

Psv/pvr/vidya

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION**

ARBITRATION PETITION NO.36 OF 2018

M/s.Shilpi Constructions Engineers & Contractors)
through Sole Proprietor Mr.Gaddigaiah R.Kurudimath)
(Swami), Age 48 years, Occupation-Contractor,)
having Office at: OS-09, 2nd floor, Sapna Garden,)
Chogm Road, Alto Porvorim, Bardez-Goa 403521)..Petitioner

Vs.

1.Welspun Group, Welspun House, 3rd floor,)
Kamala City, Senapati Bapat Marg,)
Lower Parel (West), Mumbai 400013.)

2. Mrs.Dipali Balakrishna Goenka,)
Age 48 years, Occ-Business, Resident of)
Rocky Isle, \$6C, Bhulabhai Desai Road,)
Mumbai-400026.)..Respondents

Mr.Pradip R.Kadam, for Petitioner.

Mr.Dinesh Pednekar with Mr.Chanakya Keswani with Ms.A.A.Mujawar
i/b. Economic Laws Practice, for Respondent no.2.

CORAM : G.S. KULKARNI, J.
DATE : 25th JULY, 2019

ORAL JUDGMENT:

This is a petition filed under Section 11 of the Arbitration and Conciliation Act, 1996 (for short, “the Act”) wherein the petitioner has prayed for appointment of an arbitral tribunal to adjudicate the disputes and differences between the parties as arisen under a contract for the work of proposed residence site at Village Dhokawade, Alibaug, Maharashtra (for short the 'project work') stated to be of respondent No.2 Mrs.Deepali Balakrishna Goenka.

2. At the outset, it is required to be noted that there are two respondents to the petition. Respondent No.1 as arrayed is Welspun Group as there is a correspondence entered with the petitioner on behalf of Welspun Group. In paragraph no.3 of the petition, respondent No.2 is Mrs.Deepali B. Goenka is stated to be the Director of respondent no.1.

3. Learned Counsel for the petitioner has contended that both these respondents were required to be arrayed as respondents, as right from the inception, in regard to the contract in question, there is a role of both these respondents. Learned Counsel for the petitioner states that impleading of these respondents is also as permitted by this Court (K.R.Shriram, J.) by an order dated 24 November 2017 passed in an earlier Section 11 petition [Arbitration Petition (Lodg.) No.13607 of 2017], which was withdrawn with liberty to file a fresh petition.

4. Be that as it may although respondent no.1 is impleaded as Welspun Group and although from the correspondence it can be seen that it may have a collective existence for commercial purposes, there is no such legal entity as Welspun Group. From the correspondence it appears that there is some substance that representatives of the Welspun Group companies were involved in the dealings with the petitioner concerning the petitioner. Respondent no.2 however, is not denying that

the contract was entered between the petitioner and respondent no.2.

5. The facts are quite peculiar and can be briefly stated as under:-

On receiving knowledge that respondent was interested to appoint a contractor for undertaking the project work, the petitioner by its letter dated 15 December 2015 addressed to Mr. Asim Chakraborty, Director of Welspun Group-Respondent No.1 submitted a bill of quantities stamped and signed along with the terms and conditions, which were, integral to form the petitioner's proposal. The terms and conditions were described in paragraph 1 to 13 of the said proposal of the petitioner which pertained to the scope of work, mobilisation advance, taxes, payment of running account bills, basic rates of material, defect liability period, statutory provisions related to contract labour, insurance, statutory approvals, facilities from employer, termination by contractor, statutory requirements and clause 13 pertains to settlement of disputes being the arbitration clause as being relied on behalf of the petitioner which read thus:-

“13. SETTLEMENT OF DISPUTES:-

In event of any disputes / differences arising between the parties to this contract, the same shall be settled by Arbitration and such matter shall be referred to arbitration of 3 arbitrators, 1 to be appointed by each party and the third arbitrator who shall be the presiding arbitrator shall be appointed by the 2 nominated Arbitrators. The Arbitration shall be governed by the provisions of the Arbitration and Conciliation Act, 1966 or any statutory re-enactment or amendment, thereof for the time being in force. The venue of such arbitration shall be at Panaji, Goa only.”

