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

Date of Decision: 28th March, 2022

+ ARB.P. 173/2020 & I.A. 3081/2022 (seeking early hearing)

SURYA PROCESSORS PRIVATE LIMITED Petitioner

Through: Mr. Gurmukh Choudhri, Advocate.

versus

SHREE JAI GURUDEV TEXTILE AGENCIES Respondent

Through: Ms. Tanishq Mehta and Mr. A.K. Singh, Advocates.

CORAM:

HON'BLE MR. JUSTICE SANJEEV NARULA

JUDGMENT

SANJEEV NARULA, J. (Oral):

1. The present petition under Section 11(6) of the Arbitration and Conciliation Act, 1996 [*hereinafter “the Act”*] seeks appointment of an Arbitral Tribunal for adjudication of disputes relating to invoices issued by the Petitioner – Surya Processors Pvt. Ltd. [*hereinafter “SPPL”*] in the course of their dealings with Respondent – M/s. Shree Jai Gurudev Textile Agencies [*hereinafter “SJGTA”*].

2. SJGTA does not dispute the invoices, however, they contend that the instant petition is not maintainable as there is no arbitration agreement between the parties.



3. Ms. Tanishq Mehta, counsel for SJGTA argues that the arbitration agreement relied upon by SPPL does not fulfil the requirements of Section 7(4)(a) of the Act. A mere mention of ‘*arbitration*’ in an invoice does not translate into existence of an arbitration agreement. The invoices are only a proof of service(s) rendered/ good(s) supplied; it is not an agreement in itself. SJGTA is not a member of Delhi Hindustani Mercantile Association (Regd.) [*hereinafter “DHMA”*] and therefore, they neither have confidence in its fairness, nor are its rules applicable to SJGTA. Reliance is placed on the judgment of this Court in *Taipack Ltd. v. Ram Kishore Nagar Mal*,¹ *Parmeet Singh Chatwal v. Ashwani Sahani*,² and *Kailash Nath Aggarwal v. Aaren Exports*.³

4. *Per contra*, Mr. Gurmukh Choudhri, counsel for SPPL argues that the arbitration agreement contained in the invoices, is binding on SJGTA as they have accepted and acted on the same. He states that SPPL is not insisting for reference of disputes to DHMA and instead, arbitration can be conducted through any independent Arbitral Tribunal appointed by this Court. Further, he contends that SJGTA has admitted the existence of the arbitration agreement in their reply to SPPL’s notice of invocation.

ANALYSIS

5. The Court has considered the contentions advanced by the counsel for the parties.

¹ 2007 (3) Arb. L.R. 402 (Delhi): MANU/DE/8199/2007.

² MANU/DE/0442/2020.



6. The arbitration agreement relied upon by SPPL is contained in the footnote of the invoices which features on the same page, as are other details of the invoice. The same is in a readable font size, and reads as under: -

“All disputes are to be decided by Delhi Hindustani Mercantile Association (Regd.), as per the Rules & Regulations as under Arbitration & Conciliation Act”

7. The invoices are not signed by SJGTA, and therefore the question that arises is if they can be considered to be a ground to deny the agreement. Section 7(3) of the Act stipulates that the arbitration agreement shall be in writing, which is undoubtedly an essential requisite. Sub-clause (b) and (c) of Section 7(4) of the Act indicates the legislative intent to also include a written document, not signed by the parties, within the scope of a valid arbitration agreement. Section 7(4)(b) of the Act entails that an arbitration agreement can be in the nature of exchange of communication, providing a record of the agreement in writing. Thus, taking into consideration the language deployed in the aforesaid provision, it emerges that the signature of either party on the arbitration agreement is not mandatory.

8. Furthermore, the aforesaid provision also manifests that an arbitration agreement need not be in a particular form. It is no longer *res integra* that a valid arbitration agreement can be constituted as long as all the essential attributes are fulfilled.⁴ There are numerous case laws holding that to interpret the agreement as an ‘*arbitration agreement*’, one has to ascertain

³ 2009 SCC OnLine DEL 3691.

⁴ See: Judgment of this Court in ARB.P. 241/2021 dated 05th July, 2021 titled – *Swastik Pipe Ltd. v. Shri Ram Autotech Pvt. Ltd.*



whether there is *consensus ad idem* between the parties to have their disputes referred to arbitration.⁵ In terms of Section 7(c), even exchange of statement(s) of claim and defence ‘*in which existence of the agreement is alleged by one party and not denied by the other*’ – can constitute as an arbitration agreement. In that light, the Court has perused the response of SJGTA to the notice of invocation sent by SPPL. In the said reply, SJGTA does not dispute existence of arbitration agreement, and rather admits the same. The averments in their reply, read as under: -

3. ***That as mentioned in paragraph no. 14 of the said notice, that your client has already initiated criminal proceedings under section 138 NI Act at the Ghaziabad District Courts and whereas in paragraph no. 15 of the said notice the arbitration clause is mentioned and is being reproduced as under:***

“All disputes are to be decided by Delhi Hindustani Mercantile Association (Regd.), as per the Rules & Regulations as under Arbitration & Conciliation Act.”

The above said, “All disputes..” also include the dispute regarding the alleged cheque bouncing. Why has your client not referred it to the Arbitration or Conciliation for recovery of the alleged payment prior to filing 138 Complaint?

