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

% ***Date of Decision: 29.10.2024***

\+ **ARB.P. 1247/2024**

MR. K. SAMPATHRAJ MARLECHA
SOLE PROP. OF M/S. KARNATAKA CHEMICAL INDUSTRIES
.....Petitioner

Through: Mr. Sanjay S., Adv.

versus

HIL (INDIA) LIMITED .....Respondent

Through: Mr. Yashvardhan, Ms. Kritika Nagpal, Mr. Gyanendra Shuka and Mr. Pranav Das, Advs.

CORAM:
HON'BLE MR. JUSTICE SACHIN DATTA

SACHIN DATTA, J. (ORAL.)

1. The present petition has been filed by the petitioner seeking appointment of the Sole Arbitrator to adjudicate the disputes between the parties. The disputes between the parties have arisen in the background of a Purchase Order (Order No. 4500004505) issued by the respondent upon the petitioner for supplying 1100000062- Ethylene Di Chloride (EDC)/DCE for a sum of Rs.56,05,000/-. It is stated that the petitioner delivered the goods which were accepted by the respondent without any reservation as regards quality or quantity.

2. Clause 38 of the notice inviting tender contains an arbitration clause as under:-

> *"38. ARBITRATION/CONCILIATION: All disputes and differences arising between the parties in respect of the order/contract or breach thereof will be decided by a sole arbitrator appointed by Chairman &*

> *Managing Director, HIL. The Arbitration is to be proceeded under the Indian Arbitration Act and the rules framed thereunder. The decision of the arbitration will be binding to all parties to proceedings and the laws applicable will be Law of India. The venue for arbitration shall be Delhi. (Agree).”*

3. Clause 7 of the Purchase order also contains an arbitration clause as under:-

> *“7. ARBITRATION: - All dispute and differences arising between the parties in respect of the order/contract or breach thereof will be decided by a sole arbitration appointed by Chairman & Managing director, HIL. The Arbitration is to be proceeded under the Indian Arbitration Act and the rules framed there under. The decision of the arbitration will be binding to all parties to proceedings and the laws applicable will be Law of India. The venue for arbitration shall be Delhi.”*

4. Disputes between the parties have arisen on account of alleged outstanding monetary entitlement of the petitioner, for which the petitioner sent a demand notice on 11.09.2023.

5. The disputes having remained unresolved, the petitioner finally issued a notice invoking arbitration on 18.03.2024. This was followed by a reminder dated 23.04.2024. However, the arbitral tribunal could not be constituted by mutual consent of the parties. Hence the present petition has been filed.

6. The present petition has been opposed by learned counsel for the respondent on the ground that the Arbitration Agreement does not contain the signatures of the respondent and, as such, it is contended that there exists no valid arbitration agreement between the parties.

7. This Court finds no merit in the aforesaid contention of the respondent. It is undisputed that the Purchase Order was duly issued by the respondent to the petitioner pursuant to the tender process initiated by the

respondent.

8. Further, it is undeniable that the purchase order was duly accepted by the petitioner and it is in pursuance of the same that the goods were supplied by the petitioner to the respondent. Thus, it is *prima facie* evident, that the issuance of the purchase order and the acceptance thereof, by the petitioner, resulted in a binding contract between the parties, which contains an arbitration clause as a part thereof.

9. In ***Jhar Mining Infra Private Limited v. CMD, Managing Coalfields Ltd. and Others*** 2022 SCC OnLine Ori 3027, the Court encountered a similar situation, in which the respondent therein (MCL) issued a notice inviting tender/s, in which the petitioner therein emerged as the lowest bidder. MCL then issued a Letter of Intimation (LoI), which the petitioner accepted, and the petitioner commenced providing assistance in obtaining the environmental clearance. However, MCL later cancelled the tender and the LoI, which led to the petitioner therein invoking arbitration. MCL argued that without a formal Letter of Award (LoA), no contract existed, making the arbitration clause inapplicable. It was contended by the petitioner therein that the acceptance of the petitioner's bid and issuance of an LoI created a binding contract and satisfied the requirements of the arbitration clause in the notice inviting tender.

