is a Company registered under the Companies Act, 1956 and doing business in manufacturing and selling of TMT bars. The Defendant is also a Company incorporated under the Companies Act, 1956, carrying on business in promoting real estate, construction and allied activities. The Plaintiff and the Defendant have had business transactions from 2014. During March 2016 and June 2016, the Defendant had placed purchase orders with the Plaintiff for purchase of TMT bars for the Defendant's project at Zuari Garden City (Kaveri Area) Kulikeri, KRS, Sreerangapatna Taluk, Mandya

District, Karnataka, for a total sum of Rs.1,44,48,160/-. The Defendant had placed purchase orders, which were dated 8.3.2016 and 8.6.2016.

4. The Plaintiff had supplied TMT bars from Chennai to the construction site mentioned in the purchase orders on different dates and had raised invoices to a sum of Rs.1,10,99,361/- during the financial years 2015-2016 and 2016-2017. The details had been given in the plaint. It is seen that 13 invoices had been raised by the Plaintiff towards the supply of TMT bars. They were dated 27.03.2016 (2 invoices), 29.03.2016 (3 invoices), 30.03.2016 (2 invoices), 4.4.2016 (2 invoices), 14.04.2016 (1 invoice), 8.7.2017 (1 invoice) and 15.07.2017 (2 invoices).

5. In the normal course of business, Letters of Credit were opened in favour of the Plaintiff. Previous Letters of Credit opened by the Defendant were cleared and payments were received. Two Letters of Credit opened by the Defendant in favour of the Plaintiff through Axis Bank, dated 18.03.2016 for a sum of Rs.75,88,161/- and Standard Chartered Bank Limited dated 27.6.2016, for a sum of Rs.68,60,000/- were not honoured by the Defendant bankers. The reason stated was that the Defendant had not accepted the documents and that there were discrepancies in the documents. These were informed belatedly. The Plaintiff had submitted documents to the respective banks. However, the Defendant's banker had not realised the payment to the Plaintiff. They withheld the payments for the materials already supplied by the Defendant. They had earlier supplied materials only based on the Letters of Credit opened by the Defendant. The materials were also received by the Plaintiff. The Defendant did not instruct their banker to realise the payment to the Plaintiff. The Defendant's account maintained by the Plaintiff showed a debit balance of Rs.1,01,92,209/- as on 30.9.2016. It is under these

circumstances that the Plaintiff had filed the suit, seeking the above reliefs.

6. In the suit, the Defendant has filed the present application, under Section 8 of the Arbitration and Conciliation Act to refer the disputes between the Plaintiff and the Defendant to arbitration.

7. In the affidavit filed in support of this application, the authorised signatory of the Defendant has stated that the purchase orders, which had been referred to by the Plaintiff and which had been filed by the Plaintiff along with the plaint, contained a clause that the disputes arising pursuant to the purchase orders shall be referred to arbitration. It has been further stated that in the purchase orders, it was further covenanted that the transaction shall be subject to jurisdiction of Calcutta High Court and Courts thereunder. It has been further stated that since the contractual relationship between the parties is governed by an arbitration clause and which arbitration has to be held at Calcutta and since the registered Office of the Defendant is at Calcutta and the purchase orders had been issued from Calcutta, it has been stated that the disputes which are the subject matter of this suit, should also be referred to arbitration under Section 8 of the Arbitration and Conciliation Act.

8. A counter has been filed by the Plaintiff, challenging the said version of the Defendant. According to the Plaintiff, the Defendant had not raised any disputes with the Plaintiff either with respect to the quality or quantity of the materials already supplied based on the purchase orders. It has been further stated that no dispute arose pursuant to the purchase orders. The disputes had arisen only owing to the fact that the Letters of Credit had not been honoured by the bankers and that the Defendant had not given suitable instructions to their banker, namely, Axis Bank and

Standard Chartered Bank, in which Letters of Credit had been opened in favour of the Plaintiff. It has been further stated that the Defendant, with a mala fide intention to cheat and defraud the Plaintiff, had sent emails that they had opened Letters of Credit and based on the same materials were also supplied. However, default has been made in payment and when questioned, for the first time, the Defendant has raised an issue that the matter should be referred to arbitration. It has been further stated that the Plaintiff had issued a notice on 21.9.2016 to the Defendant, who did not send any reply. The Plaintiff again sent another notice on 15.3.2017 which was also not replied by the Defendant. It has been further stated that the purchase orders do not constitute an agreement and consequently, the matters are not referable to arbitration and that this Court has jurisdiction to try the issues between the parties.

