

**IN THE HIGH COURT FOR THE STATE OF TELANGANA
AT HYDERABAD**

**TUESDAY, THE SECOND DAY OF AUGUST
TWO THOUSAND AND TWENTY TWO**

PRESENT

THE HONOURABLE SRI JUSTICE B.VIJAYSEN REDDY

ARBITRATION APPLICATION NO: 162 OF 2021

Between:

Dell International Services India Pvt. Ltd., Divya Sri Greens, Ground Floor, 12/1,
12/2A, 13/1A, Kora Magla Ring Road, Ghalaghata, Varthur, Hubli, Bangalore,
Karnataka-560036 **...APPLICANT**

AND

Analogics Tech India Ltd., Plot No.9/10, Road No.6, Nacharam Industrial Estate,
Hyderabad -500076 **...RESPONDENT**

Arbitration Application Under Section 11 of the Arbitration and Conciliation Act, 1996 praying that this Hon'ble Court may be pleased to allow the present petition and refer the claims/disputes with respect to the claims of the applicant under the purchase order dated 15/03/2019 to the Arbitral Tribunal comprising of a Sole Arbitrator to resolve the disputes between the applicant and the respondent herein.

IA NO: 1 OF 2021

Petition under Section 151 CPC praying that in the circumstances stated in the affidavit filed in support of the petition, the High Court may be pleased to condone the delay of (138) days in representing the in Arb.Application SR No.16800 of 2021 .

Counsel for the Applicant : SRI. T NATRAJ

Counsel for the Respondent: SRI Y. SWAROOP SAI

The Court made the following: ORDER

THE HON'BLE SRI JUSTICE B. VIJAYSEN REDDY

ARBITRATION APPLICATION No.162 of 2021

ORDER:

This application is filed to appoint an arbitral tribunal under Section 11 of the Arbitration and Conciliation Act, 1996 (for short 'the Act') with respect to the disputes arisen between the parties in relation to purchase order dated 15.03.2017 executed by the applicant and the respondent and consequent tax invoices raised by the applicant.

2. The petitioner is engaged in the business of manufacturing computer hardware, data storage devices, commercial services, commercial servers, laptops, monitors, peripherals, comprehensive Information Technology solutions etc. The respondent was desirous of purchasing several products from the applicant, which is detailed out in pages 11 to 14 of the application. The respondent placed order on the applicant for supply of products worth Rs.86,03,132.60 ps. inclusive of GST at 18%. Under the purchase order, as per clause No.1, the respondent has credit period of 30 days for making payment. The products were shipped by the applicant and the same were received by the respondent at its Chandigarh premises. The applicant raised multiple tax invoices as mentioned in para 5 of the application. Several emails were addressed by the applicant to clear outstanding invoices. The respondent assured the applicant

that pending payments would be cleared in three to four days vide email dated 30.01.2020. In spite of the applicant giving sufficient time to the respondent taking into consideration COVID-19 pandemic, the respondent failed to clear pending amount and stopped acknowledging any further communication from the applicant.

3. Clause 6(iii) of the purchase order provides for resolution of disputes through arbitration. Notice dated 24.09.2020 was issued by the applicant to the respondent to resolve the pending issue within a period of thirty days from the date of receipt of the notice, which was received by the respondent by email dated 24.09.2020 and by speed post on 28.09.2020. Reply notice dated 0.10.2020 was sent by the respondent acknowledging the dues of the applicant and again sought time to process the pending invoices amounting to Rs.86,03,132.60/-. In order to resolve the dispute amicably, the applicant granted final extension till 31.12.2020 to clear the outstanding dues vide emails dated 02.12.2020 and 04.12.2020. The respondent failed to make payment which lead to the petitioner issuing noticing dated 02.02.2021 invoking arbitration under clause 6(iii) of the purchase order dated 15.03.2019. The respondent, having received the notice, did not issue any reply and failed to agree upon a mutually appointed arbitrator.

