

\$~44

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

Date of Decision: 6th October, 2021

+ ARB.P. 315/2020
AIROX TECHNOLOGIES (P) LTD Petitioner
Through: Mr. G.S. Gangwar, Advocate.

versus

SHANTI MUKAND HOSPITAL Respondent
Through: Mr. B.B. Gupta, Senior Advocate
with Mr. Jai Sahai Endlaw, Mr. Achal
Gupta and Mr. Ashish Kumar,
Advocates.

CORAM:
HON'BLE MR. JUSTICE SANJEEV NARULA

J U D G M E N T

SANJEEV NARULA, J. (Oral):

1. The present petition under Section 11 of the Arbitration and Conciliation Act, 1996 [*hereinafter, 'the Act'*] seeks appointment of a Sole Arbitrator for adjudication of disputes pertaining to the transactions between the parties emanating from Final Letter of Offer¹ dated 21st November, 2019 [*hereinafter, 'Offer Letter'*].

BRIEF FACTS

2. To resolve the controversy arising in the present petition, it would be apposite to briefly note the factual matrix, leading to the filing of the present petition: -

2.1 Petitioner sent an Offer Letter to Respondent for installation of

¹ bearing Ref. No. INWR11119, titled – 'Final Offer for Oxygen Generation Plant, Model: AS-L 125' dated 21st November, 2019.

‘Oxygen Generator Plant Model: ASL 125’. The same contains an arbitration clause [Clause 15], which reads as under: -

“15. Arbitration

Any dispute or difference or claim arising out of or in relation to this transaction including construction, validity performance or breach thereof shall, failing amicable settlement be referred to arbitration under Arbitration and Conciliation Act of 1996 and any subsequent amendments thereof or time being in force. The Supplier shall appoint a Sole Arbitrator and it shall be binding on the Purchaser. Such arbitration shall take place in Aurangabad, Award of arbitrator shall be final and binding on parties.”

- 2.2 Respondent issued a Purchase Order dated 25th November, 2019. The same was accepted by Petitioner and acted upon by making supplies. The aforesaid Purchase Order does not contain an Arbitration Agreement and rather has a clause that stipulates that – *“the Jurisdiction of this Order is Courts at Delhi”*.
- 2.3 Dispute arose between the parties regarding payment of Rs. 50 lacs and interest thereon towards supply of goods. The Petitioner sent a Legal Notice dated 20th July, 2020 demanding payment of outstanding dues followed by a Notice invoking arbitration dated 29th July, 2020, unilaterally appointing an Arbitrator to adjudicate the dispute regarding non-payment.
- 2.4 The Respondent *vide* reply dated 04th August, 2020 disputed the existence of Arbitration Agreement and contended that the jurisdiction would vest with the Court(s) at Delhi, in terms with the concluded contract – *viz.* Purchase Order.
3. In these circumstances, the present petition has been filed seeking reference of disputes, relying upon the arbitration clause contained in the

Offer Letter.

4. *The Controversy*

The Petitioner relies upon Clause 15 of the Offer Letter to establish a legal and binding Arbitration Agreement between the parties. The Respondent controverts the existence of any enforceable Arbitration Agreement and contends that the Offer Letter was only an 'offer' received from the Petitioner and not the final/ concluded contract. The Respondent contends that the binding agreement between the parties is the Purchase Order, which does not contain an agreement for reference of disputes to arbitration. Thus, essentially the Respondent denies existence of the Arbitration Agreement and contends that in absence thereof the Court should decline to accept Petitioner's request for appointment of Arbitrator and dismiss the petition, being not maintainable.

CONTENTIONS OF THE PARTIES

5. Mr. G.S. Gangwar, counsel for the Petitioner, has made the following submissions: -

- 5.1 The contention of the Respondent that there is no valid Arbitration Agreement between the parties is *ex facie* contrary to the record; it is a false and frivolous plea to avoid arbitration and thus, liable to be rejected;
- 5.2 The Offer Letter was clearly accepted by the Respondent and that constitutes as a valid agreement between the parties. In the Purchase Order, there is a clear reference to the Offer Letter dated 21st November, 2019, wherein it has been averred as under: -

“Dear Sir,

This is in reference to your last offer dated 21.11.2019, several discussion over phone and personal meeting with Mr. Rajesh Kumar Sinha, Vice President (Sales), Mr. Niranjan Behera- Sales, Mr. Ajit Srivastava, RSM.

