

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION**

ARBITRATION APPLICATION NO.354 OF 2019

Hitesh Coal Traders

.. Applicant

Vs.

Rama Krishi Rasayan

A Division of Rama Phosphates Ltd. and Anr.

.. Respondents

Ms. Sheetal Prakash, with Mr. Brijesh Nittekar, i/by R.V.J. Associates, for the Applicant.
Mr. Mangal Bhandari, i/by Mr. Nishigandh Patil, for the Respondents.

CORAM : A. K. MENON, J.

DATE : 28TH JUNE, 2022.

P.C. :

1. This is an application, under Section 11 of the Arbitration and Conciliation Act, 1996, seeking appointment of a Sole Arbitrator to adjudicate upon disputes between the applicant and the respondents arising out of a Purchase Order No.RKR/16-17/115 dated 22nd December 2016. The purchase order was executed by the applicant by supplying diverse quantities of coal and in respect of which the applicant has raised numerous invoices. These invoices are numerous and said to be at-least 79, all of these are annexed at Exhibit-A to the application. They are of various dates between 19th August 2016 to 12th December 2018.

2. In support of the applicant's case, the learned counsel has relied upon clause no.7 in the "Terms and Conditions" contained in the footnote to the invoices. The invoices are said to be identical in format with the only difference being the invoice numbers, dates, purchase order numbers and description of goods including quantity and price. The invoices are signed by the applicant's authorized signatory. There are

also debit notes annexed in relation to these invoices and in the course of submissions, the learned counsel for the applicant has sought to rely upon delivery challans in a separate compilation. These delivery challans are 78 in number and it is contended that delivery has been accepted by the respondents by acknowledging receipt of goods. The delivery challans also contain an identical clause in the foot note as clause no.5. For ease of reference, clause 7 appearing in the invoice and clause 5 appearing in the delivery challan are reproduced below :-

Clause (7) in the Tax Invoices

“Disputes, if any, subject to provisions of Arbitration and Conciliation Act, 2015, as amended to date. Subject to Mumbai jurisdiction.”

Clause (5) in the Delivery Challans

“Disputes, if any, subject to provisions of Arbitration and Conciliation Act, 1996, as amended to date. Subject to Mumbai jurisdiction only.”

3. These clauses are slightly different. While the invoices referred to Arbitration and Conciliation Act of 2005, the delivery challans referred to Arbitration and Conciliation Act of 1996. These appear to be standard format invoices and standard format delivery challans. While the delivery challans, which appear to be computerized and, as set out in the footnote, are handwritten on a pre-printed form. The contention of the applicant is that all these delivery challans have been signed on behalf of the respondents and having signed the delivery challans containing an arbitration clause, the respondents are bound by the same and an agreement to refer disputes to arbitration, as contemplated in Section 7 of the Arbitration and Conciliation Act, 1996, exists.

4. The learned counsel for the applicant has invited my attention to Section 7 of the Arbitration and Conciliation Act, 1996 and has canvassed her case inasmuch as the agreement, according to her, is in writing, as evident from the pre-printed forms. The agreement is a document which is signed by the parties inasmuch as the delivery challan is signed on behalf of the applicant and delivery is acknowledged by the respondents by signing on the applicant's copy of the delivery challan. My attention has been invited to various endorsements of acknowledgment on the reverse of the delivery challans. Some of these are seen to be accepted by the security personnel at the respondents' factory premises. Others are seen to be acknowledged by the respondents' Division - Rama Krishi Rasayan. The learned counsel for the applicant has thus contended that the requirements of Section 7 stands fulfilled. The purchase order incidentally has not been disclosed in the application but has been disclosed in the affidavit-in-reply filed by the respondents.