4. Mr. T. Natraj, learned counsel for the application, has submitted that though the respondent has admitted the liability, it has been dodging payment on one pretext or the other. Mere admission of claim without discharging liability cannot be construed as non-existence of dispute. As payment is not made, the applicant has to invoke legal remedy, and therefore, the dispute continues to exist until payment is made. In any case, admission of debt/liability is only a tactic resorted to by the respondent to deprive the application its due payment.

5. Mr. Y. Swaroop Sai, learned counsel for the respondent, submitted that there is no dispute existing between the parties. According to the learned counsel, as the claim of payment under the invoices is admitted by the respondent, there is no need to refer the parties to arbitration. He further contended arbitrator would be appointed by this Court only when there is a dispute, which requires adjudication, and in the instant case, there is no dispute and therefore, referring the matter to an arbitrator is unwarranted.

6. Learned counsel for the respondent relied upon the following judgments **UNION OF INDIA v. BIRLA COTTON SPINNING & WEAVING MILLS LTD.**¹; **M/s. PEARL HOSIERY MILLS v.**

¹ AIR 1967 SC 688

UNION OF INDIA²; **M/s. CHEMIPACK (INDIA) PVT. LTD. v. M/s. ARCH PHARMA LABS LTD.** [judgment dated 10.07.2017 in CRP.No.3022 of 2017 of High Court for the State of Telangana and the State of Andhra Pradesh]; **M/s. SANKAR SEALING SYSTEMS P. LTD. v. M/s. JAIN MOTOR TRADING CO.**³ and **MARUTI UDYOG LTD. v. MAHALAXMI MOTORS LTD.** [judgment in IA.No.3340 of 1999 in S.No.2466 of 1998 dated 05.12.2002 of Delhi High Court].

7. In **BIRLA COTTON SPINNING & WEAVING MILLS LTD.'s** case (1 supra) the Supreme Court held as under:

"...The evidence recorded by the Trial Court discloses that there was no dispute between the Company and the Union arising under the contract on which the suit was filed. The Union accepted liability to pay the amount claimed by the Company in the suit. The Union still declined to pay the amount asserting that an amount was due from the company, to the Union under a distinct contract. This amount was not sought to be set-off under any term of the contract under which the Company made the claim. The dispute raised by the Union was therefore not in respect of the liability under the terms of the contract which included the arbitration clause, but in respect of an alleged liability of the Company under another contract which it may be noted had already been referred to arbitration. The Union had no defence to the action filed by the Company it was not contended that the amount of Rs. 10,625/- was not due to the Company under the contract relied upon by the

² AIR 1979 DELHI 61

³ AIR 2004 MAD 127

Company. For enforcement of the arbitration clause there must exist a dispute in the absence of a dispute between the parties to the arbitration agreement, there can be no reference.

It was urged that mere refusal by the Union to pay the amount due is sufficient to raise a dispute "in connection with the contract" within the meaning of clause 21 of the Arbitration agreement. We are unable to agree with that contention. A dispute that the Union is not liable to pay the price under the terms of the contract is undoubtedly a dispute under the contract, and in any event in connection with the contract. But a plea that the Union though liable to pay the amount under the terms of the contract will not pay it because it desires to appropriate it towards another claim under another independent contract cannot reasonably be regarded as a dispute "under or in connection" with that contract under which the liability sought to be enforced has arisen."

In **M/s. PEARL HOSIERY MILLS's** case (2 supra), the Delhi High Court held as under:

"3. Coming to the legal question and the nature of the misconception which seems to lead to the filing of such applications for stay, I think, it is useful to mention that an arbitration clause, even though it may be worded in the widest possible language, only allows differences and disputes relating to or arising out of or in connection with a contract to be referred to an arbitrator. It may well be said that the non-payment of the price of goods supplied is also a dispute or difference which should lead the matter to be referred to arbitration. However, the word 'Difference' or word 'Dispute' is not to be understood in this way when applying the law of arbitration. A dispute means that one