6. The last paragraph of the said letter is pertinent and is required to

be noted, which reads thus:-

“The Conditions as mentioned herein above shall prevail over those of any document forming part of the contract. In event of there being any variation or repugnancy between the above mentioned Conditions and the other Terms & Conditions of the Contract including any other documents forming part of the Contract, the above said Conditions shall be deemed to over-ride the provisions mentioned in the other Terms and Conditions of the Contract or any other document forming part of the Contract and to the extent of such repugnancy prevail over the said terms forming part of the Contract.”

7. The aforesaid proposal as made by the petitioner to Mr. Asim Chakraborty, Director of Welspun Group, was responded by the authorized signatory of respondent no. 2 by his letter dated 1st March, 2016 informing the petitioner that a LOI for civil work for construction of the project work was being awarded to the petitioner. It would be relevant to extract the said letter, as substantial arguments are advanced by both the sides referring to this letter. The said letter reads thus:

“Ref. No: rt/dbg/praloi/001/2016 Date: 01/03/2106

To:

M/s. Shilpi Constructions

“Engineers And Contractors

OS-09 Second floor, Sapana Garden Chogm Road,

Alot Porvorim,

Bardez- GOA – 403 521

Tel- 0832-2413577,

Email- shilipcon1@gmail.com / shilpicon@bsnl.in

Attn : Mr. Gaddigaiah.R.Kurudimath (Swami)

Sub: Letter of Intent for construction of Proposed Residence of Alibaug.

Dear Sir,

With reference to your quotation and subsequent discussions you had with us on dated 23.02.2016, we are pleased to award the L.O.I. for civil work for construction of balance job of Proposed

Residence at Alibaug. The total value of civil work will be approx. Rs.918 lacs. The detailed techno-commercial Order will be followed shortly.

You are requested to mobilize within Seven days on issuing of LOI.

Thanking you,

Yours faithfully,

For Mrs. Deepali Goenka,

sd/-

Authorized Signatory”

8. It is not in dispute that the words “With reference to quotation” would mean the very proposal/quotation of the petitioner dated 15th December, 2015. There was no dispute as raised by the respondent in regard to the terms and conditions as set out in the petitioner’s proposal dated 15th December, 2015.

9. Learned Counsel for the respondent no.2 has in terms argued that the contract is not disputed by respondent No.2. He would submit that although respondent No.1 received petitioner's proposal dated 15 December 2015, however respondent No.1 would not have any role to play meaning thereby that none of the correspondence on record entered into with respondent no.1 would be relevant. If that be so, the petitioner's letter dated 4th March, 2016 addressed to Mr. Asim Chakraborty, Director of Welspun Group, after the issuance of LOI

informing, that the LOI only referred to the balance work which was not agreeable to the petitioner and that conditions 1 to 13 in the proposal of the petitioner, be incorporated in the LOI and a fresh LOI be issued, according to respondent no.2 would not have any relevance. Although respondent no.2 intends to be deceptive, however, from the documents on record, it appears to be not so easy for respondent No.2 to have such duplicity.

10. It appears that respondent no. 2 responded to the abovesaid letter of the petitioner admitting that there was a discussion between the parties and as referred by the petitioner in the LOI dated 4th March, 2016 modified the LOI by a further letter dated 9 March 2016 addressed by the authorized signatory of respondent no. 2. The said letter dated 9 March 2016 (modified LOI) reads thus:

“Ref. No: rt/dbg/praloi/002/2016 Date: 09/03/2106

To:
M/s. Shilpi Constructions
“Engineers And Contractors
OS-09 Second floor, Sapana Garden Chogm Road,
Alot Porvorim,
Bardez- GOA – 403 521
Tel- 0832-2413577,
Email- shilipcon1@gmail.com / shilpicon@bsnl.in

Attn : Mr. Gaddigaiah.R.Kurudimath (Swami)

Sub: Letter of Intent for Construction of Proposed Residence of Alibaug.