9. This Court heard the arguments of the learned counsel on either side. Even though the Defendant is the Applicant in this application, for the sake of convenience, the parties hereinafter shall be referred to as the Plaintiff and the Defendant.

10. The Plaintiff is a Private Limited Company registered under the Companies Act, 1956 and they are doing business in manufacturing and selling TMT bars. The Defendant is also a Company registered under the Companies Act, 1956 and they are involved in promoting real estate and construction business. Naturally, they require TMT bars for their business activities.

11. It is the specific case in the plaint that the Plaintiff and the Defendant have had business transactions from 2014. The Plaintiff is the supplier of TMT bars and the Defendant is the purchaser of the same. The Defendant in March 2016 and June 2016 had placed purchase orders for purchase of TMT bars for the

Defendant's project at Zuari Garden City (Kaveri Area) Kulikeri, KRS, Sreerangapatna Taluk, Mandya District, Karnataka. The total value was Rs.1,44,48,160/-. The Defendant had placed purchase orders which were dated 8.3.2016 and 8.6.2016. The Plaintiff had supplied materials pursuant to the said purchase orders. They had raised invoices to a total sum of Rs.1,10,99,361/- during the financial years 2015-2016 and 2016-2017.

12. The details of supply of materials and the invoices raised are as follows:-

S. No	Invoice No.	Date	Description	Amount (Rs.)
1	KAR/RMD/1452/15-16	27.03.2016	TMT Bar	8,60841
2	KAR/RMD/1453/15-16	27.03.2016	TMT Bar	10,21,412
3	KAR/RMD/1462/15-16	29.03.2016	TMT Bar	6,98,996
4	KAR/RMD/1463/15-16	29.03.2016	TMT Bar	1,59,298
5	KAR/RMD/1464/15-16	29.03.2016	TMT Bar	8,60,841
6	KAR/RMD/1466/15-16	30.03.2016	TMT Bar	8,58,365
7	KAR/RMD/1467/15-16	30.03.2016	TMT Bar	2,58,698
8	KAR/RMD/16-17/0011	04.04.2016	TMT Bar	12,84,500
9	KAR/RMD/16-17/0012	04.04.2016	TMT Bar	10,51,998
10	KAR/RMD/16-17/0072	14.04.2016	TMT Bar	12,23,561
11	KAR/RMD/16-17/0240	08.07.2016	TMT Bar	12,91,932
12	KAR/RMD/16-17/0245	15.07.2016	TMT Bar	10,24,496

S. No	Invoice No.	Date	Description	Amount (Rs.)
13	KAR/RMD/16-17/0246	15.07.2016	TMT Bar	5,44,032
			Total	**1,10,99,361**

13. According to the Plaintiff, the Plaintiff supplied materials against Letters of Credit opened in favour of the Plaintiff. The earlier Letters of Credit were cleared and payments had been received by the Plaintiff. However, the last two Letters of Credit opened by the Defendant in favour of the Plaintiff through (1) Axis Bank Limited, in LC.No.1164LCO-0006412, dated 18.3.2016 for a sum of Rs.75,88,161/- and (2) Standard Chartered Bank Limited, in LC.No.852010134837-L, dated 27.6.2016, for a sum of Rs.68,60,000/- were not honoured by the two bankers.

14. It is the allegation of the Plaintiff in the plaint that the Defendant have not given instructions to the bankers to honour the Letters of Credit. The Plaintiff had sent two legal notices on 21.9.2016 and 15.3.2017. They were both received by the Defendant. The Defendant did not reply to both the notices.

15. The Plaintiff has now claimed the amount payable for the purchase already made. The Plaintiff has also claimed interest at 24% p.a. since they were commercial transactions. The Plaintiff also claims costs of the suit.