10. It was held by the Court that even the issuance of LoI is capable of bringing about a binding contract between the parties. It was held that the same was sufficient to establish an arguable case as regards the existence of an arbitration agreement, warranting constitution of an arbitral tribunal.

11. The relevant observations of the Court in that case are as under:-

> *"18. While therefore, there may not be a concluded formal*

contract, it would not be entirely correct for MCL to contend that there is no contractual relationship whatsoever between the parties. The reference in Clause 4(A).37 to the disputes arising "during the course of execution" has to be understood as disputes arising even prior to the actual execution of the contract, since clause 1.3.2.5 envisages obligations of the parties at a stage even prior to the formal execution of the contract.

19. Moreover, Clause 4(A).37 and Clause 4(A).37A have to be read in continuation and the failure of the 'successful bidder', [which is in this case would include the 'preferred bidder' and 'lowest bidder' which is the Petitioner] and MCL to resolve the dispute by the in-house mechanism, which would entitle either party to invoke the arbitration clause. It would also therefore not be correct for the MCL to contend that there is no arbitration agreement in terms of Section 7 of the Act.

20. In South Eastern Coalfields Ltd. v. S. Kumar's Associates AKM (JV) (supra), on the facts of that case, the Supreme Court noted that the bidder had failed to comply with the pre-conditions specified in the NIT and in the LoI and, therefore, a work order was not issued nor a contract was executed. In those circumstances, it was observed as under:

> *"22. **We would like to state the issue whether a concluded contract had been arrived at inter se the parties is in turn dependent on the terms and conditions of the NIT, the LoI and the conduct of the parties.** The judicial views before us leave little doubt over the proposition that an LoI merely indicates a party's intention to enter into a contract with the other party in future. No binding relationship between the parties at this stage emerges and the totality of the circumstances have to be considered in each case. It is no doubt possible to construe a letter of intent as a binding contract if such an intention is evident from its terms. But then the intention to do so must be clear and unambiguous as it takes a deviation from how normally a letter of intent has to be understood. This Court did consider in Dresser Rand S.A. case that there are cases where a detailed contract is drawn up later on account of anxiety to start work on an urgent basis. In that case it was clearly stated that the contract will come into force upon receipt of letter by the supplier, and yet on a holistic analysis - it was held that the LoI could not be interpreted as a work order."*

21. This was the purport of the decision in Dresser Rand

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S.A. v. Bindal Agro Chem Ltd. (supra) which has been referred to in the aforementioned decision in South Eastern Coalfields Ltd. v. S. Kumar's Associates (supra).

22. Again, in Bharat Sanchar Nigam Limited v. Telephone Cables Ltd. (supra), ***on the facts of that case it was noted that unless a purchase order was placed, the GCT of the contract did not become part of the contract and the conditions in Section 3 of the GCT which included the arbitration agreement "would not at all come into existence or operation". In the present case, in view of the discussion hereinbefore, it cannot prima facie be said that the stage for invoking Clause 4.37(A) has not arisen at all.***

23. Turning to the decision in Emcure Pharmaceuticals Ltd. (supra) on facts, it was found that ***unless the purchase order was issued, the bidder did not become a 'successful bidder' and, therefore, the arbitration clause would not apply. On the facts of that case, Opposite Party No. 4 and not the Petitioner there was admittedly, the 'successful bidder'.*** *Consequently, the Court is of the view that the aforementioned decisions relied upon by MCL do not assist its case.*

24. On the other hand, in Pravin Electrical Private Limited (supra), after referring to the decision of the Supreme Court in Vidya Drolia v. Durga Trading Corporation, (2021) 2 SCC 1, it was held by the Supreme Court that at that stage the Court was only expected to exercise "the power of prima facie judicial review". The observations in Vidya Drolia (supra) were that "a reasonable and just interpretation of "existence" requires understanding the context, the purpose and the relevant legal norms applicable for a binding and enforceable arbitration agreement."

25. The decisions of Delhi High Court in Mahindra Susten Pvt. Ltd. v. NHPC Ltd. (supra) and Wadia Techno-Engineering Services Ltd. (supra) are also to the same effect.