Dear Sir,

With reference to your quotation and subsequent discussions you had with us on dated 23.02.2016, we are pleased to award the

L.O.I. for civil work for construction of Proposed Residential Bungalow as per drawings and BOQ, Stone work for landscaping and retaining wall, cave and temple. The total value of Civil work will be approx. Rs.918 lacs. The detailed techno-commercial Order will be followed shortly.

You are requested to mobilize within Seven days on issuing of LOI.

Thanking you,

Yours faithfully,

For Mrs. Deepali Goenka,

sd/-
Authorized Signatory”

11. The petitioner acted upon the said LOI and by a letter dated 16th March, 2016 addressed to Mr. Ravi Tibrewala, Vice President-Special Projects, Welspun House, enclosing a Survey Contour plan as per actual survey conducted on 13th March, 2016, and a clarification in that regard was called from the respondent.

12. On 31st March, 2016 Mr. Ravi Tibrewala by an email informed the petitioners of payment of Rs.90,00,000/- made by RTGS in favour of the petitioner. Thereafter there is correspondence between the parties in regard on the construction to be undertaken. Invoices dated 11.04.2016, 16.04.2016 and 18.04.2016, were issued by the petitioner. There was further correspondence between the parties in the month of May 2016 and June 2016 on bank guarantee to be furnished by the petitioners. By letter dated 13th June, 2016, the petitioner informed Mr. Ravi Tibrewala

the list of material procured for the project and exclusively available at the site. This was a list of about 24 items.

13. Respondent No.2 by a letter dated 20th June, 2016 insisted to the petitioner compliance of the insurance when Mr. Ravi Tibrewala informed the petitioner as under :

“You know better than me the purpose and importance of this insurance and also it is obligatory on contractor as per the Indian Legal provisions. Our allowing the contractor to work without the requisite insurance means that all risk and responsibility is to our account. Such mistakes can even lead to imprisonment of the Land owner, which is really a very big risk and concern to us.”

14. It is pertinent that insurance was one of the items in the petitioner's proposal dated 15 December, 2015 as contained in Clause no. 8 which does not inter alia find express reference in the LOI dated 4 March 2016 and the modified LOI dated 9 March 2016. Thus, it is clear that the proposal of the petitioner dated 15 December 2015 as accepted by the respondent, was being acted upon by the respondent. In compliance, the petitioner by its letter dated 27th July, 2016 submitted a CAR policy and Workmen's compensation policy, being the policies registered with the Oriental Insurance Company Ltd.

15. Thereafter by letter dated 25th October, 2016, the petitioner informed Mr. Ravi Tibrewala, Vice President- Special Projects, Welspun House, submitting a revised bar chart of the works to be executed as per

the drawings. The petitioner also enclosed the rates of extra items.

16. It appears that the disputes arose between the petitioner and the respondent as can be seen from letter dated 14 November 2016 when the petitioner informed respondent-Asim Chakraborty that considering Clause 2 of the proposal of the petitioner dated 15 December 2015, it was clear that the petitioner had never agreed for mobilisation advance to be released against the bank guarantee and that the respondent's insistence for bank guarantee against mobilisation advance as already released was *de hors* the contract, and hence such insistence was not warranted. The petitioner also stated that the respondent not processing the bills of the petitioner was not appropriate and requested that the bills be processed.

17. Respondent no.2 through her authorised representative Mr.Ravi Tibrewala, by letter dated 21 November 2016 addressed to the petitioner, refuted the petitioner's contentions. However, perusal of the said letter indicates that there is no denial of the terms and conditions as contained in the petitioner's proposal dated 15 December 2015.

18. On the above backdrop respondent no.2 by her letter dated 21 November 2016 terminated the letter of intent dated 9 March 2016 issued in favour of the petitioner. By another letter of the same date (21

November 2016) respondent no.2 appears to have taken a completely contrary stand in recording in paragraph 2 of the said letter that the petitioner had commenced work at site without issuance of detailed techno-commercial order. Paragraph 2 of the letter reads thus:-

“2. Please refer your letter cited under reference no.3 above wherein we have made you crystal clear that you were started the work at site without issuance of detailed techno-commercial order by us which is violation of the terms and conditions of LOI. Hence, the work executed by you is at your risk and cost and we are not liable and responsible to make any payment against the work done at site including the payment against R.A. bill no.1 which may please be noted.”