16. The Defendant has not denied the supply of materials. They have not raised any issue regarding the quantity or quality of the products supplied. On the other hand, they have fallen back on the purchase orders and claimed that since the purchase orders contained a clause for arbitration, the entire issue should be referred to arbitration.

17. The Defendant relied on two purchase orders dated 8.3.2016 and 8.6.2016. They are both not signed by the Plaintiffs. As a matter of fact, they are not even signed by the Defendant. When this Court insisted that a certified copy of the agreement, which contained the arbitration clause, should be filed in the Court, the Defendant filed the certified copy of the purchase orders, but which were not signed by the Defendant at the time when they were issued.

18. The purchase order dated 8.3.2016 was with respect to the supply of six different items of TMT bars, amounting to Rs.68,03,820/-. The Plaintiff had supplied the materials in accordance with the purchase orders. The Defendant, to repeat, have not raised issues regarding shortfall in quantity or quality of the materials supplied. The annexure to the purchase orders gives the terms of payment, which states that the payment shall be made within 60 days on issuance of Letters of Credit. It has been further stated that if the materials are not found as per the specifications or if the quality is found to be inferior or if the materials are rejected by the clients of the Defendant, the Plaintiff will be under an obligation to replace the materials at their cost. It is also mentioned that rusted materials would not be accepted. The purchase orders also contain terms and conditions. The terms and conditions included conditions regarding delivery and the time for delivery.

19. There was a clause, stating that the purchaser may cancel the order without any liability for breach of contract if the goods are not delivered by stipulated date. There were also instructions regarding packing. There were also instructions regarding inspection of the materials.

20. Clause 21 of the purchase orders is as follows:-

"21. If

(i) the seller shall fail to deliver the goods on the due date or shall commit a serious breach or shall after due warning continue any breach of its obligations under the contract or

(ii) any distress execution or other legal process is levied upon any of the suppliers assets or

(iii) the seller shall make any arrangement or composition with his or its creditors commit any act of bankruptcy or (being a Corporation) shall enter into liquidation or have a winding up portion presented against it or call a meeting of its creditors or suffer the appointment of a receiver in respect of any part of its undertaking or assets. The purchaser may without prejudice to any other rights the Purchaser may have by law statute or under these conditions and without incurring any liability whatsoever to the sellers determine the contract summarily by notice in writing."

21. Clause 23, which is relied on by the Defendant, relates to arbitration and it is as follows:-

> "23. Arbitration:- In the event of any difference or dispute arising out of or in connection with this purchase order, the same shall be first amicable settled by mutual dialogue. If the parties fail to settle their difference or dispute arising out of or in connection with this work order (including interpretation of the terms thereof) the same

shall be referred to arbitration. The arbitration proceedings shall be conducted by a single Arbitrator appointed by the Company Secretary of Simplex Infrastructures Limited and the award/decision of such Arbitrator shall be final and binding upon both the parties. The venue of the arbitration shall be Kolkatta. However, the work shall not be stopped during the pendency of the proceedings and it shall be ensured that such work is proceeded uninterruptedly.”

22. It is the case of the Defendant in this application that since there is a clause to refer the disputes to arbitration, the matter must be referred to arbitration. The learned counsel for the Defendant has relied on **2007 3 SCC 686 (Agri Gold Exims Limited Vs. Sri Lakshmi Knits and Wovens and others)** wherein in paragraph 17, it had been held as follows:-

“17. Respondents had not filed any written statement in the suit. They had not disclosed their defence. They indisputably had raised a dispute in regard to the claim of the appellant. We have noticed the arbitration agreement entered into by and between the parties. It is of wide amplitude. The arbitration agreement brings within its fold dispute of any nature whatsoever. It is in broadest term. Respondents had made payments without prejudice to their rights and contentions. Payments were made keeping in view the ongoing business relationship between the parties. Out of the five post dated cheques, two were dishonoured. But, despite pendency of the suit, payments had been made to satisfy the claim of the

> appellant in respect of the cheques which were dishonoured. Sufficient explanation has been offered by the respondents therefor. Certain contingencies of events, as indicated herein before, are not in dispute. If the suit was confined to the amount in respect of those two cheques, the contention of Mr. Rao could have been accepted. But it is not so."

