

\$~48

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

Date of decision: 18th April, 2018

+ **ARB.P. 211/2018**

IMV INDIA PVT LTD

..... Petitioner

Through

Mr.Kishan Rawat, Ms.Jayati Parasher
and Mr.Rjan Narain, Advs.

versus

STRIDEWEL INTERNATIONALTHROUGH ITS SOLE

PROPRIETOR MR.MAHESH CHAUDHRI & ANR..... Respondents

Through

Mr.Deepak Khadaria, Adv.

CORAM:

HON'BLE MR. JUSTICE NAVIN CHAWLA

NAVIN CHAWLA, J. (Oral)

1. In view of the order passed today by this Court in Arbitration Petition No. 192/2018 and the connected petitions including the present one, the present petition is also dismissed with all pending applications, if any, with no order as to cost.
2. A copy of the aforesaid order in Arbitration Petition No. 192/2018 is placed below.

NAVIN CHAWLA, J

APRIL18, 2018/Arya

\$~30 to 48

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

Date of decision: 18th April, 2018

+ **ARB.P. 192/2018 to 209/2018 & ARB.P.211/2018**

IMV INDIA PVT LTD Petitioner
Through Mr.Kishan Rawat, Ms.Jayati Parasher
and Mr.Rjan Narain, Advs.

versus

STRIDEWEL INTERNATIONALTHROUGH ITS SOLE
PROPRIETOR MR.MAHESH CHAUDHRI & ANR..... Respondents
Through Mr.Deepak Khadaria, Adv.

CORAM:
HON'BLE MR. JUSTICE NAVIN CHAWLA

NAVIN CHAWLA, J. (Oral)

1. These petitions under Section 11 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as the 'Act') have been filed by the petitioner seeking appointment of a Sole Arbitrator for adjudicating the disputes that have arisen between the parties in relation to the Invoice(s) issued by the petitioner for supply of veterinary application material and equipment made by it to the respondents. The Arbitration Agreement relied upon by the petitioner is contained on the back of the Invoice(s) in the form of Clause 5 thereof, which is reproduced herein below:

“5. Any disputes or claims arising on or out of or in connection with quotations, orders or contracts for the supply or materials by the company shall be referred to arbitration of the The New Delhi Chamber of Commerce and in accordance with the rules of the Chamber's Tribunal or Arbitration. Any award made by such Tribunal shall be final and binding on both parties. No claim will be considered unless reported to the company within 4 days from receipt of material and the company is given an opportunity to make an investigation.”

2. The petitioner invoked the alleged Arbitration Agreement by way of its notice dated 11.07.2017. The respondents by their letter dated 08.08.2017 stated as under:

“Further, in your letter you have referred to clause 5 of the invoice raised by you on us, to initiate the arbitration proceedings to resolve the so called disputes which according to us have no relevance or meaning. First and foremost, there is no dispute as you are avoiding to reconcile your accounts with our accounts and secondly, assuming without admitting the existence of a dispute, the necessary remedial course is mentioned in Clause 5 of the invoice which reads as under:

“5. Any disputes or claims arising on or out of or in connection with quotations, orders or contracts for the supply or materials by the company shall be referred to arbitration of the The New Delhi Chamber of Commerce and in accordance with the rules of the Chamber's Tribunal or Arbitration. Any award made by such Tribunal shall be final and binding on both parties. No claim will be considered unless reported to the company within 4 days from receipt of material and the company is given an opportunity to make an investigation.”

Therefore, the only recourse available to your company (only in case of existence of a dispute) is to refer to arbitration of The New Delhi Chamber of Commerce, a forum, which has been specially mentioned by your company. It is shocking to learn that no such Chamber of Commerce exist, it appears it is also a ploy instituted by your company to dupe people who have claims/disputes against the company. In absence of any such chamber of Commerce, the dispute could never get settled and as a result, your company would have been withholding substantial sums due to people unless people opted to avail other remedies in law. Also, in absence of such a chamber of arbitrator, it is not at whims and fancies of your company to appoint a sole arbitrator based on your choice. Therefore, such a unilateral appointment is completely illegal and void.”