party has a claim and the other party says for some specific reasons that this is not a correct claim. This is a dispute. A dispute of this type requires that there should be a statement or proposition made by one side and there should be denial or refutation of that proposition by the other side. Then only can there be a dispute. Under a contract for the supply of goods, the payment of price and the delivery of goods are concurrent conditions. This is the definition of a sale under the Sale of Goods Act. If goods have been delivered and price not paid, this is not a dispute within the meaning I have just ascribed to the word 'Dispute'. A mere failure to pay the price is not a dispute. It is a mere non-performance of a specific term or condition of a contract. A dispute regarding the price could arise if, e.g., the purchaser says that goods are not of the proper quality and he refuses to pay the price, or he might say that goods have been delivered late, so, he would pay less price or he would hold up part of the price, or he might say "You have delivered the goods late, I have suffered loss, I would reduce the price by the amount of loss." If the purchaser makes any of these claims or similar claims then there is a dispute. If no such position is taken, then there is no dispute.

In **M/s. CHEMIPACK (INDIA) PVT. LTD.'s** case (*supra*), this court held as under:

"11. To find out whether there is an **arbitrable** dispute between the parties or not, the test is to see whether in response to a plaint, the defendants **admit liability** or dispute it, with a weak or strong defence. However, weak a defence may be, if the defendants in a suit refuse to **admit** to the suit claim, then there is a dispute. Such a dispute is an **arbitrable** dispute. The decision of the Madras High Court referred to by the learned Senior Counsel appears to

have arisen under very peculiar circumstances. In that case, a suit was filed for recovery of money along with an application for attachment before judgment. An order was passed in the application. Thereafter, an application was taken out under Section 8 for invoking the **arbitration** clause under Section 23A."

In **M/s. SANKAR SEALING SYSTEMS P. LTD.'s** case (supra), the Madras High Court held as under:

"18. As discussed earlier, prima facie liability of the defendants to the tune of Rs. 6.07 lakhs is admitted; but the defendants only insist upon the return of unsold materials in lieu of the above admitted claim. The defendants also complain about the quality; by imposing unilateral modifications of the Terms and conditions of the Contract and unwillingness to pay the amount, the defendants have only repudiated the contract. (i) Quality of goods (ii) unilateral modification of conditions (iii) insistence to return the unsold materials in the lieu of the admitted liability, are all questions which cannot be said to be the subject matter of the Arbitration Agreement. Those questions could be resolved only by judicial intervention. In my view, prima facie, all the disputes that are arising between the plaintiff and the defendants cannot be said to be forming, part of the subject matter of the Agreement within the meaning of Section 8 of the Act.

19. This is all the more so, when most part of the liability amount payable is admitted. The learned counsel for the plaintiff is right in submitting, "Where the purchasers have admitted the liability, the seller would be justified in resorting to a Court for recovery of the amounts due. In a case which arose under old Arbitration Act 1940, in AIR 1972 Andhra Pradesh 302, the Andhra Pradesh High Court

held the suit to be maintainable and that the purchasers cannot ask for the stay of the suit, in view of the admission of the liability throughout. Though it is a case arising under old Act, we may usefully refer to the principles thereon which read thus:

"This is a simple case, where the correspondence between the parties referred to above bears out that the defendant admitted its liability throughout and only asked for postponement of the encashment of the cheques by the plaintiff and we are, therefore, of the view that, in such a case, the plaintiff will be perfectly justified in resorting to a Court for recovery of the amounts due from the defendant. It is essential that there must be a dispute with regard to the claim made by the plaintiff and when there was no dispute at all except to admit the liability throughout, we are unable to say that from the mere fact that the defendant later moved the Delhi High Court under Section 20, that a dispute was in existence so as to entitled it to ask for stay of the proceedings in the suit by invoking the aid of Section 34, we are therefore, not prepared to hold that it is a case for staying the trial of the suit."

Thus, when there is no serious dispute on the amount payable and when the defendant has admitted most part of the liability, the present suit could only be the suit for claiming the amount due. The defendants cannot insist for reference to Arbitration.

In **MARUTI UDYOG LTD.**'s case (supra), the Delhi High Court held as under:

"3. It is settled law that the arbitration clause can be invoked only when there are differences and disputes with

regard to certain payments or breach of obligations of the respective parties of the terms of the agreement. However wherever there is an admitted liability, the arbitration clause cannot be invoked. The very connotation "admitted liability" suggests that there are no disputes or differences with regard to the said admitted liability.