23. The learned counsel for the Defendant has also relied on **2015 13 SCC 477 (Govind Rubber Limited Vs. Louids Dreyfus Commodities Asia Limited)**, wherein in paragraph 12 it was held thus:-

> "12. There may not be any dispute with regard to the settled proposition of law that an agreement even if not signed by the parties can be spelt out from correspondence exchanged between the parties. However, it is the duty of the court to construe correspondence with a view to arrive at the conclusion whether there was any meeting of mind between the parties which could create a binding contract between them. It is necessary for the Court to find out from the correspondence as to whether the parties were ad idem to the terms of contract."

24. It is the contention of the learned counsel for the Defendant that the purchase orders constitute a contract between the Plaintiff and the Defendant and consequently, there being a dispute raised by the Plaintiff it should be referred to arbitration.

25. However, the very judgement relied on by the learned counsel for the Defendant, which is extracted above in **2015 13 SCC 477**, itself states that it is the duty of the Court to find out from the correspondences

whether the parties were ad idem to the terms of the contract.

26. In the instant case, the Defendant themselves have not signed the purchase orders. They rely on the same only for the quantity and nature of goods to be supplied by the Plaintiff. The Plaintiff came to know about the type of good items or specifications of TMT bars to be supplied from the purchase orders. Even the Defendant had not taken a risk of signing the purchase orders and the Plaintiff had acted upon the purchase orders by supplying the goods. Their obligation ends with that. If the goods are of inferior quality, the Defendant had an option to return back the goods or raise a claim against the Plaintiff for the same. The Defendant had not done so. The Defendant had not bothered to reply to the notices issued by the Plaintiff.

27. The learned counsel for the Defendant relied on **2014 SCC OnLine Cal 19727 (Utkarsh Tubes and Pipes Limited Vs. Simplex Infrastructure Limited)** for the proposition, according to the learned counsel for the Defendant, that the purchase order is itself a contract between the parties. The said judgement had been given by a learned Single Judge of the Kolkatta High Court, in which the Defendant herein was also a Defendant. It is clear that the present Defendant has an habit of seeking materials to be supplied and then, defaulting in payment. In the said judgement also, the purchase order was presented before the Court, containing the very same arbitration clause.

28. Sections 7 and 8 of the Arbitration and Conciliation Act are 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) There 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. Power to refer parties to arbitration where there is an arbitration agreement.

(1) A judicial authority before which an action is brought in a matter, which is the subject of an arbitration agreement, shall, if a party so applies not later than when submitting his first statement on the substance of the dispute, refer the parties to arbitration.

(2) The application referred to in sub-section (1) shall not be entertained unless it is accompanied by the original arbitration agreement or a duly certified copy thereof.

(3) Notwithstanding that an application has been made under sub-section (1) and that the issue is pending before the judicial authority, an arbitration may be commenced or continued and an arbitral award made."

29. The ratio laid down in the judgement referred in **2014 SCC OnLine Cal 19727 (Utkarsh Tubes and Pipes Limited Vs. Simplex Infrastructure Limited)** shall be discussed hereinafter. Before that, it would be advantageous to discuss the judgement reported in **2011 5 SCC 532 (Booz Allen and Hamilton Inc. Vs. SBI Home Finance Limited)**, wherein it was held as under:-

"Where a suit is filed by one of the parties to an arbitration agreement against the other parties to the arbitration agreement, and if the defendants file an application under section 8stating that the parties should be referred to arbitration, the court (judicial authority) will have to decide

(i) whether there is an arbitration agreement among the parties;

(ii) whether all parties to the suit are parties to the arbitration agreement;

(iii) whether the disputes which are the subject matter of the suit fall within the scope of arbitration agreement;

(iv) whether the defendant had applied under section 8 of the Act before submitting his first statement on the substance of the dispute; and

(v) whether the reliefs sought in the suit are those that can be adjudicated and granted in an arbitration."

