



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

ARBITRATION APPLICATION NO.250 OF 2021

Parekh Plastichem Distributors LLP
A Limited Liability Partnership duly
registered as per the Limited Liability
Partnership Act, 2008, as amended and
having their registered office at
C/o. Parekh Prints, 1st Floor, IIT Bhatti,
Italian Textile Compound,
Goregaon (East), Mumba - 400 063
Through their authorised
representative : Ringkesh Kantilal Jain

.....Applicant

Vs.

Simplex Infrastructure Limited
A Company incorporated under the
Companies Act, 1956 having its address at
Simplex House, 22 Shakespeare Sarani,
Kolkata, West Bengal – 700 017

.....Respondent

Mr.Arnab Ghosh a/w Ms.Christabelle M.K. i/b Mr.Manoj Khatri and
Mr.Arnab Ghosh for the Applicant

Mr.Rohit K. Gupta a/w Ms.Amruta Savant i/b Mr.Pariket Shah for the
Respondent

CORAM: FIRDOSH P. POONIWALLA, J.
RESERVED ON: 25th AUGUST 2023
PRONOUNCED ON: 14th SEPTEMBER 2023

JUDGMENT (PER FIRDOSH P. POONIWALLA, J):

1. The present Application has been filed under the provisions of
Section 11 of the Arbitration and Conciliation Act, 1996 (“the Act”).

2. The Applicant is engaged in the business of supply of various chemicals, commodities and construction related admixtures and other materials.

3. In 2019, the Respondent had approached the Applicant for supply of Callipar brand Micro Silica for its Wadala (Line 7 Metro) and BKC (Line 28 Metro) site (hereinafter for the sake of brevity referred to as 'supplies'). It is the case of the Applicant that it had been regularly making supplies to the Respondent upon purchase orders being raised on it. Upon successful delivery of the supplies, the Applicant raised several invoices towards the supplies made by it. The Applicant had annexed two invoices i.e. invoices dated 12th December 2019 and 15th September 2019 to the Application. Thereafter, pursuant to the Order dated 9th August 2023 passed by this Court, which directed the Applicant to place on record the invoices corresponding to purchase orders, the Applicant filed a Compilation of Documents containing 11 invoices raised by the Applicant upon the Respondent for a total sum of Rs.24,53,220/-. It is not in dispute between the parties that the said invoices were received by the Respondent.

4. It is the case of the Applicant that, after appropriating certain payments made by the Respondent towards the said invoices, a principal sum of Rs.21,78,910/- is due and payable by the Respondent to the

Applicant. It is also the case of the Applicant that it had sent several reminders to the Respondent to make payment of the balance amount due under the said invoices.

5. By a letter dated 22nd December 2020, addressed to the Respondent, the Applicant once again called upon the Respondent to clear its outstanding dues.

6. Thereafter, by its Advocates' Notice dated 13th January 2021, the Applicant once again called upon the Respondent to make payment of Rs.21,78,910/-, failing which the Applicant would take appropriate legal action against the Respondent in the competent Court of law. The said Notice did not invoke any arbitration clause.

7. Thereafter, by its Advocates' Notice dated 15th July 2021, addressed to the Respondent, the Applicant invoked arbitration under Clause nos.3 and 4 of the invoices raised by the Applicant upon the Respondent which provided that any disputes or differences between the parties shall be settled by Arbitration, the venue of the Arbitration shall be Mumbai and that the Courts in Mumbai would have exclusive jurisdiction in the matter. By the said Notice, the Applicant nominated one Santosh Shetty to act as the Sole Arbitrator to resolve the disputes between the parties.

8. The Respondent did not reply to the said Notice dated 15th July 2021 and therefore the Applicant filed the present Application for appointment of an Arbitrator.

9. The Respondent has filed an Affidavit in Reply of one Hemanta Kumar Baliarsingh affirmed on 15th December 2022. The main contention in the said Affidavit in Reply is that the purchase orders issued by the Respondent to the Applicant contained an Arbitration Clause which provided that the venue of the Arbitration would be Kolkata and all transactions would be subject to the jurisdiction of the Calcutta High Court and the Courts thereunder, and therefore this Court did not have any jurisdiction to appoint an Arbitrator as prayed for in the Application.

10. Further, the Respondent also filed an Additional Affidavit of Hemanta Kumar Baliarsingh affirmed on 3rd March 2023. In the said Affidavit, the aforesaid contention has once again been reiterated by the Respondent. Further, along with the said Affidavit, the Respondent produced the purchase orders issued by it to the Applicant.

11. The aforesaid facts show that the main point of dispute between the parties is that, according to the Applicant, the Arbitration should be conducted under the Arbitration clause contained in the invoices raised by

the Applicant and, therefore, the venue of the arbitration would be Mumbai and this Court would have jurisdiction to appoint an Arbitrator.

12. On the other hand, it is the contention of the Respondent that the Arbitration should be conducted under the Arbitration Clause contained in the purchase orders whereunder the venue of the Arbitration is Kolkata and therefore, it would be the Courts in Kolkata, and not this Court, which would have jurisdiction to appoint an Arbitrator.

