

OC-28

ORDER SHEET

IN THE HIGH COURT AT CALCUTTA
ORDINARY ORIGINAL CIVIL JURISDICTION

(COMMERCIAL DIVISION)

ORIGINAL SIDE

AP/765/2022

M/S.BIANCA EQUIPMENTS

VS

SIMPLEX INFRASTRUCTURE LIMITED

BEFORE:

The Hon'ble JUSTICE SHAMPA SARKAR

Date: 12th February, 2025.

Mr. Rahul Das, Adv.
Mr. Sunil Kumar Singhania, Adv.
Ms. KalpanaSinghania, Adv.
... for the petitioner.

Mr. Abhishek Banerjee, Adv.
Mr. Roshan Sengupta, Adv.
Ms. Mihika Roy, Adv.
for respondent.

The Court : This is an application for appointment of an Arbitrator on the strength of a dispute resolution clause, i.e., Clause No. 17 of the work order dated July 1, 2018.

The clause is set out hereunder:-

"In the event of any difference or dispute arising out of or in connection with this work 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 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.”

The venue of the arbitration was agreed to be Kolkata.

The petitioner claims to be engaged in the business of construction of road, railways projects, industry, power and transmission lines etc. The case run by the petitioner is that, the respondent allegedly approached the petitioner for availing of services of hiring cranes, for their project at Meja Thermal Power Project at Allahabad. A letter of intent dated April 6, 2018 bearing No. 012/PC/C3242/P&M/VOL-1/001345 and the work order dated July 1, 2018 bearing No. WH32423242/180701000001 were allegedly issued by the respondent. The petitioner contends to have provided satisfactory service to the respondent. The respondent did not raise any dispute or objection with the services provided. Bills were raised and those were duly received by the respondent. As per the work order, the payment was to be made within thirty days from submission of the bills. The respondents made part payment, but the payments as per the invoices were not made. The respondent defaulted in complying with the terms and conditions of the work order. Bills from January 2019 to September 2019 and 2018-2019 and 2019 to 2020 amounting to Rs.60,04,328/- approximately have been annexed to this application. The petitioner submits that the said bills/invoices remain unpaid. According to the petitioner, the outstanding with principal and interest is beyond Rs.83 lakhs. The fact that the respondent had made part payment to

the petitioner will be available from Form 26AS of the petitioner. Thus, the liability of the respondent under the work order is evident. It is submitted by Mr. Das that, although the letter of intent did not contain an arbitration clause, the work order which followed the letter of intent, contained an arbitration clause and the work order was forwarded to the petitioner by an email issued by a representative of the respondent Mr. Arin De, who was responsible for preparation of the work order. The same was approved by Mr. Rajesh Kumar Mishra. Mr. Rajesh Kumar Mishra was the contact person mentioned in the letter of intent. Communication/documents electronically received, would also be treated as an agreement in writing under Section 7(4)(b).

Relying on the nature of work mentioned in the letter of intent and the work order, Mr. Das submits that the work order was issued and formally communicated, to give further effect to the letter of intent by formalising the contract. The invoices have been referred to in support of the contention that, the amount claimed by the petitioner was still outstanding. The petitioner also relies on a notice issued prior to initiation of proceedings under the Insolvency and Bankruptcy Code, wherein, the work order was referred to. The specific contention of the petitioner before each and every forum as also before the respondent was that, the letter of intent and the work order were part of the same transaction. Thus, even though the invoices mentioned the number of the letter of intent, the same would not be an indication that the work order was never issued. The factum of receipt of the work order by electronic mail would

be available from the document annexed to the application. The TDS deduction by the company would also indicate that, bills were paid to the petitioner. The petitioner further contends that the Pre-Suit Mediation as contemplated under the Commercial Courts Act, 2015 was initiated on wrong advice and misinterpretation of the documents.

Mr. Banerjee, learned Advocate for the respondent submits that the letter of intent is not denied. Payments have been made in terms of the invoices raised in respect of the work done as per the letter of intent. The letter of intent does not contain any arbitration clause. The unsigned work order is a non-existent document. The same does not fall within the definition of an arbitration agreement as contemplated under Section 7(4)(b) of the Arbitration & Conciliation Act, 1996. There is no record of such electronics exchange of the document. According to Mr. Banerjee, there are no similarities between the reference numbers in the two documents.

