



**IN THE HIGH COURT OF JUDICATURE AT BOMBAY,
NAGPUR BENCH, AT NAGPUR.**

Miscellaneous Civil Application (Arbn) No. 69 of 2022

Viveka Super Speciality Hospital and
Research Centre Pvt. Ltd., through its
Director, having registered office at :
Plot No. 1A, Naik Layout, Subhash
Nagar, Nagpur-440022.

... Applicant

- Versus -

Philips India Pvt. Ltd., Through its
Director, having its Corporate office at :
8th Floor, DLF Cyber City, DLF Phase-III,
Sector-25, Gurgaon-122002.
And Registered office at: Expeditors
International Pvt. Ltd., C/O Siesta
Logistics Corporation, SY No. 2/1,
Thirmalashettyhalli, Soukya Road,
Near Police Station, Samethanahalli
Post, Karnataka-560067.

E-mail-call.ccc@philips.com

... Non-Applicant

Mr. K. N. Shukul, Advocate for the applicant
Mr. Jatinkumar with Mr. Aashray Chaudhary, Advocates for the non-
applicant

CORAM : ANIL L. PANSARE, J.

Date of reserving order : 01-04-2025

Date of pronouncing order : 04-04-2025

P.C.

The applicant has preferred this application under Section
11(6) of the Arbitration and Conciliation Act, 1996 for appointment of
arbitrator.

2. Having heard both sides and having gone through the relevant material, there appears serious challenge to existence of arbitration agreement between the parties.

3. The dispute arose between the parties in connection with sale/purchase of 'Access CT-32-slice', a medical equipment. The non-applicant company vide offer/proposal dated 6-6-2019 offered to sell the said equipment for certain sum on terms and conditions mentioned in the offer/proposal. Clause 28 of the proposal refers to arbitration. It reads thus :

“28. ARBITRATION : If any dispute arises between Philips and the customer out of or in connection with this whether in the nature of interpretation or meaning of any term hereof or as to any claim by one against the other, or otherwise the same shall be referred to sole arbitrator to be appointed by Philips and the arbitration shall be governed by the Arbitration and Conciliation Act, 1996. The seat or legal place of arbitration shall be Gurgaon. The language to be used in the arbitral proceedings shall be English. The award given by the arbitrator upon such references shall be final and binding upon the parties, and each party shall bear its own expenses in relation to such arbitration. Unless otherwise awarded by the arbitrator, the fees of the arbitrators shall be shared equally by the Parties.”

As could be seen, the arbitration clause refers to dispute that may arise in connection with the offer/proposal whether in the nature

of interpretation or meaning of any term mentioned in the offer/proposal or to claim by one against other or otherwise.

4. Pursuant to said offer, the applicant vide letter dated 11-6-2019 issued a purchase order with certain terms and conditions.

Clause 13 thereof refers to arbitration, which reads thus :

“13. Arbitration : If any dispute arise between Philips and Viveka Super Speciality Hospital, out of or in connection with this whether in the nature of interpretation or meaning of any term hereof or as to any claim by one against the other, or otherwise the same shall be referred to sole, arbitrator will be appointed by Viveka Super Speciality Hospital and the arbitration shall be governed by the arbitration and conciliation act 1996. The seat or legal place of arbitration shall be Nagpur, Maharashtra.”

5. As could be seen, the applicant has also referred to dispute that may arise between the parties in connection with terms of the purchase order and not the terms of offer/proposal.

6. The non-applicant supplied the medical equipment under a tax invoice dated 20-11-2019 with certain conditions under the head of ‘Standard Conditions of Sale’. Condition No. 3 reads as under.

“3. The Buyer agrees and acknowledges that, except as otherwise provided in this Invoice, all other terms and conditions of the Quotation issued by Philips India shall be final and binding on both Philips and Buyer. The terms and

conditions on the Quotation and the Invoice issued by Philips India shall supersede any other agreements or understandings between Philips and the buyer relating to the goods in this order.”

By aforesaid condition, the non-applicant has revived the conditions of quotation and incorporated new conditions with invoices with a rider that it shall supersede any other agreement between the parties. Thus agreement, if any, entered into by parties stood superseded by unilateral declaration.

7. In context with above, learned counsel for the applicant submits that offer/proposal dated 6-6-2019 given by non-applicant is nothing but a proposal, which came to be accepted by the applicant with certain conditions including condition/clause no. 13 which refers to arbitrator. He submits that the purchase order has been acted upon by the respondent by supplying the medical equipment and, therefore, by conduct, the parties agreed to the arbitration clause mentioned in purchase order.