19. In response the petitioner by its letter dated 24 November 2016 protested against termination of the contract *interalia* recording that the termination was void and illegal and not binding on the petitioner.

20. Respondent no.2 by her letter dated 28 November 2016 responded to the petitioner's said letter dated 24 November 2016 and called upon the petitioner to visit the site within seven days, after receipt of the letter, for undertaking joint measurement of work done by the petitioner and material lying on the site so that accounts can be settled.

The said letter reads thus:-

“Sir,

1. We hereby state that in pursuance of termination of LOI vide letter cited under reference no.02 above; you have demobilized your manpower from site.

2. Without prejudice to our rights and claim under LOI & Law, we hereby once again request you to come at site within 7 days after receipt of this letter with prior intimation to us for recording joint measurements of work done by you and material lying at site if any, and settle our account, failing which we will be

constrained to take appropriate action as deemed fit including taking ex-party measurements. Further, please note that failure by you to take joint measurement will not restrict us from restarting of work by other agencies.

3. Kindly acknowledge receipt of this letter.

4. This is without prejudice to our rights and claims under LOI and any other applicable law.

Thank you.

For Mrs. Deepali Goenka

R.K. Tibrewal

Authorized Representative.”

21. The petitioner thereafter addressed a letter dated 29 November 2016 to respondent no.2 complaining how contractual obligations are breached by the respondents and stated that the petitioner was entitled to claim compensation for the substantial work undertaken by the petitioner on the site and not being paid for the same.

22. Thereafter the petitioner by its letter dated 10 January 2017 addressed to respondent no.2, raised a claim (final bill) on various counts namely for work done under the LOI, loss of interest on account of delayed payments, release of retention amount for work done under the LOI, material taken over by the owner, infructuous investment at site, loss of productivity, infructuous overheads, infructuous charges of centering, shuttering, infructuous charges of machinery tools and plant, infructuous charges of labour, loss of profit on work taken out of hand, plant and machinery and shuttering material in custody of the owner, interest etc. and called upon the respondents to make payment in that

regard, within 30 days failing which it would be presumed that disputes have arisen between the parties and the petitioner shall proceed to get the same settled by arbitration as provided in the contract. All the supporting details in respect of the claims were enclosed to the said letter.

23. Respondent no.2 by her letter dated 28 January 2017 replied to the letter of the petitioner dated 10 January 2017 denying the petitioner's claims. It is pertinent that although the claims of the petitioner were denied on various counts, respondent no.2 never disputed the specific reference as made by the petitioner to arbitration and/or existence of the arbitration agreement and to the petitioner's specific contention that the disputes be referred to arbitration.

24. The petitioner again by its letter dated 10 February 2017 addressed to respondent no.2 recorded that the disputes have arisen between the parties and as per clause 13 of the petitioner's proposal/quotation dated 15 December 2015 an arbitrator be appointed. The petitioner also named the arbitrator who would be appointed.

25. It appears that the arbitrator so nominated by the petitioner was inclined to enter a reference. Respondent no.2 by her letter dated 14 March 2017 addressed to the petitioner raised a counterclaim against

the petitioner. The petitioner had accordingly approached this Court by filing Arbitration Petition No.13607 of 2019 under Section 11 of the Act praying for appointing an arbitrator.

26. This Court by an order dated 24 November 2018 permitted the petitioner to withdraw the said petition with liberty to file a fresh petition. The order passed by this Court reads thus:-

“ Mr.Joshi appearing for petitioner, on instructions from Mr.Kurudimath, Proprietor of petitioner who is present in Court, seeks leave to withdraw the petition with liberty to file a fresh petition in accordance with law against other parties including the current respondent.

Petition dismissed as withdrawn with liberty as sought.