Secondly, our client was pressurized, threatened and defamed by Denim Mills Association to whom your client had contacted to pressurize our client by passing a resolution of sanction by Denim Mill Association against our client. In this case also, why was Delhi Hindustani Mercantile Association (Regd.) not referred for arbitration first?

Your client has himself defied and contravened the alleged terms of arbitration by (i) filing false criminal complaint u/s 138 N.I. Act and (ii) by approaching DMA to pressurize our client and to put sanction of denim trade against our client.

⁵ *M/s Caravel Shipping Services Pvt. Ltd. v. Premier Sea Food Exim Pvt. Ltd.*, (2019) 11 SCC 461, *Trimex International FZE Ltd. Dubai v. Vedanta Aluminium Ltd, India*, (2010) 3 SCC 1, *Scholar Publishing House Pvt. Ltd. v. Khanna Traders*, (2013) (3) Arb. LR 105 (Delhi), and *Lewis W. Fernadez v. Jitavlal Partapshi*, AIR 1947 Bom 65.



When your client's above said tools did not work, then your client is now trying to explore a new venture of legal exploration, in the name of Arbitration with sole intention to harass and extort our client.

4. That in view of the paragraph no. 14 & 15 of the said notice it becomes of great significance that when your client has himself violated the arbitration clause by initiating the criminal proceedings -against our client, you the addressee stand in no position whatsoever to force our client to enter appearance before the Arbitration Association namely, Delhi Hindustani Mercantile Association (Regd.).

5. That our client is not a member of your so called “Delhi Hindustani Mercantile Association (Regd.)” so our client has no trust on its fairness and unbiasedness. Therefore our client out rightly rejects your proposal of reference to arbitrator in terms of printed terms on your invoices which you have already violated by filing section 138 complaint & by initiating issues with DMA.

6. That in addition, it is still not clear as to how your client has reached the said figure of Rs. 1,32,87,823/- and also the interest of Rs. 85,61,764.51/- is also objectionable.

Further, your notice once again fails to disclose the details of invoices, purchase order, delivery challan and transport receipt etc, against which the liability of the cheque of Rs. 1,32,87,823/- was allegedly issued by our client. Your notice is quite ambiguous in this regard.

7. Moreover, your client is guilty of “forgery” & “Criminal breach of trust” and has disrupted healthy trade practice by coercing unlawfully to our client. Due to the same, our client has suffered loss of business, goodwill and mental peace. For the same, your client is solely responsible.”
[Emphasis supplied]

9. A meaningful reading of the afore-noted contentions demonstrates that SJGTA is only expressing its apprehension in opting for arbitration process before DHMA and does not deny existence of the arbitration agreement itself. Further, the main objection of SJGTA is that once SPPL had resorted to proceedings under Section 138 of the Negotiable Instruments Act, 1881, they could not have invoked arbitration thereafter. Therefore,



SJGTA is essentially disputing the claim(s) on merits, and not the arbitration agreement.

10. The judgments relied upon by SJGTA are of no assistance to them. Each case turns on its own facts. The conduct of parties is the most relevant and determinative test. In other words, if a party does not urge the contention of non-existence of an arbitration agreement in its reply to the claim, then the arbitration agreement is deemed to exist.

11. Lastly, it must be stressed that we are presently concerned with Section 11 (6A) of the Act where the Court only has to form a *prima facie* view regarding the existence of the arbitration agreement. The Supreme Court in *Vidya Drolia v. Durga Trading Corporation*,⁶ has observed that ‘the rule for the Court is ‘when in doubt, do refer’. It must therefore be noted that the commercial dealings between the parties is demonstrated from the documents placed on record by SPPL. Copy of the ledger account of SJGTA exhibits that the parties have been transacting with each other for some time. There is sufficient material on record to *prima facie* hold that the invoices were accepted as well as acted upon. Thus, the arbitration agreement can be safely inferred. That said, no final view is expressed by this Court on this issue. Detailed examination and final determination regarding the existence of the arbitration agreement is in the exclusive domain of the Arbitral Tribunal which has to be conclusively decided on the basis of evidence that the parties would lead as well as the surrounding facts

⁶ (2021) 2 SCC 1.



and circumstances.

12. In view of the foregoing, the present petition deserved to be allowed and accordingly, Mr. Laxmi Kant Gaur (Retd.), former District and Session Judge [Contact No.: +91 8800881765] is appointed as the Sole Arbitrator to adjudicate the disputes that are stated to have arisen between the parties out of invoices raised by SPPL on SJGTA.

13. The parties are directed to appear before the Sole Arbitrator as and when notified. This is subject to the Arbitrator making necessary disclosure(s) under Section 12(1) of the Act and not being ineligible under Section 12(5) of the Act.

14. The Arbitrator will be entitled to charge his fee in terms of the provisions of the Fourth Schedule appended to the Act.

15. It is clarified that the Court has not examined any of the claims of the parties and all rights and contentions on merits are left open including but not limited to the objection(s) raised by the Respondent/ SJGTA *qua* existence of the arbitration agreement that is left open to be adjudicated by the Arbitral Tribunal. As and when such a plea is raised, the Arbitral Tribunal shall be competent to rule on its own jurisdiction and decide whether there exists an arbitration agreement or not, uninfluenced by the observations made by this Court which are only *prima facie* in nature. Both the parties shall be free to raise their claims/ counter claims before the Arbitrator, in accordance with law.



16. Accordingly, the present petition is disposed of along with the pending application.

MARCH 28, 2022

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(corrected and released on: 09th April, 2022)

SANJEEV NARULA, J