3. The petitioner thereafter filed a petition under Section 11 of the Act before this court being Arbitration Petition No.625/2017. The same was however dismissed as withdrawn on a plea taken by the respondents that a single petition with respect to 19 distinct Arbitration Agreements is not maintainable.

4. The present set of petitions was thereafter filed by the petitioner.

5. The learned counsel for the respondents submits that the relationship between the parties is governed by the letter(s) of appointment of the respondents as an agent of the petitioner. He submits that such letter(s) were issued from time to time, the last being on 02.04.2012. In none of these letter(s) there is an Arbitration Agreement between the parties. He further submits that on the other hand, these letter(s) expressly state that any disputes arising from this agreement shall be subject to the jurisdiction of the appropriate Court at Delhi. He further draws the attention of this Court

to the Invoice(s) being relied upon by the petitioner to contend that in the front side of the Invoice(s), only Clause 4 and 15 of the Invoice(s) were being referred as “terms and conditions”. The alleged Agreement sought to be relied upon by the petitioner is Clause 5 at the reverse side of such Invoice(s) and therefore, was not a term and condition of the supplies being made. The relevant portion of the Invoice(s) relied upon by the respondents is reproduced herein under:

“Terms & Conditions

- 1. 100% Payment within 45 Days by the Way of Demand Draft in favor of IMV INDIA PVT.LTD.*
- 2. Please Refer to Clause 4 & 15 on the Overleaf of Invoice.*
- 3. 1% Interest Per Month Will Be Charged on Unpaid Amount After 45 Days.”*

6. The learned counsel for the respondents relies upon the judgment of this Court in ***Taipack Limited & Ors v. Ram Kishore Nagar Mal***, (143) 2007 DLT 123 to contend that no Arbitration Agreement can be said to have come into existence only because it has been mentioned at the reverse side of the Invoice(s). He further relies upon the following judgments in support of his arguments:

- 1) Alupro Building Systems Pvt. Ltd. v. Ozone Overseas Pvt. Ltd.*, MANU/DE/0495/2017;
- 2) NSK India Sales Company Private Limited v. Proactive Universal Trading Company Pvt Ltd.*, AIR 2016 Mad 19.

7. Learned counsel for the petitioner, on other hand submits that the reliance of the respondents on the letter(s) of appointment is ill-founded inasmuch as the respondents were having two separate relationships with the

petitioner; one as an Agent and other as a Distributor. As far as the relationship of the petitioner with the respondents as an Agent is concerned, the same would be governed by the letter(s) of appointment, however, the relationship of the petitioner with the respondents as a Distributor is governed by the Invoice(s) raised by the petitioner from time to time. As such Invoice(s) are not denied by the respondents, in the submissions of the learned counsel for the petitioner, the respondents are stopped from denying the existence of the Arbitration Agreement as well. He further submits that the respondents in its reply to the notice invoking Arbitration Agreement did deny the existence of the Arbitration Agreement in the form of Clause 5 mentioned above, however, on the other hand submitted that the Arbitration Agreement was no longer valid as the New Delhi Chamber of Commerce is not in existence.

8. He further relies on the judgment of the Supreme Court in ***Govind Rubber Limited v. Louis Dreyfus Commodities Asia Private Limited***, (2015) 13 SCC 477 to contend that in terms of Section 7(4)(b) and Section 7(4)(c) of the Act the existence of an Arbitration Agreement may also be inferred from the exchange of letter(s), telex, telegrams or other means of telecommunications as also from an exchange of Statement of Claim and defence in which the existence of the Arbitration Agreement is alleged by one party and not denied by the other. He submits that in construing the Arbitration Agreement, the intention of the parties must be looked into.