Whichever respondent is arrayed as respondent including the current respondent, are at liberty to raise all objections in accordance with law.”

27. Respondent no.2 has contended that even a Section 9 petition was filed before the Principal District Judge, Raigad, by the petitioner against respondent no.2 on the basis of the arbitration agreement as contained in the proposal dated 15 December 2015 of the petitioner.

28. Respondent no.2 has filed reply through her authorised representative Mr.Navin K.P.Sinha *inter alia* contending that there is no arbitration agreement between the petitioner and respondent no.2. The case of the respondents is that the petitioner is taking inconsistent stands, as in the earlier the petitioner contended that there is an arbitration agreement with respondent No.1 and now contends that

there is an arbitration agreement with respondent No.2, and hence on this count, the petition needs to be dismissed. Respondents have also disputed the claims as made by the petitioner.

29. In dealing with the contentions as urged on behalf of the petitioner in paragraph 12 of the petition, respondent no.2 in paragraph 18 of the reply however, has not denied that the quotation (proposal) referred by the petitioner, and that reference to meeting dated 23 February 2016, held between the parties was in the context of the petitioner's proposal dated 15 December 2015.

Submissions on behalf of the petitioner:

30. On the aforesaid factual backdrop, learned Counsel for the petitioner would submit that proposal dated 15 December 2015 of the petitioner was crystal clear, which contained arbitration agreement in Clause 13 (supra) whereby the parties have agreed to settle disputes by arbitration.

31. It is submitted that the last paragraph of the petitioner's proposal clearly sets out that the conditions as mentioned in the said letter “shall prevail” over those of any document forming part of the contract, and in the event of there being any variation or repugnancy between the above

referred conditions and the other terms and conditions of the contract including any other documents forming part of the contract, the said conditions shall be deemed to over-ride the provisions mentioned in the other terms and conditions of the contract or any other document forming part of the contract and to the extent of such repugnancy prevail over the said terms forming part of the contract.

32. Learned Counsel for petitioner has pointed out that in case of any clarification, the respondents were requested to respond the same. It is submitted that the proposal was addressed to Mr. Asim Chakraborty, Director, Welspun Group, Welspun House, 3rd floor, Kamala City, Lower Parel (W), Mumbai, and the same however came to be accepted by a letter of intent issued by the authorised signatory of respondent no.2. It is submitted that there is a clear reference to the quotation of the petitioner and there is no other quotation except quotation dated 15 December 2015 of the petitioner in issuing the LOI which was only and only issued on the basis of the said proposal/quotation of the petitioner. It is thus submitted that it is required to be accepted that the terms and conditions of the proposal of the petitioner dated 15 December 2015 which contained an arbitration agreement stood unconditionally accepted by respondent no.2. My attention is also drawn to a modified letter of intent dated 9 March 2016 when again referring to the said

proposal/quotation, respondent no.2 modified the scope of the work and asked the petitioner to mobilise within seven days of the issuance of the said LOI.

33. Learned Counsel for the petitioner would contend that several other conditions of the petitioner's proposal dated 15 December 2015 are acted upon. In this regard I am shown correspondence on the insurance and supply of water at the site which are specific conditions acted upon by the respondents and more particularly respondent no.2. It is thus submitted that the contentions as urged on behalf of respondent no.2 that except the arbitration agreement, all other conditions are accepted, cannot be countenanced. Learned Counsel for the petitioner has submitted that there is valid invocation of the arbitration agreement by the petitioner's letter dated 10 January 2017 and further letter dated 10 February 2017 and there is no denial on the part of the respondents of the absence of any arbitration agreement. It is submitted that such defence is taken by respondent no.2 only when the petitioner adopted legal proceedings namely under Section 9 and then under Section 11 of the Act. It is further submitted that the petitioner was granted liberty in the order passed by this Court in arbitration petition (I) no.13607 of 2017 to file appropriate petition in accordance with law against the parties including respondent no.2 and accordingly, this petition has been

filed. It is thus submitted that the contention as urged on behalf of the respondents that the petition against respondent nos.1 and 2 is not maintainable in the facts of the case, cannot be accepted.

