

* IN THE HIGH COURT OF DELHI AT NEW DELHI

% Date of decision: 26th March, 2019

+ CS(COMM) 486/2016, IA No.5646/2016 (for condonation of delay of 105 days in re-filing the suit) & IA No.8091/2018 (u/S 8 of the Arbitration & Conciliation Act, 1996).

SAARSCHMIEDE GMBH FREIFORMSCHMIEDE Plaintiff
Through: Mr. Atul Sharma, Mr. Abhinav
Agnihotri & Ms. Purva Kohli, Advs.
Versus

BHARAT HEAVY ELECTRICALS LTD Defendant
Through: Mr. Pallav Kumar, Mr. Dibya Nishant
& Mr. Gautam Mann, Advs.

CORAM:

HON'BLE MR. JUSTICE RAJIV SAHAI ENDLAW

IA No.8091/2018 (of the defendant under Section 8 of the Arbitration & Conciliation Act, 1996)

1. This application came up first before this Court on 1st June, 2018 when the following order was passed:

"4. The defendant in this suit, now confined only to recovery of money, seeks reference of the parties to arbitration.

5. The counsel for the plaintiff appears on advance notice and seeks time to file reply.

6. On such applications, adjournment cannot be granted automatically for reply, unless it is shown that anything is required to be pleaded. Nothing is stated.

7. The counsel for the plaintiff then states that he has to take instructions, whether there is an arbitration clause and whether annexure, containing the arbitration clause and copy of which has been filed by the defendant along with this application to the purchase order admittedly placed by the defendant on the plaintiff was part of the purchase order or not.

8. *The counsel for the defendant/applicant has drawn attention to page 36 of Part-III file being a copy of the purchase order placed by the defendant/applicant on the plaintiff filed by the plaintiff along with the plaint and which is found to inter alia record “With reference to above, we are pleased to place an order on you for the supply of following items, on conditions given below & in annexure PU93”. The counsel for the defendant/applicant states that what has been filed by the defendant/applicant along with this application is nothing else but Annexure PU93.*

9. *The counsel for the plaintiff states that he needs to take instructions, whether the said Annexure PU93 is in the records of the plaintiff.*

10. *In my view, the same is immaterial. Even if, Annexure PU93 is not in the records of the plaintiff as of today, the plaintiff having accepted the purchase order on the terms aforesaid, even if did not receive Annexure PU93 along with the purchase order, ought to have asked for it or taken a stand that it was not willing to accept the terms of Annexure PU93. The plaintiff admittedly did not do the same and today cannot take the ground that it needs to be verified, whether the said Annexure PU93 is in the record of the plaintiff or not.*

11. *Moreover, the advance copy of the application was received by the plaintiff much prior to today and instructions, if any required, could have been taken.*

12. *I may in this regard also notice that the counsel for the defendant/applicant on the past dates of hearing also and as recorded in the orders of the said date has been taking a stand of there being an arbitration agreement between the parties and for this reason also, the plaintiff should have been prepared on the said aspect.*

13. *In these circumstances, though adjournment sought is not justified, list on 20th July, 2018.”*

2. Pleadings in the application have been completed and the counsels have been heard.

3. What transpires is, that (i) the defendant / applicant floated an enquiry for purchase of machinery and the plaintiff submitted its offers to the defendant; (ii) the defendant placed four Purchase Orders on the plaintiff in pursuance to the aforesaid enquiry and the offers submitted by the plaintiff and stating as under:

“with reference to above, we are pleased to place an order on you for the supply of following items, on conditions given below & in annexure PU93”;

(iii) PU93 contains Clause 2 as under:

“2. ACCEPTANCE: Please acknowledge the receipt of this Purchase Order by return of mail. This purchase order will be deemed to have been accepted if no communication to the contrary is receipt of the same OR three weeks from the date of despatch.”

and Clause 14 as under:

“14. ARBITRATION: In the event of any dispute or difference arising between parties to this contract regarding execution of same or their respective rights and liabilities there under, the same shall expect as otherwise expressly provided their in, be referred to the arbitration of two arbitrators, one to be appointed by each party or in the case of the said arbitrators not agreeing then an umpire to be appointed by the two arbitrators in writing before entering on notification, or re-enactment therefore and rules framed there under from time to time shall apply to such arbitrations. If the two arbitrators, do not agree on the appointment of umpire it (the nomination of the umpires shall be done the international chamber of commerce Paris (France). The decision of arbitrator or in case of their not agreeing that of the said umpire shall be binding both on seller and purchaser. The venue of the arbitration shall invariably be New Delhi (India).”;

(iv) the plaintiff did not send any communication to the defendant to the contrary within three weeks from the date of dispatch of three of the aforesaid four Purchase Orders but beyond three weeks of the said three Purchase Orders, sent “Order Confirmation”. It is the contention of counsel for plaintiff that the “Order Confirmation” contains a clause as under:

“III. Place of performance and jurisdiction Place of performance and jurisdiction for both parties is Volklingen/Saar. We are also permitted to bring suit against the Buyer in the jurisdiction where Buyer is located.”;

and, (v) the plaintiff, within three weeks of one of the aforesaid four Purchase Orders, sent “Order Confirmation”, also containing clause as aforesaid.