8. As regards arbitration clause mentioned in the offer/proposal, learned counsel for the applicant has invited my attention to clause 35 of offer/proposal, which reads as under.

“35. ADDITIONAL CLAUSE

There are no other commitments beyond what is expressly & implicitly stated in this contract. All other commitments stand superseded post this sign-off.”

The counsel for the applicant submits that the commitments mentioned in the offer/proposal are subject to signatures by both the parties and since neither parties signed the document, the conditions mentioned in the offer/proposal will be not applicable.

9. As against, learned counsel for the non-applicant submits that the purchase order is not accepted unconditionally but is subject to the conditions of sale incorporated in the tax invoice dated 20-11-2019, by which the non-applicant has revived the terms and conditions of the quotations and incorporated additional conditions. The applicant has paid price of equipment in terms of this invoice. Thus, according to him, the conditions mentioned in offer/proposal dated 6-6-2019 as regards arbitration clause stood revived and accepted by the applicant by conduct viz. payment of cost of equipment.

10. I do not find substance in the submissions so made by the learned counsels. The conduct of the parties is such that either party has put up its conditions along with each document sent as response to earlier document. None of the documents relied upon by the parties

would give a picture of the intention of the parties to agree to a particular clause of arbitration in the sense neither is there acceptance by the applicant to the arbitration clause referred to by the non-applicant in the offer/proposal dated 6-6-2019 nor is there acceptance by the non-applicant to the arbitration clause referred to by the applicant in purchase order dated 11-6-2019.

11. In this regard, the judgment of Hon'ble Supreme Court in the case of *Rickmers Verwaltung GMB H Vs. The Indian Oil Corporation Ltd. [MANU/SC/0726/1998]* cited by non-applicant's counsel is relevant, wherein on the point of consensus of parties to create a binding contract on the basis of correspondence, the Court held as under :

“15. In this connection the cardinal principle to remember is that it is the duty of the court to construe correspondence with a view to arrive at a conclusion whether there was any meeting of mind between the parties, which could create a binding contract between them but the Court is not empowered to create a contract for the parties by going outside the clear language used in the correspondence, except insofar as there are some appropriate implications of law to be drawn. Unless from the correspondence it can unequivocally and clearly emerge that the parties were ad idem to the terms, it cannot be said that an agreement had come into existence between them through correspondence. The Court is required what the parties wrote and how they acted and from that material to infer whether the intention as expressed in the correspondence was to bring into existence a mutually binding contract. The intention of the

parties is to be gathered only from the expressions used in the correspondence and the meaning it conveys and in case it shows that there had been meeting of mind between the parties and they had actually reached an agreement, upon all material terms, then and then alone can it be said that a binding contract was capable of being spelt out from the correspondence.”

12. Thus, it is the duty of the Court to construe correspondence with a view to ascertain whether there was a consensus between the parties, which would create a binding contract between them on the point of the arbitration agreement. The Court is not empowered to create a contract for the parties by going outside the language used in the correspondence except for appropriate implications of law to be drawn.

13. In the present case, the documents exchanged between the parties are, in fact, very limited. First is, offer to supply medical equipment upon certain conditions. Second is, purchase order with certain conditions and third is, supplying medical equipment under invoice containing certain terms. By each document, the party has modified or added terms of supply or purchase. There is no further correspondence indicating that the parties have either accepted expressly or impliedly a particular clause referred to in offer/proposal or in the purchase order or that the conditions in invoice to revive the clauses of quotation has been accepted by other side.

14. The counsel for the applicant has then argued that he made first move for appointment of arbitrator by relying upon conditions of purchase order and, therefore, in terms of judgment of the Supreme Court in the case of *Balasore Alloys Limited Vs. Medima LLC [(2020) 9 SCC 136]*, the parties will be bound by arbitration clause mentioned in purchase order.

15. In this case also, two different arbitration clauses existed in two different set out documents between the parties. The Supreme Court took note of the fact that arbitral tribunal has already been constituted and in that context, the Court further took note of the fact that respondent therein was the first to invoke the arbitration clause with reference to agreement dated 31-3-2018 and considering the reply filed to the said notice, the Supreme Court found that parties intended to determine the dispute in terms of provisions contained in the agreement dated 31-3-2018. Such is not the case here. There is nothing on record to draw an inference that parties herein have agreed to resolve the dispute in terms of arbitration clause referred to by either side. The judgment, therefore, will be of no assistance in the present case.

16. That being so, it is difficult to render a finding that there exist arbitration agreement between the parties. In the circumstances, the application under Section 11(6) of the Arbitration and Conciliation Act is not tenable. The application is accordingly rejected. No order as to costs.

(Anil L. Pansare, J.)

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