13. Mr. Arnab Ghosh, the learned Advocate for the Applicant, submitted that the Arbitration Clause contained in the invoices raised by the Applicant would supersede the Arbitration Clause contained in the purchase orders issued by the Respondent. Mr. Ghosh submitted that the invoices raised by the Applicant contained an Arbitration Clause which provided that the venue of the Arbitration would be Mumbai, that Courts in Mumbai would have exclusive jurisdiction in the matter and that these terms would supersede any other terms agreed with the Respondent in the past. He submitted that, since, the invoices containing these terms were accepted by the Respondent, who accepted supplies and made some payments pursuant thereto, the Arbitration Clause in the said invoices supersedes the Arbitration Clause in the purchase orders. Mr. Ghosh submitted that, in these circumstances, the venue of the Arbitration would

be Mumbai and that this Court would have the jurisdiction to appoint an Arbitrator in the present Application filed by the Applicant.

14. Mr. Ghosh also referred to the Annexure to the purchase orders which, while referring to 'Other Terms', mentioned that the jurisdiction would be subject to the Bombay High Court.

15. In support of his submission, Mr. Ghosh relied upon the following judgments:-

- A. **Swastik Pipe Ltd. Vs. Dimple Verma** in Arbitration Petition No. 100 of 2021 (Unreported judgment of the Delhi High Court).
- B. **Bennett Coleman & Co. Ltd. V/s. MAD (India) Pvt. Ltd** in Commercial Arbitration Application No.211 of 2022 with Commercial Arbitration Petition (L) 29338 of 2022 (Unreported judgment of a Learned Single Judge of this Court).

16. On the other hand, Mr. Rohit Gupta, the learned Counsel for the Respondent, submitted that the purchase orders comprised the main agreement between the Applicant and the Respondent and therefore the Arbitration Clause in the purchase orders should prevail over the Arbitration Clause in the invoices. Mr. Gupta submitted that, just because

the Applicant had unilaterally included an Arbitration Clause in the invoices issued by it to the Respondent, the said Arbitration Clause could not supersede the Arbitration Clause contained in the purchase orders as the parties had not agreed to the Arbitration Clause in the purchase orders being superseded. Mr. Gupta further submitted that, since the Arbitration Clause contained in the purchase orders provided for the venue of the Arbitration as Kolkata, the Courts at Kolkata would have jurisdiction, and, therefore, this Court would not have jurisdiction to entertain the present Application.

17. In support of his submissions, Mr. Gupta relied upon the following orders and judgments:-

- A. **Concrete Additives and Chemicals Pvt. Ltd. V/s. S N Engineering Services Pvt. Ltd.** in Arbitration Application (L) No.23207 of 2021 (Unreported Order of a Learned Single Judge of this Court).
- B. **Alupro Building Systems Pvt. Ltd. V/s. Ozone Overseas Pvt. Ltd.**¹
- C. **Mankastu Impex Private Limited V/s. Airvisual Limited.**²

18. When the order on the present Application was reserved on 25th

1 2017 SCC Online Del 7228 : (2017) 162 DRJ 412

2 (2020) 5 SCC 399

August 2023, Advocates for both parties were given liberty to file additional judgments on or before 31st August 2023 and serve copies of the same on the other side. Pursuant to the said liberty given by this Court, the Respondent has not filed any additional judgments. However, the Applicant has filed the following additional judgments:-

- A. **Skanska Cementation India Ltd. V.s Bajranglal Agarwal and Ors.**³
- B. **Aviagen India Poultry Breeding Company Pvt. Ltd. Vs. R. Geetha Ranjani.**⁴
- C. **Balasore Alloys Limited Vs Medima LLC**⁵
- D. **M. K. Abraham & Co. Vs. State of Kerala & Anr.**⁶

19. Before dealing with the submissions of the parties it would be appropriate to set out the Arbitration Clause contained in the purchase orders and the Arbitration Clause contained in the invoices. In the purchase orders, the Arbitration Clause is found in Clause 23 of the Terms and Conditions, which reads as under:-

“23 Arbitration : In the event of any difference or dispute arising out of or in connection with this purchase order, the same shall be first amicably settled by mutual dialogue. If the parties fail to settle their difference or dispute arising out of or in connection with this work order (including interpretation of the terms thereof), the same

3 MANU/MH/1085/2002

4 MANU/TN/1991/2023

5 MANU/SC/0691/2020

6 MANU/SC/1146/2009

shall be referred to arbitration. The Arbitration proceedings shall be conducted by a single Arbitrator appointed by the Company Secretary of Simplex Infrastructures Ltd., and the award/decision of such arbitrator shall be final and binding upon both the parties. The venue of the arbitration shall be Kolkata. However, the work shall not be stopped during the pendency of the proceedings and it shall be ensured that such work is proceeded uninterruptedly.”

20. The Arbitration Clause in the invoices is Clause-3 of the terms and conditions mentioned at the bottom of the invoices, which reads as under:-

“3. Any difference or disputes between the parties, as regards outstanding dues etc. shall be settled by Arbitration through a sole Arbitrator nominated by us. The Arbitration shall be as per the provisions of Indian Arbitration & Conciliation Act, 1996 and the venue shall be Mumbai.”

21. It is well settled law that, in order to consider whether there is any arbitration agreement between the parties and also in order to consider what is that arbitration agreement, the intention of the parties is paramount. The reason for this is obvious: that Arbitration is a consensual form of dispute resolution which, barring a few exceptions, can be resorted to only if parties have consented to the same.