4. The counsel for the defendant / applicant, on enquiry whether the defendant / applicant admits the receipt of the said “Order Confirmation” from the plaintiff qua the Purchase Orders, replies in the affirmative.

5. While it is the contention of the counsel for the defendant / applicant that the parties are bound by the arbitration clause aforesaid contained in PU93 appended to the Purchase Orders, the counsel for the plaintiff contends that though the PU93 appended to the Purchase Orders contained the arbitration clause aforesaid but the said arbitration clause was not accepted by the plaintiff and on the contrary the parties are governed by the clause aforesaid in the “Order Confirmation” sent by the plaintiff with respect to each of the four Purchase Orders.

6. Neither party has placed before this Court, the enquiry initially floated by the defendant / applicant and in pursuance to which the plaintiff had submitted the offer, or the offer made by the plaintiff in pursuance to the

enquiry.

7. I have enquired from the counsel for the plaintiff, whether the offer made by the plaintiff in pursuance to the enquiry, contained any clause as contained in the “Order Confirmation” and as reproduced above.

8. The counsel for the plaintiff states that he has not examined the said aspect.

9. The counsel for the plaintiff, on enquiry whether any acceptance of the defendant / applicant was obtained on the Order Confirmations sent, replies in the negative.

10. Thus what has to be determined is, whether the parties are bound by the arbitration clause contained in PU93 appended to the Purchase Orders or by the clause aforesaid contained in the “Order Confirmation” sent by the plaintiff with respect to each of the Purchase Orders.

11. The counsel for the plaintiff relies upon paragraph 16 of *Elite Engineering & Construction (Hyderabad) Pvt. Ltd. Vs. Techtrans Construction India Pvt. Ltd.* (2018) 4 SCC 281.

12. Applying the first principles of the law of contracts, the enquiry floated by the defendant / applicant, was in the nature of an “invitation to offer”, and in response where to the plaintiff made the “offer” and which “offer” was “accepted” by the defendant / applicant by placing the Purchase Order on the plaintiff. Reference if any can be made to Sections 3 to 8 of the Indian Contract Act, 1872. On acceptance of the offer, in law, a binding contract comes into existence.

13. Considering, i) that the defendant is a public sector undertaking, all

enquiries for purchase made by which public sector undertakings generally invite offers on standard terms and conditions specified in the enquiry itself, and reject the offers which are not in acceptance of such standard terms and conditions; ii) the Purchase Orders placed by the plaintiff on defendant are in standard form PU91 which in turn refers to other terms and conditions specified in standard form PU93; and; iii) the plaintiff has chosen not to place the enquiry so floated by the defendant / applicant and the offer made by the plaintiff before this Court, it can safely be assumed that the enquiry must be in such standard form only and referring to PU91 and PU93. It follows, that the plaintiff, when made its offer, made the same accepting the terms and conditions contained in PU91 and PU93, in terms whereof the Purchase Orders, if the offer of plaintiff were to be accepted by the defendant, were to be placed by the defendant on the plaintiff. This, coupled with the fact that the plaintiff, in its offer admittedly did not make any proposal contrary to the arbitration clause contained in PU93, leads to the irrefutable conclusion that the said arbitration clause was acceptable to the plaintiff.

14. However, per Clause 2 of PU93, the plaintiff still had an option within three weeks of the Purchase Order, to renege from the Purchase Orders so placed by the defendant / applicant on the plaintiff and / or to make a counter offer and which the plaintiff admittedly did not with respect to three of the four Purchase Orders.

15. Thus, on the expiry of three weeks from the date of said three Purchase Orders, in the absence of the plaintiff having communicated to the defendant to the contrary, a binding contract came into existence between the

parties on the terms and conditions contained in the Purchase Order in form PU91 and which Purchase Order had appended thereto PU93 containing the arbitration clause.

