

IN THE HIGH COURT AT CALCUTTA
ORIGINAL SIDE
(COMMERCIAL DIVISION)

AP-COM/317/2025

M/S. EVERSHINE ENGINEERS AND FABRICATORS AND ORS.
VS
M/S SIMPLEX INFRASTRUCTURE LTD.

BEFORE:

The Hon'ble JUSTICE SHAMPA SARKAR

Date : 29th April, 2025

Appearance:
Mr. Shashwat Nayak, Adv.
Mr. Sarangam Chakraborty, Adv.
Mr. Mayank Goyal, Adv.
...for petitioner
Mr. Abhishek Banerjee, Adv.
Mr. Sitikanta Mitra, Adv.
Mr. Abhidipto Tarafdar, Adv.
...for respondent

The Court :- 1. This is an application for appointment of a learned Arbitrator on the strength of Clause 24 of the four purchase orders. According to the petitioner, the purchase orders formed a part of a single transaction, inasmuch as, the respondent had issued one letter of intent by which the work was allotted in a composite manner and the same was followed by four purchase orders. The arbitration clause in each of the purchase orders, is exactly the same. The clause is quoted below.

“24. Dispute Resolution, Governing Laws and Jurisdiction:

a) In the event of any dispute or difference arising out of and in connection with the Purchase Order, such disputes shall be firstly attempted to be settled by mutual discussions. In case of failure of the parties to reach to an amicable settlement within 30 days from the date of referring the dispute for mutual discussion, the disputes will be referred to arbitration.

b) On failure of amicable settlement as mentioned in sub clause (a) of this clause, the dispute or differences shall thereafter be settled under the Arbitration and Conciliation Act, 1996 as amended from time to time by a sole arbitrator appointed by the Company Secretary (CS) of the Purchaser. The venue of arbitration shall be Kolkata, India and the language of the arbitration shall be English. The award of the arbitrator will be final and binding upon the parties. The Hon'ble Courts at Calcutta will have the exclusive jurisdiction to adjudicate all matters arising out of the Purchase Order."

2. According to the petitioner, disputes arose with regard to non-payment. Four invoices were raised by the petitioner dated August 1, 2018, August 24, 2018, October 12, 2018 and November 20, 2018 claiming Rs. 34,40,289/- in all. According to the petitioner, four cheques were issued, thereby, releasing payments against the claim made by the petitioner, but the cheques were not issued against each purchase order but in a consolidated manner. After adjustment of the aforementioned payment, a total amount of Rs. 16,79,427/- was due and payable to the petitioner. By an e-mail dated November 20, 2019, allegedly the respondent acknowledged the outstanding of Rs. 16,79,427/- and further confirmed that the petitioner was a Sundry Creditor. According to the petitioner, the said e-mail was an acknowledgment of debt which was issued on November 20, 2019. It appears from the said e-mail that the claims were considered in a composite manner by the respondent, inasmuch as, the total outstanding as calculated by the respondent and marked as Sundry Creditors (outstanding for payment) is a composite calculation against some of the invoices.

3. Thereafter, the petitioner filed a suit before the learned District and Sessions Judge, West, Tis Hazari, Delhi claiming the amount which was marked as Sundry Creditors (outstanding for payment). The respondent entered appearance in the suit and filed an application under Sections 5 and 8 of the Arbitration and Conciliation Act, 1996, thereby raising an objection with regard to the continuation of the suit in view of the existence of an arbitration agreement. It was prayed that the suit be referred to arbitration and interims orders, if any, passed in the suit should be vacated.

4. The petitioner approached the learned Civil Court and prayed for withdrawal of the suit with liberty to file afresh before the appropriate forum. In view of such submission, the learned Civil Court disposed of the suit as withdrawn. Such submission was recorded.

5. The petitioner invoked arbitration by a letter dated January 16, 2025. According to the petitioner, the claim was beyond Rs. 31 Lakhs. The petitioner relied on the decision of the Hon'ble Apex Court in the matter of Arif Azim Company Limited Vs Aptech Limited, reported in (2024) 5 SCC 313, in support of the contention that the reference Court should not probe deep into the objections raised by the respondent, but should limit its consideration to the question whether an arbitration clause existed or not. All other objections and disputes should be left to be determined by the learned Arbitrator. Although specific liberty was not granted by the learned trial Judge while disposing of the suit as withdrawn, the fact that the petitioner prayed for disposal on the ground that the petitioner wanted to approach the appropriate forum on the

self-same cause of action was recorded and upon such prayer and submission the Civil Court disposed of the suit. Further direction or liberty was not required. Reference is made to the decision of Bharat and Others vs. Ram Pratap and Others, reported in 1984 SCC Online All. 318.

6. Mr. Nayak, learned counsel for the petitioner, submits that the application has been filed within three months from receipt of the notice invoking arbitration and as such this application is not barred by limitation. The existence of the arbitration clause is not in dispute. The fact that the parties treated the four purchase orders as a part of the same transaction, is also available from the records. Prayer is made for reference of the matter for a composite arbitration.