26. The Court is therefore, satisfied, on a prima facie judicial review in the sense in which the expression is used in Vidya Drolia (supra) by the Supreme Court, that the Petitioner does have an arguable case as regards the existence of an arbitration agreement between the parties and the conditions for its invocation of have prima facie been fulfilled. Nevertheless, in terms of the law explained in the above decisions, it would be still open for the MCL to apply to the Sole Arbitrator under Section 16 of the Act to invite a ruling on the existence of a valid arbitration agreement in terms of the aforementioned clauses referred to hereinbefore. If such an application is filed, it will be decided *independent of the observations in this judgment."*

12. In the present case, the factual position is even more explicit as regards the parties entering into a valid and binding contract containing an arbitration clause inasmuch as the tender process culminated in a purchase order dated 07.07.2022, which came to be accepted and pursuant to which, the relevant supply has been made.

13. In ***Surender Kishan Gupta v. Public Works Department, NCT of Delhi and Another*** 2024 SCC OnLine Del 1655, this Court again had occasion to consider a similar situation. Taking note of ***Jhar Mining Infra*** (supra), this Court held as under:-

> *"12. The expression 'contract' has been defined in the applicable Conditions of Contract as under:*
>
> > *"1. The Contract means the documents forming the tender and acceptance thereof and the formal agreement executed between the competent authority on behalf of the President of India and the Contract, together with the documents referred to therein including these conditions, the specifications, designs, drawings and instructions issued from time to time by the Engineer-in-Charge and all these documents taken together, shall be deemed to form one contract and shall be complementary to one another."*
>
> *13.* ***Thus, apart from the formal agreement, documents forming the tender and acceptance thereof means the contract.***
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> ***14. Undisputedly, the bid submitted by the petitioner for the tender floated by the respondent was "accepted" by the respondent vide letter dated 29.04.2022.3 Vide the said letter, the petitioner was requested to submit a performance guarantee in the prescribed form as provided in Clause 1 of the GCC. It was also mentioned therein that on receipt of performance guarantee the necessary letter to commence the work shall be issued and the site of work shall be handed over to the petitioner. It is further mentioned that failure to pay performance guarantee shall entail forfeiture of Earnest Money. Thereafter, the petitioner submitted the performance guarantee and the petitioner was "awarded the contract" vide e-mail communication dated 07.05.2022 sent by the respondent. The fact***

that the said e-mail was "auto generated" does not dilute or undermine the implication of what is stated therein.

15. In the aforesaid factual conspectus, prima facie, a concluded contract did come into existence. The absence of the signing of formal agreement does not detract from the said position. Clause 25 of GCC can certainly be invoked by the petitioner and non-signing of the formal agreement will not extinguish the arbitration agreement between the parties. *In this context, in Jhar Mining Infra (P) Ltd. v. Managing Coalfields Ltd., 4 it has been held as under:*

> *"12. It must be noted at the outset, therefore, that by acknowledging that the Petitioner as the lowest bidder i.e. L1 and therefore, the 'Preferred Bidder', the LoI was issued by MCL to the Petitioner. There is prima facie merit in the contention of the Petitioner that by accepting the LoI a contractual relation came into existence between the parties.*
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> *xxx xxx xxx*

18. While therefore, there may not be a concluded formal contract, it would not be entirely correct for MCL to contend that there is no contractual relationship whatsoever between the parties. The reference in Clause 4(A).37 to the disputes arising "during the course of execution" has to be understood as disputes arising even prior to the actual execution of the contract, since clause 1.3.2.5 envisages obligations of the parties at a stage even prior to the formal execution of the contract.

19. Moreover, Clause 4(A).37 and Clause 4(A).37A have to be read in continuation and the failure of the 'successful bidder', [which is in this case would include the 'preferred bidder' and 'lowest bidder' which is the Petitioner] and MCL to resolve the dispute by the in-house mechanism, which would entitle either party to invoke the arbitration clause. It would also therefore not be correct for the MCL to contend that there is no arbitration agreement in terms of Section 7 of the Act."