22. In the light of this settled position in law, in the present case, it would have to be considered as to whether the parties intended to be bound by the Arbitration Clause contained in the purchase orders issued by the Respondent or by the Arbitration Clause contained in the invoices raised by the Applicant.

23. In my view, the parties intended to be bound by the Arbitration Clause contained in the purchase orders issued by the Respondent for the following reasons:-

A. The purchase orders issued by the Respondent constitute the main agreement between the parties which contained the terms and conditions on which the goods had to be supplied by the Applicant to the Respondent. These purchase orders contained the description of the goods to be supplied, the quantity, the rate at which they were to be supplied, the delivery schedule, the tax and fees schedule, the terms of payment, site for inspection, the test certificate to be furnished, the place of delivery and various other terms and conditions. These purchase orders, being the main agreement between the parties, it cannot be disputed that the Arbitration Clause contained in the said purchase orders had been agreed to by the parties.

B. Since the purchase orders constituted the main agreement between the parties, if the parties intended that the Arbitration Clause in the invoices raised by the Applicant should supersede the Arbitration Clause contained in the purchase orders, then, there ought to have been an express agreement between the parties to specifically override or supersede the Arbitration Clause contained in the purchase orders. However, there is no such express agreement

between the parties which specifically provides that the Arbitration Clause in the invoices would supersede the Arbitration Clause in the purchase orders.

C. Just because the invoices raised by the Applicant contained an Arbitration Clause and state that the terms contained in the invoices would supersede any other terms agreed between the parties in the past, and the Respondent accepted the supplies under the said invoices and made some payments in respect thereof, the same cannot have the effect of the Arbitration Clause in the invoices superseding the Arbitration Clause in the purchase orders. This is more so since the Arbitration Clause in the purchase orders provided that a Sole Arbitrator would be appointed by the Company Secretary of the Respondent. It is difficult to accept that the Respondent agreed to such an Arbitration Clause being superseded by the Arbitration Clause in the invoices which provided that the Arbitrator would be nominated by the Applicant, unless there is an express agreement specifically overriding or superseding the Arbitration Clause in the purchase orders. It is also not possible to accept that the Respondent, which is based in Kolkata, agreed to Arbitration at Mumbai, instead of Arbitration at Kolkata, as provided in the Arbitration Clause contained in the purchase orders.

24. At this stage it would be appropriate to refer to the judgments cited on behalf of the parties.

25. In Concrete Additives and Chemicals Pvt. Ltd.(Supra), a Learned Single Judge of this Court has taken the view that when purchase orders had been issued which did not contain any Arbitration Clause, and, subsequently, invoices were issued which contained an Arbitration Clause, there was no arbitration agreement between the parties as the contract between the parties was under the purchase orders, which did not make any reference to an arbitration agreement between the parties. This Court further held that the Arbitration Clause in the invoice could not be considered as an arbitration agreement between the parties merely because the tax invoices issued pursuant to the purchase order had been accepted. This Court also held that the same did not mean that there was any conscious agreement between the parties to refer the disputes for adjudication in Arbitration, as required by the provisions of Section 7 of the Act. Paragraph Nos.2 to 6 of the said Order are relevant and are reproduced hereunder:-

“2. The purchase orders are annexed to the application at page 22 onwards (Exhibit A-1 to Exhibit A-13). A perusal of the purchase orders in no manner indicates that there is an arbitration agreement between the parties. However, it appears that in executing the purchase orders the applicant issued tax invoices and in the tax invoices, which are the printed forms, in a column “Terms & conditions” the following clause was incorporated:-

“1) All or any disputes or differences that may arise between the parties hereto shall be referred to the arbitration of a sole arbitrator to be appointed by CONCRETE ADDITIVES & CHEMICALS PVT. LTD. The arbitration proceedings shall be governed by the provisions of the Arbitration & Conciliation Act, 1996. The venue of the arbitration shall be at Mumbai.”

3. It is on the basis of the tax invoices, the applicant is before the Court to contend that there is an arbitration agreement between the parties. Such a contention as urged on behalf of the applicant cannot be accepted as issuance of tax invoice is certainly required to be held to be an unilateral act on the part of the applicant. The contract between the parties is actually born under the purchase order. The purchase orders do not contain or make any reference to an arbitration agreement between the parties.

4. To accept the applicant's case that there is an arbitration agreement between the parties in my opinion, would be in the teeth of Section 7 of the Act which provides as to what would constitute an arbitration agreement. In the present context, it can be clearly held that there is no conscious agreement between the parties to refer the disputes for adjudication in arbitration. Merely because the tax invoices which are in response to the purchase orders provide for an arbitration, certainly such invoices do not bring about an arbitration agreement as contemplated under Section 7 of the Act.

5. Mr. Menon's contention that the tax invoices have been accepted by the respondent and therefore it is required to be presumed that there is an arbitration agreement between the parties also cannot be accepted. The acceptance of the tax invoices is required to be held to be relevant accepting the delivery of the goods and the payment to be made under the invoices. Certainly it cannot be accepted that the unilateral invoices brought about an arbitration agreement between the parties as section 7 would provide.

6. In the above circumstances, in my opinion, there is no arbitration agreement between the parties. The petition is wholly without any merit. It is accordingly rejected. No costs.