4. The extracts of the letter dated 5th April, 1997, the minutes of the meeting and the affidavit filed by Mr. M.C. Mehta in his capacity as Managing Director of the defendant No. 1 company leave no manner of doubt that not only the defendant No. 1 had accepted the liability of 7.63 crores towards the plaintiff but also undertook to discharge the liability by making the payment through Installments.

5. What is material for the purpose of Section 8 of the Arbitration Act is that there should be existence of difference or disputes with regard to a particular liability arising out of the terms of the agreement. If the liability is acknowledged and admitted it does not come within the meaning and ambit of disputes and differences.

6. In view of the foregoing reasons the application under Section 8(1) of the Arbitration and Conciliation Act, 1996 cannot be allowed as arbitration clause is not invocable in respect of admitted liability.

8. On the other hand, the learned counsel for the applicant relied upon a judgment of the Supreme Court in **IDEAL MARKETING v. NUCHEM LIMITED**⁴, wherein it was held as under:

"... A claim can be resolved only in appropriate civil proceedings or arbitration proceedings. The respondent has

⁴ 2014 SCC OnLineP & H 2880.

been blowing hot and cold even in the reply by acknowledging that the amount is payable yet stating that it has to verify the position on records. There is also no acknowledgment of the rate of interest claimed by the petitioner. No decree can be passed in the present proceedings even on admission. The adjudication of the claim can only be in arbitration proceedings."

9. The judgment in **BIRLA COTTON SPINNING & WEAVING MILLS LTD.**'s case (1 supra) can be differentiated on facts. In the said case, Birla Cotton sought for reference to arbitration. The Union of India admitted the liability and opposed reference. Having noticed that the Union of India desired to appropriate amount (admitted claim) under another independent contract the Supreme Court held that such refusal to pay cannot be treated as a dispute in connection with the contract under which liability is being enforced. In the present case, the facts are different and thus, the aforesaid decision is not applicable to the facts of this case.

In **M/s. PEARL HOSIERY MILLS**'s case (2 supra), in a suit for recovery of price of goods, an application was filed by the defendant under Section 34 of the Arbitration and Conciliation Act for staying the suit contending that the matter has to be referred to arbitration. The High Court of Delhi having considered contentions of the defendants recorded that existence of a dispute or difference is not alleged or proved or even pointed out from any documentary

material or contemporary dealings between the parties and held as under:

"8. ... I am hence prepared to agree to the view that the difference or dispute should be quite obvious to the Court when deciding the question of stay, and when it is not obvious that there is such a dispute or difference or where such dispute or difference does not fall within the scope of the arbitration clause then the stay has to be refused.

9. ... As I have said a dispute or difference requires the statement of a proposition and a denial thereof by the other side. As the existence of such a dispute or difference is not alleged or proved or even pointed out from any documentary material or contemporary dealings between the parties, I come to the conclusion that this suit cannot be stayed and I accordingly reject the application for stay with costs."

On close reading of judgment of the Delhi High Court, it can be gathered that there was no authentic material before the learned Judge to come to the conclusion that there was a dispute regarding payment and in fact, referring to several other judgments and observations, as pointed out in paragraph Nos.7 and 8 therein, rejected the stay application with costs. Thus, the said judgment is of no help to the petitioner.

In **M/s. SANKAR SEALING SYSTEMS P. LTD.'s** case (3 supra) and **MARUTI UDYOG LTD.'s** case (supra), the applications under Section 8 of the Arbitration and Conciliation Act, 1996 were dismissed in view of admission of liability by the

defendants and by holding that arbitration clause cannot be invoked when there is an admitted liability by the defendants who sought for reference to arbitration.

The decision in **M/s. CHEMIPACK (INDIA) PVT. LTD.** (supra) also arises out of an application under Section 8 of the Arbitration and Conciliation Act, 1996 wherein the defendant denied the liability and the application was allowed by the trial Court. Thus, the judgment is not application to the facts of the case.