Heard the rival contention of the parties.

Admittedly, the work order dated July 1, 2018 contains an arbitration clause. The receipt of the notice invoking arbitration is not denied by the respondent. The issue before this Court is whether Clause 17 of the work order should be construed as a valid arbitration agreement, in view of the contention of the respondent that the work order was neither signed nor executed. The specific case of the respondent is that, the letter of intent dated April 6, 2018 did not contain an arbitration clause. The payments were made against the bills raised in respect of the works done as per the letter of intent.

It is urged by the respondent that, the petitioner does not have the locus to invoke arbitration. The notice invoking arbitration dated March 24,2022, must not be accepted by this court. I have perused the notice. In the said notice, the petitioner has categorically enumerated the claims. In the first paragraph, the petitioner specifically mentioned the letter of intent as also the work order. No reply to the said notice invoking arbitration was received by the petitioner. There was no denial to the issuance of the work order by the respondent. In the notice issued under the Insolvency and Bankruptcy Code as well, the petitioner mentioned the work order which followed the letter of intent. No reply to the same was received by the petitioner. At no point of time did the respondent dispute the existence of the work order. Only when, the matter was filed for appointment of an arbitrator before this Court, the respondent come up with a plea that the work order was neither signed nor issued. The first contention of Mr. Banerjee that, the unsigned document cannot be treated as a valid arbitration agreement is not accepted. The referral court cannot probe deeper into the matter by embarking upon an investigation. The prima facie test undertaken by this court, leads this court to accept that the work order was served upon the petitioner by email and the same contained the arbitration clause. The same was forwarded by Mr. Arin De and approved by Mr. Rajesh Kumar Mishra. Mr. Arin De prepared the work order and Mr. Rajesh Kumar Mishra approved the same. In the letter of intent, Mr. Rajesh Kumar Mishra was mentioned as the contact person. I find that the subject matter of the letter of intent and in the work order, are similar. Subject

of the letter of intent is as follows:-

“SUB:- LETTER OF INTENT FOR SUPPLY OF 01 NO. crawler mounter 150 TON CAPACITY WITH 70 M BOOM LENGTH INCL. 10M JIB ON MONTHLY HIRE FOR EXECUTION OF BALANCE WORKS OF MAIN PLANT AND OFFSITE CIVIL WORK PACKAGE FOR MEJA THERMAL POWER PROJECT (2 X 660 MW)”

The subject matter in the work order as per the work order, is as follows:-

“Contract C3242:- BALANCE WORKS OF MAIN PLANT AND OFFSITE CIVIL WORKS PACKAGE FOR MEJA THERMAL POWER PROJECT (2X660 MW)”

The equipment to be mobilised and supplied is as follows:-

“Equipment

1 PM.1D.010.M51.0000CRAWLER CRANE-MANITOWOC-40000W

Capacity :150 TON

Quantity: 1

UoM:No

HSN Code:Nil”

Both the letter of intent and the work order mention the same equipment which was to be supplied by the petitioner for the balance works of the main plant and offsite civil works package for Meja Thermal Power Project (2X660 MW). According to Mr. Banerjee, C3242 was the number of the contract entered into between the respondent and NTPC. The said number was assigned by NTPC. Reference of the said number will not make the work order a part of the letter of intent. Prima facie, it appears to this Court that in the work order as well as the letter of intent, the contract number was referred to as C3242, meaning thereby, that the letter of intent and the work order were both issued in connection with the work to be performed by the respondent in respect of the contract no. C 3242 entered into between the NTPC and the respondent. The petitioner was engaged as a sub-contractor or service provider

and that was why in both these documents, the original contract No. between the respondent and the NTPC had been mentioned. The project number is also the same i.e. 2X660 MW in both the documents. Under such circumstances, whether the work order was issued or is a valid document, will have to be decided by the learned arbitrator on the basis of the evidence before him, upon cross-examination. The work order was sent by e-mail. The subject mentioned in the said email is “work order copy”. According to the petitioner, the attachment, i.e., Bianca-equipments.pdf was the work order prepared by the sender of the email, i.e., Mr. Arin De. Moreover, the respondent did not at any point of time, raise an objection regarding issuance of the work order. Section 7 of the Arbitration & Conciliation Act, contemplates that an arbitration agreement can be in the form of a contract or in the form of a separate agreement. The arbitration agreement shall be in writing. An arbitration agreement shall be treated to be in writing, if by exchange of letters, telex, telegrams or other means of telecommunications, a record of the agreement can be ascertained. In the facts of this case, electronic mail sent by Arin De enclosing Bianca-equipment.pdf as an attachment, is available. The similarities in the nature of works in the letter of intent and the work order is also prima facie evident.