26. Although it has been pointed out that the Order of this Court in **Concrete Additives** (Supra) has been challenged by filing a Special Leave Petition before the Hon'ble Supreme Court, there is no stay on the said Order granted by the Hon'ble Supreme Court.

27. In the case of **Alupro Building Systems Pvt. Ltd.** (Supra) the Delhi

High Court has taken the same view, i.e., if the purchase orders did not contain any Arbitration Clause, and the invoices issued contained an Arbitration Clause, there would be no arbitration agreement between the parties and the parties could not be referred to Arbitration. Paragraph Nos.18 to 22 of the said judgment are relevant and are set out here under:-

18. At this stage, it must be noticed that the POs admittedly did not contain any arbitration clause. They only state that disputes arising therefrom would be subject to the jurisdiction of the courts at Bangalore. The question then arises whether the mere acceptance of supplies by the Petitioner on the basis of invoices containing an arbitration clause would amount to acceptance by the Petitioner of such arbitration clause?

19.1 In Taipack Limited & Ors. v. Ram Kishore Nagar Mal (supra), the facts were that the Petitioner therein had placed an order on the Respondent therein for the supply of BOPP films. On the rear of the said PO dated 13th February 1997, it was mentioned that in Clause 10 "any terms stipulated in seller's confirmation or any other documents in addition or contradiction to what is mentioned in this order will not be acceptable to us unless specifically agreed to in writing. Clause 11 stated that any dispute arising out of the contract would be subject to the jurisdiction of Courts in Delhi "and the supplier expressly agrees to submit to such jurisdiction." Condition No. 4 read as under:

"In case of any dispute the judgment of the Tribunal or any other authority appointed by the Paper Merchants Association (Regd.) Delhi will be final and binding."

19.2 The Respondent issued demand notices which were denied by the Petitioner. On 20th January 2001 the Petitioner received a notice of the claim filed by the Respondent before the Arbitrator appointed by the Paper Merchants Association. The objection by the Petitioner to the jurisdiction of the Arbitrator was negatived and the Respondent's claim was allowed. This Court held that there was in fact no arbitration clause contained in a document signed by the parties as contemplated under Section 7 (4) (a) of the Act. It held in para 16 as under:

"16. In the present case, there is no arbitration agreement which could be said to be 'contained in a document signed by the parties.' [See Section 7 (4) (a) of the Act]. Therefore, one has to ascertain whether there is an arbitration agreement which could be said to be contained in 'exchange of letters, telex, telegrams or any other means of telecommunication, which provide a

record of the agreement'. An "arbitration agreement" is a species of the genus, that is "agreement. There has to be, first and foremost an agreement." For the existence of an agreement there has to be "consensus ad idem" between the parties, i.e., there should be agreement to the same thing in the same sense."

- 19.3 The Court in Taipack Limited & Ors. v. Ram Kishore Nagar Mal (supra) concluded that when the Respondent supplied the goods in compliance of the PO, it accepted the terms and conditions stipulated therein. The mere printing of Condition No. 4 on the reverse of the invoice was, at the highest, an offer made by the Respondent to the Petitioner. It was observed that "the making of the payment by the Petitioner for the supplies effected by the Respondent cannot be considered to be a step taken by the Petitioner to indicate its acceptance of the conditions mentioned by the Respondent on the reverse of the invoice." Further, the signature of the Petitioner's agent on the Respondent's copy of the invoice cannot "tantamount to acceptance of the Respondent's so-called offer for arbitration." Further, the Condition No. 4 of the invoice did not use the expression 'arbitration' or 'arbitrator'. It did not make a reference to the 'Constitution and Regulations' of the Paper Merchants Association (Regd.), Delhi. There was also no document from which it could be inferred that the Petitioner had consented to the conditions on the reverse of the invoice. In the circumstances, the Court found that there was no arbitration agreement between the parties and that the arbitrator appointed by the Paper Merchants Association (Regd.) had no jurisdiction to adjudicate the disputes between them.*
- 20. The Court finds that the facts of the case at hand are more or less similar to the facts of the above decision in Taipack Limited & Ors. v. Ram Kishore Nagar Mal (supra). Here also, the Respondent seeks to rely upon the endorsement on each of the invoices. That endorsement is only for the quantities as indicated in the invoices having been received. There is no deemed acceptance of the conditions appended to the invoices. The mere endorsement of Mr. Sanjeev that the quantity is ok cannot lead to an inference that the Petitioner agreed to the arbitration clause printed on the invoice.*
- 21.1 Turing next to the decision in NSK India Sales Company Private Limited v. Proactive Universal Trading Company Private Limited (supra), there the Respondent placed orders on the Petitioner through POs. Pursuant thereto, supplies were made under the invoices raised by the Petitioner. The invoices were governed by the terms and conditions as set out in the General Terms of Business (GTB). The GTB contained an arbitration clause in terms of which each party could appoint an independent arbitrator. The arbitration was to be held at Chennai in accordance with the Act.*
- 21.2 Notice was sent by the Petitioner to the Respondent proposing its nominee arbitrator and calling upon the Respondent to do likewise.*

However, the Respondent contended that there was no valid arbitration agreement between the parties. Thereafter, the Petitioner filed an application under Section 11 of the Act. Reliance was placed on the Section 7 of the Act. It was contended that an inference could be drawn from the documents exchanged between the parties regarding the existence of an arbitration agreement.

