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Arbitration clause contained in an unsigned invoice prima facie constitutes an arbitration agreement: Delhi HC holds that question of existence and validity ought be decided by the sole arbitrator

Swastik Pipe Ltd. Vs Shri Ram Autotech Pvt. Ltd.

Case No.	Arb. P. 241/2021
Date	05 July 2021
Court	High Court of Delhi
Coram	Hon'ble Mr. Justice Sanjeev Narula

1. FACTUAL MATRIX

- 1.1 The present petition was filed under Section 11(6) of the Arbitration and Conciliation Act, 1996 (**'the Act'**) for the appointment of a Sole Arbitrator. The appointment was sought by the Petitioner Swastik Pipe Ltd. (**'Petitioner'**) for adjudicating upon a dispute that arose due to non-payment of outstanding sums against the goods delivered to Shri Ram Autotech Pvt. Ltd. (**'Respondent'**). Petitioner based its application on the arbitration clause mentioned in an invoice exchanged between the Parties.
- 1.2 Petitioner was engaged in the business of manufacturing, exporting, and supplying steel pipes and tubes to heavy engineering industries in India and abroad. Respondent was in the business of manufacturing and supplying sheet metal and plastic moulded components. Respondent placed orders with Petitioner for the purchase of 'C.R. Strips' and the same were supplied as per Respondent's request and specifications, on a running account basis. While some payment was made by the Respondent, an amount of INR 15,63,217/- (inclusive of interest @ 18% p.a. till 29 December 2020 for the delayed payments), was outstanding against the goods which have been already been delivered and received.
- 1.3 As the liability was not discharged, a legal notice dated 31 December 2020, was issued by Petitioner calling upon Respondent to make good the amount due or agree to arbitration in accordance with the terms and conditions of the invoices which contained an arbitration clause. Concededly, the invoice containing the arbitration agreement was not signed by either party but the same was also not controverted by Respondent as it failed to respond to the notice. Despite service of notice by the Court, Respondent willfully chose not to appear, which led the Hon'ble Court to proceed *ex-parte* based on the submissions advanced by the Petitioner.

2. ISSUE

- 2.1 Whether the terms and conditions appearing in an unsigned invoice and containing an arbitration clause constitute a valid arbitration agreement between the parties to appoint an arbitrator under Section 11(6A) of the Act?

3. CONTENTIONS OF THE PETITIONER

- 3.1 Petitioner contended that the following clause which was conspicuously placed at the front page of the invoices under terms and conditions constitutes an arbitration agreement.

"2. All disputes, touching and/or concerning this bill, shall be, solely, resolved by an arbitrator duly appointed by the Hon'ble Delhi High Court under The Arbitration and Conciliation Act, 1996, amended unto date or any repeal thereof. The seat of arbitration shall be Delhi and shall be solely and exclusively subject to Delhi jurisdiction. The language of arbitration proceedings shall be English."

- 3.2 Moreover, the goods accompanying the invoices have been duly received by the Respondent under a Goods Receipt, duly signed, and acknowledged, copies whereof are placed on record. Besides, there are other documents such as e-Way Bills evincing the supply and sale of goods, which *prima facie* demonstrates the dispute regarding non-payment.
- 3.3 Petitioner relied broadly upon Section 7(4)(b) and Section 7(4)(c) of the Act to prove the existence of a *prima facie* valid arbitration agreement. Section 7(4)(b) provides that, “an arbitration agreement could be in the nature of exchange of communication, providing a record of the agreement in writing.” In view of this, the Petitioner contended that signature of either party or a particular form was not mandatory to prove the existence of a valid Arbitration Agreement. It was argued that if all the necessary attributes were present along with the existence of real intent of the parties, that is, ‘*consensus ad idem*’, it was enough to establish the existence of a valid arbitration agreement. The Petitioner relied upon various judgements of the Hon’ble Supreme Court in support of its contention.¹ Section 7(4)(c) of the Act states that, “an arbitration agreement can also be inferred from the exchanges of statement(s) of claim and defense in which existence of the agreement is alleged by one party and not denied by the other.” Petitioner contended that the existence of an arbitration agreement specifically alleged by it with the narration of commercial transactions and notice invoking arbitration, was not refuted by the Respondent and amounts to acquiescence.