Submissions on behalf of the respondent no.2:

34. On the other hand, learned Counsel for respondent no.2 has made submissions referring to the affidavit in reply and would primarily contend that there is no arbitration agreement between the petitioner and respondent no.1. As noted above the learned counsel for respondent no.2 at the outset would submit that the respondent no.2 does not deny the existence of the contract between the parties. However, existence of arbitration agreement is denied. It is submitted that respondent No.1-Welspun is not a necessary party inasmuch as there is no arbitration agreement between Welspun and the petitioner, as also Welspun is not a legal entity. It is further submitted that the petitioner is not clear as to with whom the petitioner has a contract. It is submitted that the proceedings of the earlier arbitration petition filed by the petitioner are relevant inasmuch as it would be clear that the petitioner conceded that there is no arbitration agreement between the petitioner and respondent no.2. It is thus submitted that there is no conclusive binding arbitration agreement between the parties. It is contended that the petitioner in LOI dated 1 March 2016 and 9 March 2016 has rejected any suggestion from the petitioner inserting terms and conditions in the proposal dated 15

December 2015. In support of his contention, learned Counsel for the respondents has referred to a decision of the Supreme Court in (I) *Jagdish Chander vs. Ramesh Chander & Ors.*¹, (II) *Elite Engg. Construction (Hyd.) (P) Ltd. vs. Techtrans Construction India (P) Ltd.*², (III) *M.R. Engineers and Contractors Pvt. Ltd. vs. Som Datt Builders Ltd.*³

Discussion and conclusion :

35. Having heard the learned Counsel for the petitioner and the learned Counsel for the respondents, at the outset some admitted facts are required to be noted. The petitioner had issued to respondent no.1 a proposal dated 15 December 2015 (to Mr.Asim Chakraborty, Director, Welspun Group i.e. respondent no.1) which sets out 13 conditions alongwith a detail bill of quantities. It is not in dispute that the said proposal contained Clause 13 which is an arbitration clause for settlement of dispute as noted hereinabove. It is pertinent to note that the last paragraph of the said proposal of the petitioner had categorically recorded that '*the conditions as mentioned in the said proposal shall prevail over those of any document forming part of the contract and in event of there being any variation or repugnancy between the said conditions and the other terms and conditions of the contract including any other documents forming part of the contract, the said*

1(2007) 5 SCC 719.

2(2018) 4 SCC 281.

3(2009) 7 SCC 696

conditions shall be deemed to over-ride the provisions mentioned in the other terms and conditions of the contract or any other document forming part of the contract and to the extent of such repugnancy prevail over the said terms forming part of the contract'. Learned Counsel for respondent no.2 has also, at the outset, clarified that respondent does not dispute the contract.

36. The next admitted fact is that acting upon the proposal of the petitioner, the respondent no.2 issued two letters of intent one dated 1 March 2016 and another dated 9 March 2016. In both these letters of intent as noted above, there is a specific reference to “**quotation**” namely the petitioner's proposal dated 15 December 2015, as there is no other quotation as specifically pointed out even by the learned Counsel for the respondent. Further it is also clear that the LOI-letter of intent, was acted upon, the petitioner mobilised, and the respondents also issued a mobilisation advance of Rs.90 lakhs, also the petitioner commenced work at site. All these issues are discussed in the forgoing paragraphs. It is also quite apparent that disputes arose between the parties in regard to the scope of the work and the claim of the petitioner for the amounts under the bills/invoices issued by the petitioner for the work undertaken and insistence of the respondent for bank guarantees etc.

37. However, what is significant is that, consequent to the disputes arising between the parties, petitioner addressed a letter dated 10 January 2017 to respondent no.2 setting out the claims and also invoking the arbitration agreement. There was response to this letter of the petitioner by respondent no.2 by her letter dated 28 January 2017 in which respondent no.2 did not, even remotely, deny the existence of the arbitration agreement between the parties. Also respondent No.2 apart from saying that the claims of the petitioner are false and imaginary and not maintainable, never denied the petitioner's assertion that the disputes are required to be referred to arbitration as called upon by the petitioner in its letter dated 10 January 2017. In fact respondent No.2 by her letter dated 14 March 2017 made a counter claim. These are some of the significant admitted facts on record.