The objection with regard to existence of the arbitration agreement includes the aspect of validity of an arbitration agreement. The court at the referral stage will apply the prima facie test. In case of debatable and disputable facts, the court will ask the parties to abide by the arbitration

agreement as the arbitral tribunal has primary jurisdiction and authority to decide the disputes including the question of jurisdiction and non-arbitrability. The restricted and limited review by the referral court is to check and protect parties from being forced to arbitrate when the matter is demonstrably “non-arbitrable” and to cut off the deadwood. The court, by default, will refer the matter when contentions relating to non-arbitrability are plainly arguable, when consideration in summary proceedings will be insufficient and inconclusive and when facts are contested. This is not the stage for this court to enter into a mini trial or elaborate review so as to usurp the jurisdiction of the Arbitral Tribunal. The Court must affirm and uphold integrity and efficacy of arbitration as an alternative dispute resolution mechanism.

A deeper consideration of whether an arbitration agreement exists between the parties must be left to an arbitrator, who is to examine the documentary and oral evidence produced before him in detail, after witnesses are cross-examined on the same.

When the genuineness of an agreement is in question, the arbitral tribunal is competent to decide on its own jurisdiction, including challenges to the validity of the arbitration agreement itself.

This aligns with the principle of Kompetenz-Kompetenz, enshrined in Section 16 of the Arbitration and Conciliation Act, 1996, which empowers the arbitral tribunal to rule on its own jurisdiction, including objections with respect to the existence or validity of the arbitration agreement.

Therefore, when the issue pertains to the genuineness of an agreement

containing an arbitration clause, it is generally within the purview of the arbitral tribunal to adjudicate upon such matters, subject to the supervisory role of the courts as envisaged under the Arbitration and Conciliation Act.

The issuance of demand notices and the steps taken by petitioner before different fora and the continued silence of the respondent as also the denial of the issuance of the work order, clearly indicate that, there is no chance for any amicable settlement.

Reference is made to the decisions of ***Demerara Distilleries Private Limited and Another versus Demerar Distillers Limited*** reported in ***(2015)13 SCC 610*** and ***Visa International Ltd. v. Continental Resources (USA) Ltd.***, reported in ***(2009) 2 SCC 55***.

The mechanism for appointment of the arbitrator as per the clause 17, is barred by law. There cannot be an unilateral appointment by the respondent. The petitioner has rightly approached this court. Reference is made to the decisions of ***Perkins Eastman Architects DPC and Another vs. HSCC (India) Ltd.*** reported in ***2019 SCC OnLine SC 1517*** and ***Central Organisation for Railway Electrification vs. ECI SPIC SMO MCML (JV) A Joint Venture Company*** reported in ***2024 SCC OnLine SC 3219***.

All contentions of Mr. Banerjee with regard to the claim of the petitioner and non-existence of the work order are matters of trial on evidence and those can be raised before the learned Arbitrator even as a preliminary issue. The learned Arbitrator has the jurisdiction under the law to rule on its own jurisdiction and on the question of arbitrability. The Learned Arbitrator can

decide such issue at the appropriate stage when raised by the respondent. The referral Court is, prima facie, satisfied as to the existence of the arbitration agreement and the invocation. Thus, these two parameters have been satisfied.

Rest of the issues raised by Mr. Banerjee including the invalidity of the claim of the petitioner shall be urged before the learned Arbitrator. The Court appoints Mr. Dhruba Ghosh, learned senior Advocate, Bar Library Club, as the learned Arbitrator, to arbitrate upon the disputes between the parties. The appointment is subject to the disclosure in terms of Section 12 of the Arbitration and Conciliation Act, 1996. The learned Arbitrator will fix his remuneration in terms of the schedule of the Act.

This application stands disposed of.

(SHAMPA SARKAR, J.)

Sb/GH.