9. I have considered the submissions made by the counsels for the parties. The alleged Arbitration Agreement relied upon by the petitioner is at the reverse side of the Invoice(s) raised by the petitioner on the respondents. The front side of such Invoice(s) draws attention of the

respondents only to Clauses 4 and 15 and not to Clause 5 on the reverse sides of the same. In fact, learned counsel for the petitioner cannot deny the assertion of the respondents that there was never any institution by the name of “New Delhi Chamber of Commerce” in existence.

10. From the Invoice(s) it cannot be inferred that the parties were *ad idem* on the existence of the Arbitration Agreement between the parties. In **Taipack Ltd** (supra), this court had dealt with a similar submission in detail and had concluded as under:

“13. In my opinion, the submission of the Petitioner that there was no existing agreement between the parties to refer the disputes arising out of their commercial relationship to Arbitration, is well founded. The arbitrator has rejected the objection as to non-existence of an arbitration agreement on the basis of the said Clause 4 printed on the reverse of the invoices etc. raised by the Respondents. The arbitrator held that since the Petitioner herein received the goods without any protest and prejudice, or without intimating any contrary intention through a letter or notice, it was not open for it to resile from the conditions printed on the bills & invoices of the Respondents herein. As per the said clause, the matter was referable to Paper Merchants Association, Chawri Bazaar, for arbitration. Consequently, according to the learned Arbitrator, an arbitration agreement existed between the parties in relation to their commercial transactions and he had jurisdiction to arbitrate the same.

xxxxx

16. In the present case, there is no arbitration agreement which could be said to be 'contained in a document signed by the parties'. Therefore, one has to ascertain whether there is an arbitration agreement which could be said to be contained in 'exchange of letters, telex, telegram or any other means of telecommunication, which provide a period of the agreement'. An “arbitration agreement” is a species

of the genus, that is “Agreement”. There has to be, first and foremost an agreement. For the existence of an agreement there has to be “consensus ad idem” between the parties, i.e., they should agree to the same thing in the same sense.

17. In the present case, the Petitioner herein made his offer when it placed the purchase order dated 13.2.1997 upon the Respondents which, inter-alia, contained clauses 10 and 11 as aforesaid. Clause 10, specifically made any other terms or conditions, contained in any document of the respondents that were in addition to, or in contradiction to those contained therein, inapplicable to the contract unless they were specifically agreed to by the petitioner in writing. Clause 11 subjected all disputes to jurisdiction of Delhi Courts. The respondents acted on this offer by effecting supplies of the goods, and at the same time raised an invoice dated 6.3.1997 for Rs.1,49,866.17 which contained condition No.4 as extracted above.

18. What is the legal effect of the aforesaid conduct of the respondents? In my view, when the respondents supplied the goods in compliance of the Purchase Order, it accepted the terms and conditions stipulated therein. The mere printing of condition No. 4 on the reverse of the invoice was, at the highest, an offer made by the respondents to the petitioner. Unless the said offer was accepted by the petitioner, it could not result in a binding and enforceable contract. The inclusion of terms and conditions at the back of the invoice, unilaterally issued by the respondents while effecting delivery of the goods in terms of the petitioner's purchase order, would not bind the petitioner. The purchase order itself made it clear that the petitioner did not intend to refer its disputes to arbitration in respect of the resulting transaction arising out of the said purchase order. Arbitration was clearly contra indicated when the petitioner's purchase order itself stated that “any dispute arising out of this contract shall be subject to the jurisdiction of Courts in Delhi.” The Respondents was well

aware that the petitioner had shunned arbitration, yet the respondents acted in furtherance of the said purchase order by effecting supplies.”

11. The above judgment has been followed by this Court in ***Alupro Building Systems Pvt. Ltd.*** (Supra) again by rejecting reliance on a clause printed on an invoice as an Arbitration Agreement.