16. It has been held by the Supreme Court in ***Govind Rubber Limited Vs. Louis Dreyfus Commodities Asia*** (2015) 13 SCC 477 that an arbitration agreement need not be signed by all parties if the record of the agreement is provided by exchange of letters, telex, telegrams or other means of telecommunication, and it can be *prima facie* observed that the parties are ad idem. In the present case also, the record of the transaction between the plaintiff and the defendant / applicant shows that an agreement came into force between the parties on the lapse of three weeks from the date of the Purchase Order, and during which the plaintiff did not show any intention to reject the Purchase Order or make a counter to the offer of the defendant / applicant. Reference may also be made to ***Bharat Petroleum Corporation Vs. Great Eastern Shipping Co. Ltd.*** (2008) 1 SCC 503 holding that an offeree's silence, coupled with conduct taking the form of a positive act, may constitute as acceptance of an offer and form an agreement sub silentio.

17. The "Order Confirmation" sent by the plaintiff beyond three weeks of the Purchase Order is thus of no avail, specially when the defendant, though a binding contract would have come into existence merely on placing of the Purchase Orders, had still given an option to the plaintiff to within three weeks, communicate to the contrary. On the plaintiff not doing so, the plaintiff was deemed to have accepted the Purchase Orders.

18. As far as the Purchase Order within three weeks whereof the plaintiff sent the "Order Confirmation", is concerned, again, applying the first

principles of the law of contract, the same constituted a counter offer of the plaintiff to the Purchase Order of the defendant. The plaintiff admittedly did not seek acceptance from the defendant of the said counter offer. The plaintiff, nevertheless, by instituting this suit for recovery of damages for breach of contract from the defendant, is treating a binding contract to have come into existence. Such binding contract can be only in terms of the Purchase Order which was in acceptance of the offer made by the plaintiff pursuant to enquiry floated by defendant and cannot be in terms of the “Order Confirmation” which was never accepted by the defendant. Thus, qua the said Purchase Order also, an arbitration agreement is found to exist, encompassing the disputes subject matter of suit. Even otherwise, in accordance with *Ameet Lalchand Shah Vs. Rishabh Enterprises* (2018) 15 SCC 678, since the disputes with respect to the other documents forming part of the same principal transaction are found to be arbitrable, the dispute with respect to the Purchase Order dated 15th September, 2012 is also held to be arbitrable.

19. There is another aspect. All the four “Order Confirmation” do not contain the Clause reproduced above claimed by the counsel for the plaintiff to be part thereof. The said clause is to be found in a document titled as under:

“Terms and Conditions of sale Saarschmiede GmbH Freiformschmiede (Edition September 2008)”

No reference to the document aforesaid is to be found in the four “Order Confirmation” with respect to four Purchase Orders. It appears that the “Terms and Conditions of Sale” are not part of the Order Confirmation and are perhaps extracted from the website of the plaintiff and to which also

there is no reference in the four “Order Confirmation”. For this reason also, it cannot be said that the arbitration clause in the Purchase Orders stands superseded.

20. As far as *Elite Engineering & Construction (Hyderabad) Pvt. Ltd.* supra referred to by the counsel for the plaintiff is concerned, that was concerned with Section 7(5) of the Arbitration & Conciliation Act and which according to me does not apply in the facts of the present case. The arbitration clause in the present case is part of the Purchase Order admittedly placed by the defendant / applicant on the plaintiff and which Purchase Order is deemed to have been accepted by the plaintiff in the absence of the plaintiff, within three weeks thereof conveying to the contrary. Thus, the question of incorporation by reference, with which Section 7(5) deals, does not arise. Such high value contracts of technical nature are ordinarily not contained in one document and are always contained in separate parts of the same document, generally divided into three parts i.e. financial, technical and general terms and conditions. Merely because the arbitration clause is contained in the part titled ‘General Terms and Conditions’ and which part is expressly referred to and appended to the Purchase Orders containing the financial terms, would not attract Section 7(5) and it cannot be said that the arbitration clause is incorporated by reference. Even otherwise, the reference to PU93 in the Purchase Order of the defendant/application makes it clear that the intention is to incorporate all the terms in PU93, including the arbitration clause, and not just a particular part thereof. Thus, even if Section 7(5) were to apply, the reference to PU93 is such as to make all the conditions therein, including the arbitration clause, part of the Purchase Order and as per which, as already recorded above, a binding contract came

into force between the plaintiff and the defendant/applicant.

21. The application thus succeeds and is allowed.

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22. The suit is disposed of by referring the parties to arbitration.

23. On request of counsel for the plaintiff, it is clarified that any observation qua merits of the claim would not be binding on the parties.

RAJIV SAHAI ENDLAW, J

MARCH 26, 2019

‘gsr’..

(Corrected and released on 4th April, 2019).