21.3 The Madras High Court in NSK India Sales Company Private Limited v. Proactive Universal Trading Company Private Limited (supra) did not accept the plea of the Petitioner. It was observed in para 18 of the judgment, as under:

“18. In the sequence of documents issued, it is the respondent who first issued the purchase order. This does not contain an Arbitration Clause. The document of delivery of goods also does not contain an arbitration clause. It is stated to be signed by the 'gate keeper' of the respondent. It is only the invoice issued to the petitioner which contains the arbitration clause and it is stated to have been simultaneously issued in view of the factum of the same being interlinked to the goods received. This document neither contains the declaration in the prescribed form duly signed at the back nor is there any other endorsement so as to consider it as an acceptance on the part of the respondent. There is in fact thus no agreement whatsoever inter se the parties on the issue of the mode of resolution of the dispute through arbitration and there cannot be an arbitration clause by implication in any other document. In fact, the very fact that the respondent has not signed this document would show the unwillingness of the respondent to accept the arbitration as a mode of resolution of dispute, to which the petitioner had never protested.”

21.4 The Madras High Court in the above decision further observed that the Petitioner could not confuse the above issue with the one about the validity of the transaction for the purpose of Sale of Goods Act, 1930 wherein goods were retained by the Respondent, without returning them and not paying for them. While it might be that the sale was complete subject to any objection which may be raised by the Respondent, the question of the existence of a valid arbitration clause was different.

22. In light of the legal position explained in the above decisions, the Court concludes that in the present case, there was no arbitration agreement between the parties which could be validly invoked by the Respondent. Consequently, the Arbitrator lacked jurisdiction to enter upon reference and proceed with the arbitration. The impugned Award must, therefore, be declared to be null and void.”

28. In the two judgments referred to above there existed both purchase orders and invoices. Even though the purchase orders did not contain any

Arbitration Clause, the Courts came to the conclusion that the Arbitration Clause contained in an invoice issued by one party was not binding on the other party.

29. On the other hand, in the judgments of this Court in **Bennett Coleman and Co. Ltd.** (Supra) and **Skanska Cementation India Ltd.** (Supra), and the judgment of the Madras High Court in **Aviagen India Poultry Breeding Company Pvt. Ltd.** (Supra), even though the purchase orders did not contain any Arbitration Clause, the Courts held that the Arbitration Clause in the invoices issued by one party was binding on the other party. Further, in the judgment of the Delhi High Court in **Swastik Pipe Ltd.** (Supra), where no purchase orders were issued, the Court came to the conclusion that the Arbitration Clause contained in the invoice issued by one party was binding on the other party. These judgments relied upon by the Applicant do not take the case of the Applicant any further as these judgments do not consider a situation where Arbitration Clauses are contained both in the purchase orders and in the invoices. These judgments do not consider as to what would be the approach of a Court in such a factual situation. In these circumstances, in my view, these judgments are not applicable to the present case at all.

30. The judgment of the Hon'ble Supreme Court in the case of **Balasore Alloys Limited** (Supra), referred to by the Applicant, is closer to the facts of

the present case. Paragraph Nos. 6 to 14 of the said judgment are relevant and are set out here under:-

“6. In the above background, we have heard Shri. Maninder Singh, learned Senior Counsel for the applicant, Shri S. N. Mookherjee and Shri. Ritin Rai, learned Senior Counsel for the Respondent and perused the application papers.

7. Having taken note of the averments contained in the pleading and the contentions urged by the learned Senior Counsel for the respective parties, it is evident that the parties having entered into a business transaction, certain disputes have arisen between them which is to be resolved through arbitration. To that extent the parties are also in agreement. The issue for consideration however, is with regard to the appropriate Clause that will operate providing for arbitration and will be applicable in the factual matrix herein.

8. Since the applicant is before this Court invoking the arbitration Clause in the purchase order (37 separate purchase orders), it is necessary to take note of the arbitration Clause relied upon, which reads as hereunder:

“7. ARBITRATION: Disputes and differences arising out of or in connection with or relating to the interpretation or implementation of this contract/order shall be referred to the Arbitral Tribunal consisting of 3 Arbitrators of which each party shall appoint one Arbitrator, and the two appointed Arbitrators shall appoint the third Arbitrator who shall act as the Presiding Arbitrator as per the provisions of the Arbitration and Conciliation Act, 1996 and any modification or re-enactment thereto. The venue of the arbitration proceedings shall be at Kolkata and language of the arbitration shall be English. The arbitration award shall be final and binding upon the parties and the parties agree to be bound thereby and to act accordingly. When any dispute has been referred to arbitration, except for the matters in dispute, the parties shall continue to exercise their remaining respective rights and fulfil their remaining respective obligations.”

9. Since the transaction entered into between the parties and the dispute having arisen not being in dispute; further the above-extracted arbitration Clause being explicit; in a normal circumstance no other consideration would have been necessary in the limited scope for consideration in an application Under Section 11 of the Act, 1996. However, in the case on hand the fact remains that undisputedly an Agreement dated 31-03-2018 is also entered into between the parties relating to the very same transaction which is referred to as the "Umbrella Agreement" by the Respondent and as

"Pricing Agreement" by the applicant. The said agreement also makes provision for resolution of disputes through arbitration in the manner as indicated therein.

