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

+ **ARB.P. 479/2023**

M/S PHOENIX CONTACT INDIA PVT LTD Petitioner

Through: **Mr.Gitesh Chopra, Adv.**

versus

ELECTROCARE INDUSTRIES Respondent

Through: **Mr.Vishesh Kalra, Mr. Shubham Saigal, Adv.**

CORAM:

HON'BLE MR. JUSTICE DINESH KUMAR SHARMA

ORDER

29.02.2024

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1. The present petition under Section 11(6) of the Arbitration and Conciliation Act, 1996 has been filed on behalf of the petitioner seeking the appointment of a sole arbitrator for adjudication of disputes *inter se* the parties.
2. The controversy in the present case can be summed up as that the petitioner's case is that the invoice issued to the petitioner on which the respondent duly acted upon, clearly mentions that the arbitration shall take place in Delhi.
3. *Per contra*, the plea of the respondent is that the respondent's have issued the Purchase Orders on the basis on which the goods were supplied by the petitioner, contains an arbitration clause with the place of arbitration at Mumbai.
4. Learned counsel for the respondent has submitted that since the



Purchase Order on the basis of which the petitioner has acted upon and supplied the goods the contract stood concluded and the place at arbitration shall be in Mumbai not in Delhi.

5. Learned counsel for the petitioner has relied upon the judgment of the High Court of Calcutta in ***R.P. Infosystems Private Limited v. Redington (India) Limited***. MANU/WB/2343/2023, to emphasize at this point that the invoice is also an agreement and therefore, the arbitration clause in this invoice should be considered and acted upon. However, learned counsel for the respondent has relied upon the judgment of this Court in ***M/s Taipack Limited & Others v. Ram Kishore Nagar Mal*** 2007 SCC OnLine Del 804.

6. I consider that judgment cited by the learned counsel for the respondent is directly on the point. In ***M/s Taipack Limited*** (supra) also purchase order was issued which contained the following clauses:

4. Clauses 10 and 11 thereof read as follows:-

“10. Any terms stipulated in seller's confirmation or any other documents in addition or contradiction to what mentioned in this order will not be acceptable to us unless specifically agreed to in writing”.

“11. Any dispute arising out of this contract shall be subject to the jurisdiction of courts in Delhi and the supplier expressly agrees to submit to such jurisdiction.”

7. However, in the invoice the following condition 4 was printed:

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

8. In the present case also the arbitration clause in the purchase order was admittedly as follows:



All disputes/differences whatsoever, which shall arise between the parties hereto during the continuance of this agreement or afterwards, touching the agreement or the construction or application thereof or any clauses contained on the rights, duties, liabilities of either party in connection there with, shall be referred to a Sole Arbitrator to be appointed with the consent of both the parties. The place of Arbitration shall be at Mumbai and the arbitrator appointed shall have held the office of judge of any Indian High Court or Supreme Court of India. In the event of the parties not being able to agree to a sole Arbitrator within period of 15 days from being called upon to agree such appointment then in that event Electrocure Industries shall have the right to nominate such Sole Arbitrator with similar qualification and his decision will be binding on the parties. Such Arbitration proceedings will be held in consonance with the provisions of The Arbitration and Conciliation Act 1966 or any statutory modification or reenactment thereof for the time being in force.

9. The arbitration clause as claimed by the petitioner in the invoice is clause 8, which is as under:

“8. Any dispute and difference or claim arise to this transaction including construction of breach there of shall, failing apply referred to arbitration under Indian Act any statutory modification thereof for time of arbitration shall take place in Delhi, and be final and binding on parties.”

10. The contention of learned counsel for the petitioner is that in view of the judgment in ***R.P. Infosystems Private Limited*** (*supra*), the arbitration clause contained on the overleaf of the invoices should be considered to be valid. Learned counsel has also submitted that in ***R.P. Infosystems Private Limited*** (*supra*) it was also *inter alia* held that as long as arbitration agreement confirms to certain principles outlined in various judicial pronouncements and essentials outlined in



Section 7 of the Act, it is to be construed as a valid arbitration agreement and this is in line with the principle of party autonomy which is the guiding principle behind arbitration of India. Learned counsel has submitted that even in *M/s Taipack Limited & Others* (supra), it was *inter alia* held that an arbitration agreement has necessarily to be in writing and it may be contained, *inter alia*, in a document signed by the parties, or in an exchange of letters, telex, telegrams or any other means of telecommunication, which provide a record of the agreement. Learned counsel has also submitted that *M/s Taipack Limited & Others* (supra) will not be applicable in the present case as in that case in purchase order there was no arbitration clause and the court took a view that the parties had already agreed to not opt for dispute resolution through arbitration.

11. However, I consider that the arguments advanced by the learned counsel for the petitioner cannot be accepted and is liable to be rejected. It is a settled proposition that once the seat of arbitration is designated the seat court has an exclusive jurisdiction as a result of which only the court where the seat is located would have jurisdiction to the exclusion of all other courts.

12. The co-ordinate bench of this Court in *M/s Taipack Limited & Others* (supra) after taking into account the entire controversy in *M/s Taipack Limited & Others* (supra) held as under:

15. Arbitration agreement means an agreement by the parties to submit to arbitration all or certain disputes which have arisen, or which may arise between them in respect of a defined legal



relationship, whether contractual or not. It may be in the form of an arbitration clause in a contract or in the form of a separate agreement. An arbitration agreement has necessarily to be in writing. It may be contained, inter alia, in a document signed by the parties, or in an exchange of letters, telex, telegrams or any other means of telecommunication, which provide a record of the agreement.