38. On the above conspectus, the question which falls for consideration is as to whether there is an arbitration agreement between the petitioner and respondent no.2.

39. It may be observed that not only from the tenor of the letters addressed by the respondents to the petitioner but also from the arguments as advanced on behalf of respondent no.2, it is quite

apparent that the pleas being taken on behalf of the respondents no.2 do not appear to be bonafide and of a prudent litigant and more particularly when the respondents have contended that there is no arbitration agreement between the parties. This for the reason that when it came to the proposal of the petitioner, it was fully acted upon and a letter of intent was issued to the petitioner.

40. A perusal of the series of correspondence between the parties clearly indicate that respondent no.2 has thought it convenient to correspond with the petitioner not always by herself but by her different representatives including the acceptance of the petitioner's proposal, forming the contract. In fact respondent no.1 as a group was acting as a representative of respondent no.2. It is not denied that Welspun is a group of companies as clear from the correspondence and intricately connected with respondent no.2. Moreover, respondent no.2 has not in any manner denied her association with Welspun group.

41. The contract as noted above is not being disputed by respondent no.2 which has been acted upon, the genesis of the contract being the proposal of the petitioner dated 15 December 2015 which contains the arbitration agreement. Considering the proposal and the clear terms and conditions of the proposal and the conditions as set out therein and

one of the conditions being the arbitration agreement and as per the terms expressly set out therein these conditions were to prevail over all other conditions, in the absence of any contrary material and any specific rejection of the terms and conditions on the part of the respondents. Respondent no.2 cannot be selective in accepting and acting upon the contractual terms. There is no material to show that respondent no.2 has expressly rejected the terms and conditions of the petitioner's said proposal so as to hold that they would not form part of the contract.

42. It would be thus required to be held that the contract entered between the parties was on the terms and conditions as set out in the proposal dated 15 December 2015 of the petitioner which includes the arbitration agreement between the parties. There cannot be any other interpretation of the contract, as can be clearly gathered from a cumulative reading of the proposal dated 15 December 2015 alongwith the letters of intent issued by respondent no.2 dated 1 March 2016 and 9 March 2016. It clearly appears that that there is conscious acceptance on the part of respondent no.2 of the terms and conditions of the proposal dated 15 December 2015.

43. It also cannot be overlooked that respondent no.2 now intends to wriggle out of her contractual obligations, by conveniently adopting

different stands. Firstly respondent no.2 does not dispute the contract, but conveniently disputes the arbitration agreement when the proposal of the petitioner was specific. Secondly respondent no.2 has categorically acted upon the contract on all counts, mobilization money was advanced to the petitioner. The petitioner thereafter mobilized and procured materials. Thirdly at no point of time even when the petitioner issued notices invoking arbitration, the respondents never took a position that there is no arbitration agreement between the parties. All these circumstances would lead to an unequivocal conclusion that the parties had a conscious intention to enter into an arbitration agreement. Certainly the duty of the Court would be to holistically examine the facts and circumstances and the terms and conditions of the contract as to how the parties have positioned themselves in the contractual set up.

44. It is a settled principle of law that the Court is required to follow general rules of construction of contract, as there are no guidelines in Section 7(5) of the Act regarding the conditions that need to be fulfilled before construing a reference to a portion of a contract, as a reference incorporating the whole of it, along with the arbitration clause contained in it. In this context it would be appropriate to refer to a recent decision of the Supreme Court in “*Inox Wind Limited Vs.*

Thermocables Ltd.”⁴. The Supreme Court referring to the decision in *M.R. Engineers and Contractors Pvt. Ltd. vs. Som Datt Builders Ltd.* (supra) and considering the scope of Section 7(5) of the Act, has upheld the arbitration agreement in the purchase order which referred to the terms and condition in the attached standard terms and conditions. The observations of the Supreme Court in paragraphs 19 are required to be noted which read thus:-