10. *It would be appropriate to take note of the arbitration Clause which reads as hereunder:*

"23 . GOVERNING LAW; DISPUTES

This Agreement shall be governed by and construed in accordance with the laws of the United Kingdom. Any claim, controversy or dispute arising out of or in connection with this Agreement or the performance hereof, after a thirty calendar day period to enable the parties to resolve such dispute in good faith, shall be submitted to arbitration conducted in the English language in the United Kingdom in accordance with the Rules of Arbitration of the International Chamber of Commerce by 3 (Three) arbitrators appointed in accordance with the said Rules, to be conducted in the English language in London in accordance with British Law. Judgment on the award may be entered and enforced in any court having jurisdiction over the party against whom enforcement is sought."

11. *At this stage, it is necessary for us to refer to the decision rendered in Olympus Superstructures (P) Ltd. v. Meena Vijay Khetan and Ors. MANU/SC/0359/1999 : (1999) 5 SCC 651 wherein this Court was confronted with the issue of there being two different arbitration clauses in two related agreements between the same parties. This Court while dealing with the same had harmonised both the clauses and had on reconciliation held that the parties should get the disputes resolved under the main agreement. In that context it was held as hereunder:(SCC pp. 667-68, para 30)*

"30 . If there is a situation where there are disputes and differences in connection with the main agreement and also disputes in regard to "other matters" "connected" with the subject-matter of the main agreement then in such a situation, in our view, we are governed by the general arbitration Clause 39 of the main agreement under which disputes under the main agreement and disputes connected therewith can be referred to the same arbitral tribunal. This Clause 39 no doubt does not refer to any named arbitrators. So far as Clause 5 of the Interior Design agreement is concerned, it refers to disputes and differences arising from that agreement which can be referred to named arbitrators and the said Clause 5, in our opinion, comes into play only in a situation where there are no disputes and differences in relation to the main agreement and the disputes and differences are solely confined to the Interior Design Agreement. That, in

our view, is the true intention of the parties and that is the only way by which the general arbitration provision in Clause 39 of the main agreement and the arbitration provision for a named arbitrator contained in Clause 5 of the Interior Design agreement can be harmonised or reconciled. Therefore, in a case like the present where the disputes and differences cover the main agreement as well as the Interior Design Agreement, - (that there are disputes arising under the main agreement and the Interior Design agreement is not in dispute) - it is the general arbitration Clause 39 in the main agreement that governs because the questions arise also in regard to disputes relating to the overlapping items in the Schedule to the main agreement and the Interior Design agreement, as detailed earlier. There cannot be conflicting awards in regard to items which overlap in the two agreements. Such a situation was never contemplated by the parties. The intention of the parties when they incorporated Clause 39 in the main agreement and Clause 5 in the Interior Design Agreement was that the former Clause was to apply to situations when there were disputes arising under both agreements and the latter was to apply to a situation where there were no disputes or differences arising under the main contract but the disputes and differences were confined only to the Interior Design Agreement. A case containing two agreements with arbitration clauses arose before this Court in *Agarwal Engg. Co. v. Technoimpex Hungarian Machine Industries Foreign Trade Co.* There were arbitration clauses in two contracts, one for sale of two machines to the Appellant and the other appointing the Appellant as sales representative. On the facts of the case, it was held that both the clauses operated separately and this conclusion was based on the specific Clause in the sale contract that it was the "sole repository" of the sale transaction of the two machines. Krishna Iyer, J. held that if that were so, then there was no jurisdiction for travelling beyond the sale contract. The language of the other agreement appointing the Appellant as sales representative was prospective and related to a sales agency and "later purchases", other than the purchases of these two machines. There was therefore no overlapping. The case before us and the above case exemplify contrary situations. In one case the disputes are connected and in the other they are distinct and not connected. Thus, in the present case, Clause 39 of the main agreement applies. Points 1 and 2 are decided accordingly in favour of the Respondents"

12. Having taken note of the arbitration Clause existing in two

different set of documents between the same parties relating to the same transaction; in order to harmonise or reconcile and arrive at a conclusion as to which of the clauses would be relevant in the instant facts; it would be necessary for us to refer to the manner in which the arbitration Clause was invoked and the nature of the dispute that was sought by the parties to be resolved through arbitration. In that regard a perusal of the documents will reveal that in the case on hand the applicant had not initiated the process of invoking the arbitration clause. On the other hand a notice dated 13-03-2020 (Annexure A-41) was issued on behalf of the Respondent by its attorney to the applicant referring to the breach of the agreement dated 31.03.2018 (Umbrella agreement/Pricing agreement) and as per the procedure provided under Clause 23 of the said agreement an opportunity was provided to amicably resolve the matter; failing which it was indicated that the Respondent would approach the International Chamber of Commerce ("ICC") in 30 days. It is in reply to the said notice dated 13-03-2020 issued by the Respondent on 13-04-2020, the applicant herein disputed the claim put forth by the Respondent under the Agreement dated 31-03-2018 referring to it as the Pricing Agreement. Further, the applicant thereafter referred to the nature of their claim and thereon proceeded to indicate that the constitution of the Arbitral Tribunal and conduct of arbitration proceeding shall be in accordance with Clause-7 of the contract terms forming part of and governing all individual contracts.