30. The conditions referred to in the above judgement, are not satisfied in the present case. A purchase order can never be an agreement between the parties unless it is signed by both the parties. However, the learned counsel for the Defendant had stated that the Calcutta High Court had still referred the parties to arbitration. I am not in agreement with the said judgement of the learned Single Judge of the Calcutta High Court, since even in the said judgement, the learned Single Judge of the Calcutta High Court had not specifically given any finding whether the purchase order constitutes an arbitration agreement between two parties. That issue was not answered. The arbitration clause was referred and the parties were referred to arbitration. I hold that arbitration cannot be resorted to as an escapism alternate to facing the rigours of trial. In this case, the Plaintiff has also attributed fraud on the Defendant and I am convinced that the issues

should be settled by adducing evidence in adversial trial. Particularly, in this case, the purchase order had not been even signed by the Defendant.

31. The Plaintiff have produced two purchase orders and the same have been examined by this Court. The two purchase orders also contain the very same clauses and they are not signed by the Defendant.

32. In **Karnataka Power Transmission Corporation Limited and another Vs. Deepak Cables (India) Limited reported in (2014) 11 SCC 148,** wherein paragraphs 8 and 21, it was held as follows :

> "8. From the aforesaid provision, it is graphically clear that unless an arbitration agreement stipulates that the parties agree to submit all or certain disputes which have arisen or which may arise in respect of defined legal relationship, whether contractual or not, there cannot be a reference to an arbitrator. To elaborate, it conveys that there has to be intention, expressing the consensual acceptance to refer the disputes to an arbitrator. In the absence of an arbitration clause in an agreement, as defined in sub-section (4) of Section 7, the dispute/disputes arising between the parties cannot be referred to the Arbitral Tribunal for adjudication of the dispute.
>
> 21. In Jagdish Chander [Jagdish Chander v. Ramesh Chander, (2007) 5 SCC 719], the Court, after referring to the earlier decisions, culled out certain principles with regard to the term "arbitration agreement". The said principles basically emphasise on certain core aspects, namely, (i) that though there is no specific 10 form of an arbitration

agreement, yet the intention of the parties which can be gathered from the terms of the agreement should disclose a determination and obligation to go to arbitration; (ii) nonuse of the words "arbitration" and "arbitral tribunal" or "arbitrator" would not detract from a clause being interpreted as an arbitration agreement if the attributes or elements of arbitration agreement are established i.e. (a) The agreement should be in writing. (b) The parties should have agreed to refer any disputes (present or future) between them to the decision of a private tribunal. (c) The private tribunal should be empowered to adjudicate upon the disputes in an impartial manner, giving due opportunity to the parties to put forth their case before it. (d) The parties should have agreed that the decision of the private tribunal in respect of the disputes will be binding on them; and (iii) where there is specific exclusion of any of the attributes of an arbitration agreement or contains anything that detracts from an arbitration agreement, it would not be an arbitration agreement. In this context, the two-Judge Bench [Jagdish Chander v. Ramesh Chander, (2007) 5 SCC 719] has given some examples and we think it apt to reproduce the same: (SCC p. 725, para 8)

"8. (iii) … For example, where an agreement requires or permits an authority to decide a claim or dispute without hearing, or requires the authority to act in the interests of only one of the parties, or provides that the decision of the authority will not be final and binding on the parties, or that if either party is not satisfied with the decision of the authority, he may file a civil suit seeking relief, it cannot be termed as an arbitration agreement." "

33. From a reading of Section 7 of the Arbitration and Conciliation Act, particularly, Section 7(4)(b) and the principles laid down by the Honourable Supreme Court, with respect to the ingredients, which constitute "arbitration agreement', it is clear that there is no arbitration agreement between the parties in the present case. The two purchase orders have not been signed by both parties. It is specifically not signed by the Defendant, who relies on the same. I have no hesitation to hold that since there is no arbitral agreement between the parties, the parties cannot be referred to arbitration under Section 8 of the Arbitration and Conciliation Act.

34. In the result, this application is dismissed. No costs.

Sd/.C.V.K.J
06.06.2018

//Certified to be a true copy//

Dated this the th day of 2018.

KY/07.06.2018 COURT OFFICER