19. In the present case, the purchase order was issued by the Appellant in which it was categorically mentioned that the supply would be as per the terms mentioned therein and in the attached standard terms and conditions. The Respondent by his letter dated 15.12.2012 confirmed its acceptance of the terms and conditions mentioned in the purchase order except delivery period. The dispute arose after the delivery of the goods. No doubt, there is nothing forthcoming from the pleadings or the submissions made by the parties that the standard form attached to the purchase order is of a trade association or a professional body. However, the Respondent was aware of the standard terms and conditions which were attached to the purchase order. The purchase order is a single contract and general reference to the standard form even if it is not by a trade association or a professional body is sufficient for incorporation of the arbitration clause.”

45. In **Jagdish Chander Vs. Ramesh Chander And Others**⁵, the Supreme Court has laid down the principles in regard to what constitutes an arbitration agreement. It is held that the intention of the parties to enter into an arbitration agreement shall have to be gathered from the terms of the agreement and if the terms of the agreement clearly indicate an intention on the part of the parties to the agreement to refer their disputes to a private tribunal for adjudication and a

4 (2018)2 SCC 519

5 (2007) 5 Supreme Court Cases 719

willingness to be bound by the decision of such tribunal on such disputes, it would be an arbitration agreement. It is further held that there is no specific form of an arbitration agreement. In the present case, applying these principles, it can be clearly seen that the proposal of the petitioner in no uncertain terms contained clause 13 being arbitration agreement and there is no material that respondent No.2 rejected the acceptance of this contention when respondent No.2 acted upon all other conditions of the contract.

46. Applying the above principle, it needs to be noted that there is no contrary material to indicate that at any point of time respondent no.2 denied the existence of the arbitration agreement. In fact the correspondence between the parties clearly would go to show, the acceptance of the terms and conditions of the petitioner's proposal by issuance of letters of intent. The reliance on the decision as referred on behalf of the respondents would also not suggest a proposition contrary to the above discussion. Respondent no.2 has accepted that there is existence of the contract and that there is nothing on record to indicate that the terms and conditions of the proposal were not accepted by respondent no.2, which included an intention on the part of respondent to enter into arbitration agreement.

47. In the above circumstances, it would be required to be held that there is an arbitration agreement between the petitioner and respondent no.2. As regards impleadment of respondent no.1 it may not be of any legal significance, it however appears that as Respondent No.2 had resorted to a hide and seek approach in commercially dealing with the petitioner who is comparatively a small contractor before a giant business group of the respondents, the petitioner on an ill advice impleaded respondent no.1 in the present form.

48. Accordingly, the petition needs to succeed. It is allowed by the following order:-

ORDER

- (i) Mr.Justice A.P.Lavande, Former Judge of this Court is appointed as a prospective Sole Arbitrator to arbitrate the disputes and differences between the parties under the proposal/letter dated 15 December 2015;
- (ii) The prospective Sole Arbitrator, fifteen days before entering the arbitration reference, shall forward a statement of disclosure as per the requirement of Section 11(8) read with Section 12(1) of the Arbitration and Conciliation Act,1996, to the Prothonotary & Senior Master of this Court, to be placed on record of these proceedings with a copy to be forwarded to both the parties;
- (iii) The fees payable to the arbitral tribunal shall be governed in

accordance with the fees prescribed under the Bombay High Court (Fees Payable to Arbitrators) Rules, 2018;

(iv) At the first instance, the parties shall appear before the prospective arbitrator within 10 days from today on a date which may be mutually fixed by the prospective sole arbitrator;

(v) All contentions of the parties are expressly kept open;

(vi) Disposed of in the above terms. No costs.

(vii) Office to forward a copy of this order to the learned Arbitrator on the following address:-

Mr. Justice A.P. Lavande
F-101, Sattadhar Basilio's Complex,
St. Inez, Panaji,
Goa-403 001.
Mobile: 9422807844

49. At this stage, learned Counsel for respondent No.2 seeks stay of this order. The order is, accordingly, stayed for a period of four weeks from the day it is available.

(G.S.Kulkarni, J.)