4. JUDGEMENT OF THE DELHI HIGH COURT

- 4.1 The Hon’ble High Court while considering the language of Section 7(4)(b) of the Act observed that the signature of either party on the arbitration agreement is not mandatory. It was opined by the Court that sub-clauses (b) and (c) of Section 7(4) show that the legislative intent is also to include a written document not signed by the parties, within the ambit of a valid arbitration agreement, as Section 7(4)(b) provides that an arbitration agreement can be in the nature of exchange of communication, which provides a record of the agreement in writing. Taking into consideration the language deployed in the aforesaid provision, there can be no doubt that, the signature of either party on the Arbitration Agreement is not mandatory. Moreover, the provision noted above manifests that an arbitration agreement need not be in a particular form, and a valid agreement can be constituted if it has all the necessary attributes. Further, while construing the terms of any agreement, the real intent of the parties is germane, which could be gleaned from the facts and circumstances. Since the terms and conditions printed on an invoice are generally inserted unilaterally by

¹ Trimex International FZE Ltd. Dubai v. Vedanta Aluminium Ltd., India, (2010) 3 SCC 1; see also M/s. Caravel Shipping Services Pvt. Ltd. v. Premier Sea Food Exim Pvt. Ltd, (2019) 11 SCC 461; see also Scholar Publishing House Pvt. Ltd v. Khanna Traders, 2013 (3) Arb. LR 105 (Delhi)

the party issuing the invoice, the Court called upon the Petitioner to validate the mutual intention of the parties to settle the disputes through arbitration.

- 4.2 Further, in view of the language of Section 7(4)(c) of the Act, the Court delved into the meaning of the expression “statements of claim and defence” occurring in Section 7(4)(c) of the Act and held that it cannot be given a restrictive meaning referring to decisions of the Supreme Court relied by the Petitioner stating that the existence of the arbitration agreement can also be inferred from the stand taken by the parties in the pleadings filed under the petition under Section 11 of the Act. The Court thus observed that although there was no exchange of statements of claim and defense, the fact that the Respondent failed to reply to deny the existence of an arbitration agreement, both in response to the legal notice invoking arbitration as well as to the present petition, the existence of the arbitration agreement was un rebutted. It was opined that the Court at this stage has to only form a *prima facie* view regarding the existence of the arbitration agreement in terms of Section 11(6A) of the Act. Detailed examination and final determination regarding the existence of the arbitration agreement is in the domain of the Arbitral Tribunal.

- 4.3 Deferring to the restricted jurisdiction available to the Court under Section 11 of the Act, it was observed that if there existed sufficient material on record to establish that the condition/clause in the invoices/exchanges were accepted and acted upon, the parties would be *ad idem*, and arbitration agreement could be safely inferred. This aspect, however, had to be conclusively determined on the basis of evidence as well as on the surrounding facts and circumstances, by the Arbitral Tribunal.

5. CONCLUSION

- 5.1 The Court allowed the application and held that there existed a *prima facie* arbitration agreement between the parties and a sole arbitrator was appointed to adjudicate the dispute. Respondent was granted liberty to raise all objections under law, including but not limited to the existence of the arbitration agreement before the learned Arbitrator as per Section 16 of the Act.

6. PSL OPINION

- 6.1 The High Court advertent to the dicta of the Supreme Court in *Vidya Drolia v. Durga Trading Corporation* (2021) 2 SCC 1 has astutely observed that “the rule for the Court is ‘when in doubt, do refer’”. A Section 11 Court does not concern itself with the nitty gritty of the dispute and only undertakes a limited exercise of ascertaining existence of an arbitration agreement, while deferring all questions including validity of arbitration agreement to the wisdom of the Arbitral Tribunal. This is the true intent and purport of the doctrine of competence-competence envisaged under Section 16 of the Act and a *prime facie*

existence of arbitration agreement is sufficient for the Court to refer the parties to arbitration.

- 6.2 This judgment must be cautiously noted by commercial parties (who routinely transact without executing negotiated contracts) while exchanging correspondences and invoices that an intention to arbitrate may be imputed if such documents contain an arbitration clause, even if unsigned. It will serve the parties well to clearly refute the existence of an arbitration agreement with alacrity, if a counter party issues a notice invoking arbitration based on unsigned/unexecuted documents.
- 6.3 In fact, the precise question of inference of arbitration agreement on the touchstone of true intention of the parties or '*consensus ad idem*' has engaged the Courts often and judicial precedents indicate that there is no strait-jacket formula to ascertain whether condition on invoices can amount to binding arbitration clauses. An arbitration agreement could be inferred through a series of correspondences, or even on demur of one of the parties to an arbitration proceeding, who can otherwise object to it on the ground of absence of agreement. In other words, if such party does not urge the contention of non-existence of an arbitration agreement in its reply to the claim, then the arbitration agreement is deemed to exist.