5. As far as this arbitration application is concerned, the averments in the application are to the effect that the applicant seeks appointment of a Sole Arbitrator in accordance with the Arbitration and Conciliation Act, 1996 in terms of an agreement arrived at between the parties, as recorded in the "Terms and Conditions" of various delivery challans and invoices raised by the applicant upon the respondents during the period 19th August 2016 to 12th December, 2018". Thus, the agreement pleaded is only on the basis of the invoices and delivery challans, to the exclusion of the purchase order. This, it is contended is a sufficient compliance with the requirements of Section 7 of the Arbitration and Conciliation Act, 1996 and the respondents having accepted delivery by acknowledging receipts in writing, an

agreement in writing has come into force. Ms. Prakash therefore submitted that a Sole Arbitrator be appointed in terms of the arbitration agreement.

6. Opposing the application, Mr. Bhandari has contended that there is no substance in the application inasmuch as the parties do not have an agreement to refer disputes to arbitration. The disputes essentially pertain to non-payment of a sum of Rs.2,58,348/- and interest of Rs.12,48,073/-. The total claim thus is Rs.15,06,421/-. However, further interest is claimed @ 24% p.a. Mr. Bhandari submits that there is no question of any agreement having been arrived at to refer disputes pertaining to non-payment of the invoice amount. There are disputes, according to him, in relation to quality of coal supplied and the respondents had at one stage offered a token amount as and by way of a settlement but this was not accepted.

7. Mr. Bhandari relied upon an affidavit of one Pritesh Kishore Jhaveri dated 9th October 2019, in which the respondents have contended that there is no arbitration agreement between the parties and hence there is no question of appointing a Sole Arbitrator. The Purchase Order No.RKR/16-17/115 dated 22nd December 2016 issued by the respondents is the main document, based on which invoices were raised and that "Terms & Conditions" in the purchase order clearly provide for disputes to be subjected to jurisdiction of a competent court in Pune and no other court. Clause 19 of the "Terms & Conditions" in the purchase order has been canvassed in support of opposition to the application. A copy of the purchase order is annexed to the affidavit-in-reply and clause 19 therein reads as under :-

“19. All suits arising, if any, out to the agreement shall be instituted in and court of competent jurisdiction in Pune and no other court.”

8. Faced with the contention on behalf of the applicant that there is an arbitration agreement in writing between the parties, as observed from the delivery challans, Mr. Bhandari submits that as far as the delivery challans themselves are concerned, the parties having signed the documents, would only entail disputes relating to delivery and it has nothing to do with the payments since payments are due under invoices. Invoices are not signed by the respondents. Invoices are signed only by the applicant. He submits that, in the instant case, the claim is a monetary claim, which should be subjected to a suit that the applicant may choose to file and that too within the agreed jurisdiction i.e. “court competent jurisdiction in Pune”. He submits that there is no occasion to refer the dispute to the arbitration in relation to non-payment of dispute amount. He submits that the amount due if at all would have to be ascertained after making up of accounts. There is no occasion to appoint an arbitrator in the absence of any arbitration agreement contained in the purchase order read with the invoices. He submits that the principal contract is based on the purchase order. In support of his contention, he has also pointed out that the applicant has not disclosed the fact that there are several purchase orders and not only one purchase order. In this respect, he has invited my attention to the various invoices relied upon by the applicant forming part of Exhibit-A collectively.

9. Reference in many of these invoices is to different Purchase Orders. For instance, in the Invoice No.HCT/1617/0539 dated 19th August 2016, being the

earliest invoice in question, the Purchase Order number is PO16-17/0338. The Invoice No.HCT/1617/0945 dated 5th November 2016 bears Purchase Order No.RKR/16-17/78 dated 19th October 2016. Subsequent purchase orders likewise have been numbered as Purchase Order No.RKR/16-17/115 dated 22nd December 2016, Purchase Order No.RKR/16-17/152 dated 6th March 2017, Purchase Order No.RKR/17-18/040 dated 29th May 2017 and so on. Thus, it is evident that there are multiple purchase orders, none of which contains an arbitration clause. All purchase orders contemplate adjudication of disputes by a court and not by a reference to arbitration.