13. In the above backdrop, when both, the purchase order as also the Pricing Agreement subsists and both the said documents contain the arbitration clauses which are not similar to one another, in order to determine the nature of the arbitral proceedings the said two documents will have to be read in harmony or reconciled so as to take note of the nature of the dispute that had arisen between the parties which would require resolution through arbitration and thereafter arrive at the conclusion as to whether the instant application filed Under Section 11 of the Act, 1996 would be sustainable so as to appoint an arbitrator by invoking Clause 7 of the purchase order; more particularly in a situation where the Arbitral Tribunal has already been constituted in terms of Clause 23 of the agreement dated 31-03-2018.

14. To determine this aspect, apart from the fact that the Respondent was the first to invoke the arbitration Clause with reference to the Agreement dated 31-03-2018, it is noticed that in the reply dated 13-04-2020 issued by the applicant it is in the nature of invocation of the arbitration Clause by the applicant. It would be appropriate to take note of the contents in Paras 6, 7, 8 and 9 thereof which is the crux of the dispute that would require resolution through arbitration and reads as hereunder:

"6. Under the Pricing Agreement, which contains the price and terms of payment governing individual contracts, the Products are purchased by Medima at the Provisional Sales Price arrived at by applying a discount on CRU/Ryan's notes. Where the Final Sales Price to the customer after deduction

of expenses and fees as specified in the Pricing Agreement is higher than the Provisional Price, Medima is liable to remit the difference between the two. However, the Pricing Agreement unequivocally stipulates that all risks for sale to customers shall be borne by Medima and as such, confers no right upon Medima to recover losses from Balasore.

7 . Balasore is, on the other hand, entitled to recovery of 100% of the Provisional Price and any amount recovered by Medima in addition thereto.

8 . In this context, Balasore has repeatedly pointed out to Medima that the statements issued by Medima are incomplete and do not contain necessary details customer-wise for the purposes of reconciliation.

9. Even on the basis of the incomplete and inaccurate statements provided by Medima from time to time, it is clear that Medima has been making much high deductions than permissible under the Pricing Agreement and thereby depriving Balasore of amounts lawfully owing to it under the individual contracts. Some of the issues repeatedly raised by Balasore are:

1. The allegedly actual secondary costs are nearly twice as high as the budgets and estimates projected by Medima at the time of booking the contracts; 2 . The quantity and quality of Products invoiced by Medima to the customers are different from the contracts signed by Medima and Balasore; 3 . Interest for availing credit for delay in recovery beyond 60 days cannot be deducted as an expense; 4 . Commission has to be charged on the net sales price and not the Final Sales Price.”

15. A close perusal of the extracted portion would indicate that the reference made by the applicant with regard to the price and the terms of the payment governing individual contracts is with reference to the Pricing Agreement which in fact is the Agreement dated 31-03-2018. In that context, Clauses 5, 8, 9 and 10 of the Pricing Agreement would indicate that it provides for the mechanism relating purchases and sales; final price, payment of provisional price and adjustment of advance, determination of the final sale price and monthly accounting and payment. On taking note of the same, a perusal of the contract terms in the purchase order relied upon by the applicant does not provide for such determination of pricing except the purchase order referring to the price of the quantity ordered for and the special terms relating to provisional price etc. Therefore, in that circumstance the nature of dispute raised by the applicant themselves in the reply notice dated 13-04-2020 will indicate that those aspects are to be determined in terms of the provisions contained in the Agreement dated 31-03-2018 which resultantly will be relevant for payment to be made under each of the purchase order.

Therefore, even if disputes are raised relating to the contract terms, the pricing, deductions etc. will relate to the main agreement and the Arbitral Tribunal constituted thereunder can go into other issues if any arises under the contract terms of the individual Purchase Order as well.

16 However, in an attempt to dispel such understanding, Mr. Maninder Singh, learned Senior Counsel sought to contend that while the Respondent relies on the Pricing Agreement dated 31-03-2018, the transaction in fact had commenced as far back as on 08-08-2017 and 21 purchase orders were placed up to 30-03-2018 i.e. prior to 31-03-2018, the date on which the Pricing Agreement was executed and as such the same cannot be deemed to have applied to the earlier purchase orders. Though such contention is put forth we are unable to accept the same since Clause-20(a) of the Agreement dated 31-03-2018 provides that the Agreement shall commence on 31-03-2017 and end on 31-03-2021 which clearly indicates that it was the intention of the parties that the terms contained in the Agreement would govern all transactions, including those which had commenced from 08-08-2017. Further it is noticed that the parties were earlier governed by an Agreement dated 19-06-2017 which was for a fixed quantity of 2000 MT of the produce while the present agreement, according to the parties was on a long-term basis fixing the time period for which it was valid and the individual purchase orders will have to be taken note for the specific quantity ordered for under each of the transactions, the price of which was to be ultimately determined as provided under the Pricing Agreement.”

