

ORDER SHEET

AP/679/2023

IN THE HIGH COURT AT CALCUTTA
Ordinary Original Civil Jurisdiction
ORIGINAL SIDE
(Commercial Division)

RAHEE INFRATECH LIMITED
Versus
HINDUSTHAN ENGINEERING AND INDUSTRIES LIMITED

BEFORE:

The Hon'ble JUSTICE MOUSHUMI BHATTACHARYA

Date : 25th September, 2023.

Appearance:

Mr. Shounak Mukhopadhyay, Adv.

Mr. Kallol Saha, Adv.

Mr. Akash Ghosh, Adv.

Ms. Shinjita Ray, Adv.

...for the petitioner

Mr. Ayan Banerjee, Adv.

Mr. Arijit Bhowmick, Adv.

...for the respondent

The Court: This is an application for appointment of Arbitrator under Section 11 of the 1996 Act.

The respondent, through learned counsel, says that there is no dispute which would require appointment of an Arbitrator.

The material placed before the Court, on the contrary, shows a series of letters written by the parties to one another pointing to an intention to arbitrate.

But first, the arbitration agreement. The arbitration agreement is contained in three Purchase Orders issued by the respondent on the petitioner for supply of railway track components. The P.O.s are of 12th April, 2022, 22nd April, 2022 and 4th May, 2022.

The astonishing part of the facts shown to the Court is that the respondent issued the three P.O.s on the petitioner without the terms containing the arbitration clause which were printed overleaf on all three of the P.O.s. The overleaf portions were made known to the petitioner by way of a letter written by the respondent to the petitioner on 27th March, 2023. However, the arbitration clause was extracted in this letter. The complete three P.O.s including the arbitration clause printed overleaf were supplied by the respondent to the petitioner only on 10th May, 2023. A comparison of what was initially sent to the petitioner in April and May, 2022 with the P.O.s which were sent in March and May, 2023 would clearly bring out the fact of the arbitration clause being concealed from the petitioner at the relevant point of time.

The dispute essentially relates to unpaid dues of the petitioner in terms of the contract and consequential damages suffered by the petitioner on account of the non-payment. The petitioner wrote to the respondent on 10th March, 2023 raising a dispute on account of the items manufactured by the petitioner in terms of the P.O.s without being aware of the arbitration clause at this point of time. The respondent denied the terms of the contract by a letter dated 10th May, 2023 but enclosed the arbitration agreement contained in the three P.O.s first on 27th March, 2023 and thereafter on 10th May, 2023. The

petitioner accordingly replied to the respondent's 10th May letter on 5th June, 2023 expressing its agreement to refer the disputes to arbitration and stating that the exchange of letters would show that there is indeed a valid and subsisting arbitration agreement between the parties. The respondent replied to this letter on 17th July, 2023 stating that there is no dispute between the parties.

The petitioner had in the meantime invoked the arbitration clause by its letter dated 5th June, 2023.

It is undisputed that the respondent itself furnished the arbitration agreement to the petitioner on 27th March, 2023 and 10th May, 2023. The respondent does not dispute that the three P.O.s contain these arbitration clauses.

Section 7(4)(b) of The Arbitration and Conciliation Act, 1996 provides that an arbitration agreement will be considered to be in writing in terms of Section 7(3) through an exchange of letters, telegrams, telex and other means of telecommunication between the parties which provide a record of the agreement. The facts of this case would completely fit within the contemplation of Section 7(4)(b) since the respondent's letters of 27th March, 2023 and 10th May, 2023 contain the arbitration agreement and the petitioner by its letter of 5th June, 2023 expressed its clear intention to arbitrate.

VISA International Limited Vs. Continental Resources (USA) Limited, (2009) 2 SCC 55 held that existence of an arbitration agreement can be ascertained in the facts of a case particularly where the parties intend to be governed by the

arbitration agreement which can be gathered from the correspondence exchanged between the parties taking together the surrounding circumstances. The Supreme Court relied on Section 7 of the 1996 Act to come to this conclusion.

The short question which arises before the Court is whether there is an existing dispute between the parties. The allegations of non-payment of dues points to a clear existence of dispute between the parties.

There is nothing on record to show that the dispute is a moribund dispute or that the petitioner has come with a stale claim. The parties on the other hand fall within both Section 11(5) as well as (6) of the 1996 Act.

AP/679/2023 is accordingly allowed and disposed of by appointing Mr. Dipanjan Datta, advocate to act as the Arbitrator subject to the learned Arbitrator communicating his consent in the prescribed format to the Registrar, Original Side of this Court within three weeks from date.

The petitioner's advocate-on-record shall communicate this order on the learned Arbitrator by 27th September, 2023 along with the requisite details of the contact person of the petitioner.

(MOUSHUMI BHATTACHARYA, J.)