7. Mr. Abhidipto Tarafdar, learned Advocate for the respondent, vehemently opposes the prayer for reference on the following grounds :-

a) Section 14 of the Limitation Act would not apply as there was no determination by the learned Court that the petitioner had an alternative remedy and the suit was not maintainable on the ground of lack of jurisdiction of the learned Civil Court.

b) The situation would have been otherwise if the learned Civil Court had disposed of the application under Sections 5 and 8 of the Arbitration and Conciliation Act, 1996 filed by the respondent and relegated the parties to arbitration. In that event, the question of exclusion of time could arise.

c) Even if the benefit of the order of the Hon'ble Apex Court excluding the period of between March 15, 2022 to February 28, 2022 is

allowed to the petitioner, the invocation of the arbitration clause was delayed by 71 days.

d) That the claim in the suit was for an amount of little more than Rs.16 Lacs, but in the notice invoking arbitration, the claim was more than Rs.31 Lacs. There was discrepancy in the purchase orders mentioned in the notice invoking arbitration and in the plaint. Thus, the suit was filed for different reliefs and in respect of other purchase orders. The time consumed in litigating the suit, should not be excluded.

In support of his contention, Mr. Tarafdar has relied upon the decisions reported in AIR 1934 All. 688 and AIR 1939 Cal. 625.

8. Considered the submissions. It appears from the conduct of the parties that by one letter of intent the petitioner was asked to supply MS Moulds. The specific quantity, unit and the amount were mentioned. Pursuant to the said LOI, four separate Purchase Orders were issued. Thus, the respondent, in my prima facie view, treated the transaction to be one. Secondly, in the communication by which the respondent accepted the petitioner as a Sundry Creditor (outstanding payment), also appears to cover the dues in respect of all the purchase orders. The suit was also filed for a total claim of Rs.20,15,312 (principal and interest as outstanding on the date of filing of the suit) in a composite manner.

9. The plaint case and the pleadings at paragraphs 3(b), (c), (d), (e), (l) and (j) etc. do not indicate that the suit was restricted to a single purchase order, but to the total claim which was acknowledged by the respondent as outstanding and payable to the petitioner as a sundry creditor.

10. Thus, a composite reference is permissible for the sake of convenience, to prevent multiplicity of proceeding and will also be cost effective.

11. An application was filed by the respondent under Sections 5 and 8 of the 1996 Act. The contention of the respondent was that Clause 24 of the Purchase Orders contained a dispute resolution clause and the disputes ought to be referred to arbitration. Prayers were made for reference to arbitration. The respondent did not contend that the purchase orders did not form a part of the same transaction.

12. Under such circumstances, this Court finds that the parties have proceeded with the business proposal and the obligations under the purchase orders as a part of a single transaction. The objection with regard to discrepancies in the purchase orders can be raised before the learned Arbitrator.

13. The next point raised by Mr. Tarafdar is that the petitioner is not entitled to a reference on the ground that the claim is 'deadwood'. The records reveal that the petitioner had approached the Civil Court within the period of limitation and claimed a sum due under the contract. The claim was on the basis of the e-mail sent by the respondent. The suit was disposed of upon submission that the petitioner wanted to proceed before the appropriate forum. Such prayer of the petitioner was made after the respondent filed the application under Sections 5 and 8 of the 1996 Act. It was also the specific case of the respondent that the suit should be referred to arbitration. Upon such application being filed the petitioner being aware of the legal consequences chose to withdraw the

suit on the ground that the petitioner would proceed before the appropriate forum. The suit was permitted to be withdrawn on January 4, 2024 upon the Civil Court recording the submissions of the petitioner. Thus, on such withdrawal the petitioner invoked arbitration.

14. Under such circumstances, in my view, the claim cannot be said to be ex facie time barred. Neither can the invocation be said to be time barred in view of the fact that between 2021 and 2024 the petitioner was pursuing its remedy before the Civil Court and thereafter had withdrawn the matter from the Civil Court. The Civil Court recorded that the petitioner wished to approach the appropriate forum. In *Arif Azim Company Limited* (supra) the Hon'ble Apex Court laid down a two-pronged test for the referral court to decide whether a reference to arbitration should be refused or not; a) whether the claim was ex facie time barred and b) whether the application for reference was within time. Here, the application under Section 11 has been filed within three years from invocation of arbitration and the claim cannot be treated as ex-facie barred. Mr. Tarafdar's contention is that the invocation was delayed by 71 days. Further probe by this Court would amount to the referral court conducting a mini trial. In the above facts, the claim of the petitioner or the disputes raised by the petitioner cannot be said to be ex facie time barred and it is for the learned Arbitrator to decide whether the petitioner would be entitled to exclusion of the time spent in proceeding with the Civil Suit, while deciding the issue of limitation. This issue can also be decided as a preliminary issue, if pressed by the

respondent. The questions of arbitrability, admissibility, limitation etc. can also be raised before the learned Arbitrator by the respondent.

15. Under such circumstances, this application is disposed of with the prima facie, finding that there exists an arbitration clause. The prayer for appointment of a learned Arbitrator is allowed. All the other objections raised by Mr. Tarafdar will be available at the appropriate stage before the learned Arbitrator.

16. Mr. Rajarshi Dutta, learned Advocate (Mobile No.9903039663) is appointed as the sole Arbitrator, to arbitrate upon the dispute between the parties.

17. The learned Arbitrator shall comply with the provisions of Section 12 of the Arbitration and Conciliation Act, 1996. The learned Arbitrator shall be at liberty to fix his remuneration as per the Schedule of Arbitration and Conciliation Act, 1996.

(SHAMPA SARKAR, J.)