19. Prima facie, there was a contract between the parties and the disputes arising thereof are to be resolved as per the arbitration agreement contained in Clause 25 of GCC."

(Emphasis supplied)

14. Given the factual matrix of the present case, the ratio of the above

judgments applies to the facts of the present case.

15. This Court also notices that the absence of the respondent's signature on the notice inviting tender / purchase order does not preclude or is determinative as regards existence of the arbitration agreement.

16. In ***Cox and Kings Ltd. v. SAP Ltd. (5J)*** (2024) 4 SCC 1, it has been held as under:-

> *"**79.** Section 7 of the Arbitration Act contains two aspects : a substantive aspect and a formal aspect. The substantive aspect is contained in Section 7(1) which allows parties to submit disputes arising between them in respect of a defined legal relationship to arbitration. The legal relationships between and among parties could either be contractual or non-contractual. For legal relations to be contractual in nature, they ought to meet the requirements of the Indian contract law as contained in the Contract Act. It has been shown in the preceding paragraphs that a contract can either be express or implied, which is inferred on the basis of action or conduct of the parties. Thus, it is not necessary for the persons or entities to be signatories to a contract to enter into a legal relationship — the only important aspect to be determined is whether they intended or consented to enter into the legal relationship by the dint of their action or conduct.*
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> ***80.** The second aspect is contained in Section 7(3) which stipulates the requirement of a written arbitration agreement. A written arbitration agreement need not be signed by the parties if there is a record of agreement. [Govind Rubber Ltd. v. Louis Dreyfus Commodities Asia (P) Ltd., (2015) 13 SCC 477: (2016) 1 SCC (Civ) 733] The mandatory requirement of a written arbitration agreement is merely to ensure that there is a clearly established record of the consent of the parties to refer their disputes to arbitration to the exclusion of the domestic courts."*

17. As such, on a *prima facie* conspectus, this Court is satisfied that there exists an arbitration agreement between the parties. Needless to say, it shall be open to the respondent to further agitate and elucidate this aspect before the duly constituted arbitral tribunal, and the same shall be considered by the arbitral tribunal in accordance with law.

18. In the circumstances, there is no impediment in appointing a sole

arbitrator to adjudicate the disputes between the parties as contemplated in terms of ***Perkins Eastman Architects DPC v. HSCC (INDIA) Limited***, (2020) 20 SCC 760, ***TRF Limited v. Energo Engineering Projects Limited***, (2017) 8 SCC 377 and ***Bharat Broadband Network Limited v. United Telecoms Limited,*** (2019) 5 SCC 755. ***Interplay between Arbitration Agreements under the Arbitration & Conciliation Act, 1996 & the Indian Stamp Act, 1899, In re***, 2023 SCC OnLine SC 1666 and ***SBI General Insurance Co. Ltd. v. Krish Spinning*** 2024 INSC 532.

19. Accordingly, Mr. Aditya Kumar Choudhary, Advocate, (Mobile:+91 9911401535) is appointed as the Sole Arbitrator to adjudicate the disputes between the parties.

20. Needless to say, the respondent shall be entitled to raise appropriate jurisdictional objections by moving an application under Section 16 of the Arbitration and Conciliation Act, 1996, which shall be duly considered by the learned sole arbitrator.

21. The learned Sole Arbitrator may proceed with the arbitration proceedings subject to furnishing to the parties requisite disclosures as required under Section 12 of the A&C Act.

22. The learned Sole Arbitrator shall be entitled to fee in accordance with Fourth Schedule to the A&C Act; or as may otherwise be agreed to between the parties and the learned Sole Arbitrator.

23. The parties shall share the arbitrator's fee and arbitral costs, equally.

24. All rights and contentions of the parties in relation to the claims/counter-claims are kept open, to be decided by the learned Arbitrator on their merits, in accordance with law.

25. Needless to say, nothing in this order shall be construed as an

expression of this Court on the merits of the case.

26. The present petition stands disposed of in the above terms.

SACHIN DATTA, J

OCTOBER 29, 2024/*uk*