31. In the case of **Balasore Alloys Limited** (Supra), the Hon’ble Supreme Court was considering a case where Arbitration Clauses were contained in the purchase orders and in an Agreement dated 31st March 2018 entered into between the parties which was referred to by one party as the “Umbrella Agreement” and by the other party as “Pricing Agreement”. As can be seen from the paragraphs of the judgment quoted above, after considering the factual situation and the law, the Hon’ble Supreme Court came to the conclusion that the Arbitration Clauses in the said Agreement dated 31st March 2018 would govern the parties as there was consensus ad-idem to the terms and conditions contained therein and the said

Agreement dated 31st March 2018 was comprehensive and encompassing all terms of the transactions between the parties. Applying the ratio of the said judgment to the present case, it is clear that, in the present case, as set out hereinabove, the purchase orders issued by the Respondent are comprehensive and encompass all the terms of the transaction between the parties, and therefore the Arbitration Clause contained in the said purchase orders would govern the parties and not the Arbitration Clause contained in the invoices issued by the Applicant. As held hereinabove, the same is more so because the parties have not expressly and specifically agreed that the Arbitration Clause contained in the purchase orders, which is the main agreement, would be superseded by the Arbitration Clause contained in the invoices issued by the Applicant.

32. That leaves me to consider one more argument advanced by the Applicant. It is the case of the Applicant that the purchase orders contained an Annexure, in which against the title "Other Terms", it is stated that jurisdiction would be subject to Mumbai High Court. It is the submission of the Applicant that, because of this Clause, this Court would have jurisdiction under Section 11 of the Act to appoint an Arbitrator. In the context of this submission, the Applicant has referred to a judgment of the Hon'ble Supreme Court in the case of **M. K. Abraham & Co.** (Supra) and in particular to Paragraph No. 10 thereof, which reads as under:-

“10. If a contract consists of a printed form with cyclostyled amendments, typed additions and deletions and handwritten corrections, an endeavour shall be made to give effect to all the provisions. However, in the event of apparent or irreconcilable inconsistency, the following rules of construction will normally apply :

- (i) The cyclostyled amendments will prevail over the printed terms;*
- (ii) The type-written additions will prevail over the printed terms and cyclostyled amendments;*
- (iii) Hand written corrections will prevail over the printed terms, cyclostyled amendments and typed written additions.*

*The above rules have evolved from the well known maxim of construction that "written, stamped or typed additions, when inconsistent with the printed terms, would normally prevail over the printed terms" and proceeds on the assumption that the printed form contained the original terms, and changes thereto were incorporated by the cyclostyled amendments, followed by changes by type-written additions and lastly the hand written additions. The logical explanation for such assumption is this: The printed form contains standardized terms to suit all contracts and situations. It is not drafted with reference to the special features of a specific contract. When such a standard form is used with reference to a specific contract, it becomes necessary to modify the standard/general terms by making additions/alterations/deletions, to provide for the special features of that contract. This is done either by way of an attachment of an annexure to the standard printed form, incorporating the changes, or by carrying out the required additions/alterations/deletions in the standard form itself. Such additions/alterations/deletions are done by typing/stamping/hand. We may refer to the following oft-quoted enunciation of the legal position by Lord Ellenborough in *Robertson v. French* [1803- 13] All ER Rep.350 with reference to printed form of contract with hand- written additions :*

..... that the words super added in writing are entitled, nevertheless, if there should be any reasonable doubt on the sense and meaning of the whole, to have a greater effect attributed to them than to the printed words, inasmuch as the written words are the immediate language and terms selected by the parties themselves for the expression of their meaning and the printed words are a general formula adapted equally to their case and that of all other contracting parties on similar occasions and subjects".

Another parallel principle that is equally relevant is that where the contract has several annexures/attachments, prepared at different points of time, unless a contrary intention is apparent, the latter in point of time would normally prevail over the earlier in point of time."

33. I am unable to accept the said submission of the Applicant. In the present case, this Court has to consider as to what is the venue of the Arbitration, and only if the venue of the Arbitration is Mumbai would this Court have jurisdiction to entertain this Application under Section 11 of the Act. Although, in the Annexure, it is stated that jurisdiction is subject to Mumbai High Court, the same is not at all in connection with the arbitration proceedings. As far as Arbitration is concerned, Clause 23 of the purchase orders is very clear that the Arbitration would be at Kolkata and, in fact, Clause 24, which follows the same, provides that all transactions will be subject to the jurisdiction of the Calcutta High Court and the Courts thereunder. In this situation, it is very clear that, as far as arbitration is concerned, the parties have agreed that the venue of the arbitration shall be at Kolkata. It is also clear from Clauses 23 and 24 of the purchase orders that the parties intended that the seat of the Arbitration would be Kolkata.

34. Since I have come to the conclusion that the Arbitration Clause in the purchase orders issued by the Respondent is the Arbitration Clause governing the parties, and since the said Arbitration Clause provides the venue and seat of the Arbitration as Kolkata, in the light of the law laid down by the Hon'ble Supreme Court in **Indus Mobile Distribution Pvt. Ltd.**

V/s. Datawind Innovations Pvt. Ltd. and Ors.⁷ the Courts at Kolkata will have jurisdiction to entertain an Application under Section 11 of the Act.

35. In these circumstances, and for all the reasons stated herein above, this Court has no jurisdiction to entertain the present Application filed under the provisions of Section 11 of the Act or appoint an Arbitrator to arbitrate upon the disputes and differences between the parties.

36. Accordingly, the present Arbitration Application is dismissed.

37. In the facts and circumstances of the case there will be no order as to costs.

(FIRDOSH P. POONIWALLA, J.)

⁷ (2017) 7 Supreme Court Cases 678