We are pleased to place our confirmed order for supply.....”

The aforesaid communication demonstrates that the intention of the parties was to consider the Offer Letter as the binding agreement;

- 5.3 Although, the Petitioner accepted the Purchase Order dated 25th November, 2019 and made supply thereto, however, the same was under the Offer Letter that contains the general terms and conditions (including the Arbitration Agreement between the parties). Clause 17 of the Offer Letter stipulates as under: -

“17. General Conditions of Supply

The General Conditions of Supply form an integral Part of the offer shall be read and understood in conjunction with the General Conditions of Supply. The General Conditions of Supply shall be applicable and prevail, unless otherwise accepted by the supplier in writing.”

- 5.4 Respondent, in its Reply to the Notice of invocation, did not deny existence of the arbitration clause contained in the Offer Letter. Rather, the Respondent only contended that the jurisdiction would lie at the Court(s) in Delhi and contested the unilateral appointment of the Arbitrator being contrary and *dehors* the Act. This clearly indicates that the arbitration clause contained in the Offer Letter was admitted and this admission would constitute as a valid and binding Arbitration Agreement in terms of Section 7 (5) of the Act;
- 5.5 The jurisdiction of the Court under Section 11 (6A) of the Act is limited to examining existence of an Arbitration Agreement between

the parties. Since the Petitioner has met the *prima facie* test, the disputed questions urged by the Respondent, including the existence of the Arbitration Agreement, should be left for adjudication by the Arbitral Tribunal. In support of his submission, reliance is placed upon the judgment of the Supreme Court in ***Nimet Resources Inc. and Anr. v. Essar Steels Ltd.***² and the decision of the coordinate bench of this Court in ***Rollform Equipment Pvt. Ltd. v. Hema Engineering Industries Ltd.***³.

6. *Per contra*, Mr. B.B. Gupta, Senior Counsel for the Respondent has made the following submissions: -

- 6.1 The reliance placed by the Petitioner on the Offer Letter is misplaced and erroneous since the same does not constitute as a legal and binding agreement between the parties;
- 6.2 While the Offer Letter containing the arbitration clause is not disputed, however, the same is not a contractual document as is it not signed by both the parties;
- 6.3 The Offer Letter, though styled as the '*Final Offer*', remained only an '*offer*' that was never accepted by the Respondent therefore, the parties would not be governed by the same;
- 6.4 The parties are instead, bound by the terms and conditions contained in the Purchase Order dated 25th November, 2019, that was issued as a counter-offer in response to the Offer Letter, which modified all the terms contained therein;

² (2000) 7 SCC 497.

³ 2021 SCC OnLine Del 3344.

6.5 The Purchase Order was unconditionally accepted by the Petitioner and the work was done and supplies were made thereunder. Hence, the Purchase Order would constitute to be the binding/ concluded contract between the parties. In fact, even the alleged claim is under the Purchase Order itself.

ANALYSIS

7. The short question before this Court is whether the Offer Letter is a valid and binding Arbitration Agreement between the parties whereunder, a reference can be made to arbitration.

8. Having considered the contentions advanced by the parties, for the reasons stated hereinafter, the Court is of the opinion that the present petition is not maintainable as the Offer Letter does not constitute as a valid/ binding Arbitration Agreement between the parties for this Court to assume jurisdiction under Section 11 of the Act.

9. The Offer Letter dated 21st November, 2019 contains an arbitration clause in the terms and conditions provided therein. However, the said Offer Letter was not accepted by the Respondent as in response thereto, there was a counter-offer by the Respondent – *vide* Purchase Order dated 25th November, 2019. The acceptance under Section 7 of the Indian Contract Act, 1872 must be absolute, unqualified, and unconditional to form a binding contract and, in light of a counter-offer which was undisputedly accepted by the Petitioner, it cannot be held that the Offer Letter was accepted to form a valid agreement. The Purchase Order called upon the

Petitioner to sign and return a copy as a token of acceptance. And indeed the Petitioner without protest, complied by affixing its signatures, on the Purchase Order. Petitioner thus, acted upon the Purchase Order unconditionally. Therefore, the valid/ binding contract between the parties is the Purchase Order. This fact remains uncontroverted. In the Petition as well as in the Rejoinder, the Petitioner admits acceptance of the Purchase Order and that it acted upon the same.