10. At first blush, the contention of the learned counsel for the respondent appears to be interesting and worth consideration. However, on a detailed analysis of the judgments cited by the learned counsel for the respondent, his contention is found to be without merit. Reasons are hereunder. Even if the respondent has admitted the claim of the applicant, it needs to be seen whether such admission is bonafide or not. Going by the sequence of events, in the present case, the respondent has never denied the liability in any of its emails and correspondence. Even after arbitration application is filed, the counsel for the respondent categorically stated that the amounts will be paid. However, the million dollar question is when the amounts would be paid and if the amounts are not paid, how are they to be recovered by the applicant.

11. Learned counsel for the respondent submitted that the matter will be settled out of Court. However, the learned counsel for the applicant contended that the respondent is not fair and he had been dodging payment for the past more than two years.

12. If payment is admitted but not made, the applicant again has to invoke either civil law remedy or arbitration as the case may be. Unless there is some instrument or award passed, which has the effect of a decree in terms of Section 2(2) of the Code of Civil Procedure, it is needless to point out that the applicant again has to invoke legal remedy to recover the dues. In a pending civil suit, if a claim is admitted by the defendant, the plaintiff can invoke Order 12 Rule 8 CPC for passing a decree of payment and later, seek execution of the decree. However, in the instant application under Section 11(6) of the Act, this Court is not exercising the power of a civil Court nor an arbitrator. On an admission made by the respondent, this Court cannot pass any award or decree.

13. However, in order to give a quietus to the litigation as the debt is admitted, reasonable opportunity has been given to the respondent to take instructions from his client so that the matter can be referred to the Lok Adalat under the Legal Services Authority Act, 1987. This Court, in fact, informed the learned counsel for the respondent that if the parties agree for passing of an award before

the Lok Adalat, in terms of a compromise as the claim of the applicant is admitted, then award can be passed under Section 21 of the Legal Services Authority Act, which becomes enforceable as a decree before a civil Court. However, the learned counsel for the respondent, having taken instructions, submitted that his client requires some more time to work out an amicable settlement. In such circumstances, this Court holds that the admission by the respondent of the claim of the applicant herein is not bonafide and it is only to dodge or avoid payment of money to the applicant. In the opinion of this Court, the applicant cannot be left without any remedy and even if claim of the applicant is admitted, but without bonafides, then the same would constitute a dispute, which requires to be adjudicated before an arbitrator in view of the agreement between the parties.

14. Accordingly, arbitration application is allowed. Sri Mangari Rajender, Retired District Judge, is appointed as arbitrator to adjudicate the claims and disputes between the parties and to pass an award in accordance with law.

15. The learned Arbitrator is entitled to fees as per the rates specified in the Fourth Schedule to the Act of 1996, inserted by Act 3 of 2016 with effect from 23.10.2015, which shall be borne by both parties in equal shares.

The miscellaneous petitions pending, if any, shall stand closed. There shall be no order as to costs.

SD/-K.SRINIVASA RAO
JOINT REGISTRAR

//TRUE COPY//

SECTION OFFICER

ONE FAIR COPY TO THE HON'BLE SRI JUSTICE B. VIJAYSEN REDDY
(FOR HIS LORDSHIPS KIND PERUSAL)

To

1. Sri Mangari Rajender, Retired District Judge, Villa No. 142, Keerthi Richmond Villa, Suncity, Hyderabad - 500086. (By Special Messenger) (along with a copy of affidavit and material papers)
2. 18 L.R. Copies
3. The Under Secretary, Union of India Ministry of Law, Justice and Company Affairs, New Delhi
4. The Secretary, Telangana Advocates Association, Library, High Court Buildings, Hyderabad.
5. One CC to SRI. T. NATRAJ Advocate [OPUC]
6. One CC to SRI. C. M. R. VELU, Advocate [OPUC]
7. Two CD Copies
8. One Spare Copy



HIGH COURT

DATED:02/08/2022

NOTE: L.R Copy To Be MARKED



ORDER

ARB.APPL.No.162 of 2021

ALLOWING THE ARBITRATION APPLICATION

(21) VIV
8/9/22