12. In ***Govind Rubber*** (supra) Supreme Court while holding that an Arbitration Agreement may also exist in standard forms of contract, in case of Internet Purchase, Tele Purchase etc., emphasized that it has to be shown that the parties were *ad idem* on having their disputes resolved through Arbitration. It was held that the jurisdiction of Arbitrators is derived from the consent of the parties.

13. The reliance of the learned counsel for the petitioner on the judgment of this Court in ***Shri Kailash Nath Agarwal v. Aaren Exports***, MANU/DE/2916/2009 is also unfounded as in the said case the only dispute was regarding the existence of the invoices which were being relied upon for the purposes of the existence of the Arbitration Agreement. In the present case, the respondents do not deny the existence of such invoices and the only question is whether an Arbitration Agreement can be said to have come into existence only because there is a clause to the said effect on the reverse side of the invoice.

14. This Court in ***Scholar Publishing House Pvt. Ltd. v. M/s Khanna Traders***, MANU/DE/2110/2013, while upholding the existence of an Arbitration Agreement in that case on the basis of a clause in the invoice, also approved of the judgment of this Court in ***Newsprint Sales Corporation v. The Daily Pratap***, MANU/DE/9052/2006 holding as under:

“6. In Newsprint Sales Corporation (supra), the Learned Single Judge noticed the Bombay and Calcutta High Court decisions, and concluded correctly, if one may say so, that there is no strait- jacket formula to say that such invoices cannot or can amount to binding arbitration clauses. The decision correctly surmised that the views of the other High Court had stressed the necessity to consider the conduct of the parties, evident from the record. Thereafter, in Newsprint Sales Corporation (supra), dealing with the facts in question, the Learned Single Judge concluded that there was no agreement. The relevant observations are as follows:

“32. None of the delivery challans refers that the supply made is on the condition that the disputes, if any, would be referred to the arbitration of an arbitrator appointed by the Paper Merchants Association (Regd.).

33. It is a case where pursuant to an oral contract where goods were delivered, post delivery, bills have been raised and in the said bills, referred to as debit memo, terms have been printed, one of which being the term, that disputes would be referred for sole arbitration.

34. Parties have to be ad idem on material terms of the contract when they enter into a contract and not post execution of the contract, unless of course, at the post execution stage, parties agree on certain terms to vary or modify terms of the contract.

35. Petitioner has not brought any material on record to show that before or at the time of effecting supply, it had made known to the respondents that delivery would be on a term that dispute, if any, would be referred to arbitration in terms of the rules and regulations or bye laws of the Paper Merchants Association. In that view of the matter, the inevitable

conclusion is that the respondents objector cannot be bound by the arbitration clause contained in the bye laws of the Paper Merchant Association for the reason parties were not ad idem that dispute would be referred to an arbitrator to be nominated by the Paper Merchants Association.”

15. In the present case, the fact that at least for one part of the relationship between the parties, the petitioner admits that there is no Arbitration Agreement in existence between the parties and the fact that the Proforma Invoice issued by the petitioner did not have any Arbitration Clause, the front side of the Invoice(s) does not draw the reference of the respondents to the Clause 5 on the reverse side of the Invoice(s) which contains an Arbitration Agreement between the parties; and that there was no institute by the name of New Delhi Chamber of Commerce, in my opinion, no Arbitration Agreement can be said to have come into existence between the parties.

16. Reliance of the petitioner on the reply dated 08.08.2017 given by the respondents to the notice invoking the Arbitration is also ill-founded inasmuch as the said reply does not show that the petitioner was *ad idem* on the existence of the Arbitration Agreement. In fact, a reading of the reply suggests totally to the contrary.

17. In view of the above, the present petitions are not maintainable and are accordingly dismissed, leaving it open to the parties to initiate such other appropriate proceedings as may be open to them in law for resolution of their disputes. There shall be no order as to cost.

NAVIN CHAWLA, J

APRIL18, 2018/Arya