10. The learned counsel on behalf of the applicant has relied upon response to Demand Notice dated 15th April 2019, calling upon the respondents to pay a sum of Rs.16,73,050/- and to refer disputes to a sole arbitrator named therein. She submits that there is no denial of the fact that there is an arbitration agreement. She invites my attention to the letter dated 3rd May 2019 addressed by the respondents' Advocate to the applicant's Advocate, a copy of which is annexed at Exhibit-H to the application, which sets out the respondents' reaction to the demand. In the said letter, in paragraph 3, the respondents have stated thus :-

"3. With respect of para 4, my client states that my client has strong objection to appointing Mr. Ranjeev Chaverllo as arbitrator for reason that he has close business relation with your client and has possibility of acting basis. Please take note that only by way of consent of parties to arbitration agreement, the individual can be appointed as a Sole Arbitrator. My client repeats and reiterates his objection to appointment of Mr. Ranjeev Charverllo as Arbitrator."

11. Thus, the arbitration agreement stands established and admitted. This submission is met by the respondents' counsel by contending that yes, there is an agreement, but it only relates to delivery of goods since the arbitration agreement in writing and signed by the parties is only in the delivery challan. The purchase order is not signed by the applicant and the invoice is not signed by the respondents. Thus, it is contended by Mr. Bhandari that on a fair reading of the set of documents relied upon by the applicant's counsel, no arbitration agreement can be said to be existing between the parties.

12. In the course of submissions, the counsel for the applicant has relied upon several decisions as listed below :-

- (i) Caravel Shipping Services Pvt. Ltd. Vs. Premier Sea Foods Exim Pvt. Ltd.¹
- (ii) Hitesh Coal Traders Vs. NITCO Ltd.²
- (iii) Hitesh Coal Traders Vs. Turakhia Textiles Pvt. Ltd.³
- (iii) Chloro Controls India Pvt. Ltd. Vs. Severn Trent Water Purification Inc. and Ors.⁴
- (iv) Surya Processors Pvt. Ltd. Vs. Shree Jai Gurudev Textile Agencies⁵

13. Inviting my attention to the decision of this court in *Hitesh Coal Traders Vs. NITCO Ltd. (Supra)*, it is contended that in Arbitration Application (Lodging) No.271 of 2021, this court has vide an order dated 18th April 2022, in similar circumstances,

1 MANU/SC/1252/2018

2 Arbitration Application (Lodging) No.271 of 2021 – Order dt. 18th April 2022.

3 Arbitration Application No.68 of 2021 – Order dt. 30th November 2021.

4 (2013) 1 SCC 641

5 2022 SCC OnLine Del 984

concluded that there is an arbitration agreement as contained in invoice as also delivery challan and therefore an agreement as contemplated under Section 7(2) of the Arbitration and Conciliation Act, 1996, exists. A reference has thus been made to sole arbitration.

14. The learned counsel for the applicant invites my attention also to an order dated 30th November 2021 in Arbitration Application No.68 of 2021, wherein, in similar circumstances, the court had appointed an arbitrator relying upon an agreement, to refer disputes to arbitration comprised in invoices and delivery challans, annexed to that application. My attention is also invited to a decision of the Supreme Court in *Caravel Shipping Services Pvt. Ltd. (Supra)*, in which in para 3, the Supreme Court observed in the facts of that case that the respondent has expressly agreed to be bound by the arbitration clause, which is a pre-printed condition annexed to the Bill of Lading. In view thereof, an arbitration agreement existed as between the parties to that dispute. The agreement in question was part of a Multimodal Transport Document / Bill of Lading. Hence, the Supreme Court held that there was a valid arbitration agreement.