10. In these circumstances, the terms and conditions contained in the Petitioner's Offer Letter, stood superseded by the counter-offer contained in the Purchase Order. The Offer Letter remained only an 'offer'. Acceptance of the Purchase Order dated 25th November, 2019, constituted a valid/ binding agreement between the parties that governed the transaction. There may be a mention of the Offer Letter in the Purchase Order, however, that would not imply that the Offer Letter stands incorporated in the Purchase Order or that the issuance of the Purchase Order was acceptance of the Offer Letter. Pertinently, the terms of the Purchase Order are at complete variance with the Offer Letter and therefore, the same cannot be construed as acceptance of the Offer Letter – it was a counter proposal, and, on its acceptance, a binding agreement was constituted. The consequence is that the terms and conditions contained in the Offer Letter, including the Arbitration Agreement will not apply.

11. The next contention of the Petitioner that merits consideration is whether the exchange of the Notice of invocation and its Reply thereto, constitutes as a valid Arbitration Agreement, as contemplated under Section

7(5) of the Act. Here, the Court has to infer the real intent of the parties from the communication/ correspondence exchanged between the parties – to ascertain the existence of a valid and binding Arbitration Agreement.⁴ In terms of Section 7 of the Act, while it is not necessary that the Arbitration Agreement should be signed by both the parties, however, the said exchange/ or communication should definitely bring out intention of the parties to resort to arbitration, in case of dispute(s). In the present case, when the Petitioner invoked arbitration, the Respondent emphatically denied existence of an Arbitration Agreement and categorically stated that the parties would be solely governed by the concluded/ binding document – viz. Purchase Order dated 25th November, 2019, that does not contain an arbitration clause.

12. Although, in the Reply to the Notice of invocation, the Respondent commented upon the unilateral appointment of the Arbitrator by the Petitioner, however, that in itself is not equivalent to an acceptance of the Arbitration Agreement. The Reply to the invocation must be read holistically, and not selectively. It is easily discernible that the Respondent has refuted that there was any valid Arbitration Agreement between the parties thus, reliance on Section 7 (5) of the Act, is devoid of merit.

13. Hence, on the basis of the documents placed before this Court, on an *ex facie* basis, the Court finds that that there is no valid/ existing Arbitration Agreement between the parties.⁵ Although, the issue of existence of the

⁴ See *Trimex International FZE Ltd., Dubai v. Vendanta Aluminium Ltd., India*, (2020) 3 SCC 1.

⁵ See *Duro Felguera SA v. Gangaram Port Ltd.*, (2017) 9 SCC 729 and *Vidya Drolia v. Durga Trading*

Arbitration Agreement is ordinarily left to be decided by the Arbitral Tribunal in terms of the doctrine of *kompetenz-kompetenz*, however, at the pre-reference stage, the Court is empowered. at the threshold, to examine the existence of Arbitration Agreement to weed out meritless cases. The judgments cited by Mr. Gangwar, are distinguishable on facts and are not applicable. In *Nimet Resources (supra)*, the Court therein also observed that the Court has power to decide a question as to the existence or otherwise of the Arbitration Agreement, while exercising jurisdiction under Section 11 of the Act; but when the correspondence/ or exchange of documents between the parties are not clear as to the existence of an Arbitration Agreement, in terms of Section 7 of the Act, the appropriate course would be that the Arbitrator should decide such a question under Section 16 of the Act. In *Rollform Equipment (supra)*, the Court while dismissing with a Section 9 Petition, recorded the consent of the parties for the appointment of an Arbitrator, and further, found the question of existence of Arbitration Agreement to be arguable. For the foregoing reasons, the Court does not find any merit in the contention of the Petitioner that the question of its existence of Arbitration Agreement should be left for adjudication by the Arbitral Tribunal, as a preliminary issue.

14. In view of the above, the Court does not find merit in the present petition and accordingly, the same is dismissed.

SANJEEV NARULA, J

OCTOBER 6, 2021/nk

corrected and released on 21st October, 2021

Corporation, (2021) 2 SCC 1.