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, telegram 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., they should agree to the same thing in the same sense.

17. In the present case, the Petitioner herein made his offer when it placed the purchase order dated 13.2.1997 upon the Respondent which, inter-alia, contained clauses 10 and 11 as aforesaid. Clause 10, specifically made any other terms or conditions, contained in any document of the respondents that were in addition to, or in contradiction to those contained therein, inapplicable to the contract unless they were specifically agreed to by the petitioner in writing. Clause 11 subjected all disputes to jurisdiction of Delhi Courts. The respondent acted on this offer by effecting supplies of the goods, and at the same time raised an invoice dated 6.3.1997 for Rs.1,49,866.17 which contained condition No.4 as extracted above.

18. What is the legal effect of the aforesaid conduct of the Respondent? In my view, when the Respondent supplied the goods in compliance of the Purchase Order, 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. Unless the said offer was



accepted by the Petitioner, it could not result in a binding and enforceable contract. The inclusion of terms and conditions at the back of the invoice, unilaterally issued by the Respondent while effecting delivery of the goods in terms of the Petitioner's purchase order, would not bind the Petitioner. The purchase order itself made it clear that the Petitioner did not intend to refer its disputes to arbitration in respect of the resulting transaction arising out of the said purchase order. Arbitration was clearly contra indicated when the Petitioner's purchase order itself stated that "Any dispute arising out of this contract shall be subject to the jurisdiction of Courts in Delhi" The Respondent was well aware that the Petitioner had shunned arbitration, yet the Respondent acted in furtherance of the said purchase order by effecting supplies.

19. On the other hand, there were hardly any further steps required to be taken by the Petitioner when the Respondent effected supplies and sent its invoice. The supplies having been effected, there was no other step required to be taken by the Petitioner, by which it could be inferred that the Petitioner consented to the conditions contained on the reverse of the Respondents invoice. 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 Respondents on the reverse of the invoice. This is so, because the Petitioner was, in any case, obliged to make payments for the supplies received by it in accordance with its purchase order.

20. The signature by the petitioners agent on the respondents copy of the invoice cannot tantamount to acceptance of the respondents so called offer for arbitration. The signatures in such a situation were evidently an acknowledgment of receipt of the goods and nothing more. There is another aspect of the so- called Arbitration Agreement contained in condition No.4 of the Respondents invoice. The said condition in the invoice firstly does not use the expression 'arbitration' or 'arbitrator'. Secondly, the Respondent does not even make a reference to the "Constitution and Regulations" of the Paper Merchants Association (Regd.), Delhi.



Consequently, it is difficult to accept that the Petitioner ever became aware of, or agreed to refer its dispute with the Respondent and relation to the contract in question to arbitration by the Paper Merchants Association (Regd.), Delhi. The condition No. 4 appears to be incomplete and rather vague. Pertinently, Regulation XXX of the Paper Merchants Association states that the clause, above clause No. 2 in bold words, has to be printed by the Merchant on its invoice, for it to bind the outsider. However, what is printed by the Respondent on its invoice as condition No. 4 is nowhere close to the boldly printed text in Regulation XXX. It also appears that the arbitration contemplated in Regulation XXX is in respect of disputes of non-payment “between member to member or member to outsider”. It is not in respect of disputes of non-payment from an outsider and a member, which is the case in hand. In response to the invoice sent by the Respondent, with the condition No.4 as aforesaid, there was no exchange of letters, telegrams or any other means of telecommunication in writing from the side of the Petitioner to the Respondent, where from the consent of the Petitioner to the conditions contained on the reverse of the invoice could be inferred.

21. For the aforesaid reasons I find that there was in fact no arbitration agreement between the parties and that the arbitrator appointed by the Paper Merchants Association (Regd.), Delhi had no jurisdiction to adjudicate the disputes between the parties in relation to the contract in question. The arbitrator has completely misdirected himself in dealing with the aforesaid specific objection as to his jurisdiction.”

13. In the present case also, even the petitioner has acted upon the purchase order issued by the respondent and supplied the goods therefore the terms and conditions as stipulated in the purchase order were deemed to be accepted by the petitioner. In the circumstances, the petitioner unilaterally cannot provide its own arbitration clause in the invoice. The contention of the petitioner that the respondent never refuted clause 8 in the invoice and therefore, the jurisdiction of Delhi



was accepted is also liable to be rejected.

14. The plea of the petitioner can be rejected on another ground. Even as per clause 8 it merely states that the arbitration shall take place in Delhi whereas in the purchase order it has specifically provided that the place of arbitration shall be at Mumbai. It has been held in various judgments that once the place of arbitration is fixed, the venue of the arbitration may be at any place. However, by reading the arbitration clause in the purchase order makes it clear that the parties have agreed to the jurisdiction at Mumbai. Mere absence of words like 'only', 'alone', 'exclusive' and 'exclusive jurisdiction' does not render territorial jurisdiction clause ineffective.

15. Thus, in a given situation where the place of arbitration has been agreed to be at Mumbai, there may be a possibility that with the consent of the parties, the arbitration may take place in Delhi. However, in view of the specific clause in the purchase order, this court does not have territorial jurisdiction. Thus, the petition is dismissed.

16. Hence, this Court has no territorial jurisdiction and the petition stands disposed of.

DINESH KUMAR SHARMA, J

FEBRUARY 29, 2024

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