15. Considering the fact that there are numerous invoices and delivery challans and that delivery challans only contain the arbitration clause, which had been signed by the respondents whereas the invoices had not signed by the respondents, it is sought to be contended that a composite reference can be made and in that behalf, reliance is placed on the decision of *Chloro Controls India Pvt. Ltd. Vs. Severn Trent Water Purification Inc. and Ors. (Supra)*. Armed with these decisions, the learned

counsel for the applicant has urged the court to hold that there is a valid arbitration agreement and that such agreement can be enforced by referring the parties to arbitration.

16. On behalf of the respondents however, Mr. Bhandari has relied upon a decision of this court in the case of *Concrete Additives and Chemicals Pvt. Ltd. Vs. S.N. Engineering Services Pvt. Ltd.*⁶, wherein the court found that there were purchase orders and invoices and in those invoices, there was a pre-printed condition requiring disputes to be referred to arbitration. The court further observed that incorporation of a clause for reference of dispute to arbitration having been introduced only in the invoice, it was a unilateral act and that the purchase order did not contain any such arbitration agreement. The court thus found that there was no agreement in writing. He therefore urged me to hold that in the absence of the purchase order providing for an express reference to an arbitration, there was no occasion to hold that there was an arbitration agreement.

17. Reliance is also placed by Mr. Bhandari on the decision of this court in *Ritz Fashions and Ors. Vs. Bhagyashri Textiles Pvt. Ltd.*⁷, which was filed under Section 34 of the Arbitration and Conciliation Act, 1996, challenging the award, in which the court came to the conclusion that there was no arbitration agreement since the principal contract did not have an arbitration agreement.

18. Furthermore, Mr. Bhandari has relied on a decision of the Madras High Court

6 *Arbitration Application (Lodging) No.23207 of 2021 – Order dt. 17th January 2022.*

7 *Arbitration Petition No.803 of 2017 – Order dt. 11th March 2020.*

in Original Petition No.823 of 2014, wherein the court was faced with a similar set of documents and the court observed that, there is no reference to a method by which an arbitration clause can be incorporated by implication – from a collective set of documents of trade where one such contained the arbitration clause.

19. With the aid of these decisions, Mr. Bhandari would submit that in the fact situation at hand, there is no occasion to submit that there is an arbitration agreement.

20. Having considered rival contentions of the parties, I am of the view that the applicant has not made out a case for appointment of an Arbitrator. The agreement contained in the delivery challans alone cannot constitute an arbitration agreement in writing as contemplated under Section 7 of the Arbitration and Conciliation Act, 1996 for the purposes of referring adjudication of disputes pertaining to the alleged non payment of invoices. Furthermore, the amounts claimed are at the foot of the account for a period from 2016 to 2018. A composite reference, as canvassed before me in the facts of the case, cannot be made for the simple reason that there are multiple purchase orders as well, which fact has not been disclosed in the application but has been demonstrated before me by the respondents' counsel during the course of submissions. There are multiple purchase order references, which are incorporated in the invoices. Thus, I am of the view that in the facts at hand, the principal contract emanates from the purchase orders themselves, which clearly provides for adjudication of dispute by a court of law and that too subject to jurisdiction of the court in Pune.

21. The arbitration clause has been incorporated unilaterally in the invoices. The invoices have not been signed by the respondents and it is only the delivery challans that bear the signatures. Many of the signatures affixed on the delivery challans are by the security personnel accepting delivery at the factory. This, in my view, cannot be considered as an agreement to refer disputes to arbitration. The delivery challans prima facie only served the purpose of recording the fact that the applicant delivered certain quantity of coal mentioned therein at the respondents' factory. It does not relate back to the principal agreement between the parties, which is contained in the purchase orders. Thus, on facts, I am of the view that signatures of the various persons, who accepted delivery, cannot come to the assistance of the applicant in concluding that there is an arbitration agreement in writing, as contemplated under the Arbitration and Conciliation Act, 1996.

22. For the aforesaid reasons, no reference can be made to the arbitrator and in the result, application cannot succeed. I therefore pass the following order :-

- (i) Arbitration Application is rejected.
- (ii) No costs.

(A.K. MENON, J.)