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

RESERVED ON – 24.04.2024.

% ***PRONOUNCED ON – 20.05.2024.***

\+ ARB.P. 1196/2023

M/S DHAWAN BOX SHEET CONTAINERS PVT. LTD.

..... Petitioner

Through: Mr. Aayush Malhotra, Adv.

versus

M/S SHREYANSH HEALTHCARE PVT. LTD. ..... Respondent

Through: Mr. Rahul Jajoo, Adv.

CORAM:
HON'BLE MR. JUSTICE DINESH KUMAR SHARMA

J U D G M E N T

DINESH KUMAR SHARMA,J :

1. By way of the present petition filed under Section 11(5) of the Arbitration and Conciliation Act, 1996 (hereinafter, referred to as the *'A&C Act'*), the petitioner seeks appointment of Arbitral Tribunal comprising of a Sole Arbitrator to adjudicate the disputes between the parties.

2. The facts in brief are that the petitioner is engaged in the business of manufacturing corrugated boxes and cartons. The respondent placed various orders upon the petitioner for supply of corrugated boxes. The petitioner having been supplied the same issued various invoices from

time to time. The petitioner's plea is that there was outstanding due of Rs. 36,40,006/- (Rupees Thirty Six Lakhs Forty Thousand Six Only) for which the petitioner issued a legal demand notice dated 01.06.2023.

3. Learned counsel for the petitioner submits that the respondent coerced the petitioner into settling the matter by accepting part consideration and agreeing to receive the balance consideration in a proportionate manner on recovery of dues against whom the respondent has stated to have initiated recovery proceedings. Learned counsel for the petitioner states that the respondent falsely informed the petitioner that proceedings under IBC has been initiated against him which was found to be false. The petitioner in these circumstances accepted the offer of the respondent vide consent letter dated 12.06.2023.

4. Learned counsel for the petitioner submits that since the dispute has arisen between the parties the arbitration was invoked vide notice dated 01.08.2023.

5. Learned counsel for the respondent in its reply stated that merely on the basis of statement on invoice, the arbitration agreement does not come into existence. The respondent denied the existence of any arbitration agreement between the parties. The respondent in the reply also took an objection of the invoices being unstamped. However the same is not being pressed and thus not discussed, being in the domain of the Arbitrator if appointed.

6. Learned counsel for the respondent pleaded that there is no agreement between the parties as required under Section 7 of the Arbitration and Conciliation Act. The respondent also took a plea that the goods supplied were of the bad quality and the same were returned to the

petitioner. The respondent also took a plea that after return of the goods the total value of the goods supplied were of Rs. 13,16.829/- (Rupees Thirteen Lakhs Sixteen Thousand Eight Hundred Twenty Nine Only) against which a total amount of Rs. 16,28,987/- (Rupees Sixteen Lakhs Twenty Eight Thousand Nine Hundred Eighty Seven Only) has already been paid.

7. The demand raised in the notice invoking arbitration were stated to be frivolous and baseless. Learned counsel for the respondent also stated in the reply that as a good gesture the respondent has already paid Rs. 12,51,000/- (Rupees Twelve Lakhs Fifty One Thousand Only) to the petitioner after discussing issues related to the quality of the products supplied and the same was accepted vide a consent letter dated 12.06.2023.

8. The respondent also denied to have made any statement regarding filing of the insolvency proceedings by M/s Synergy Group against the respondent.

9. The petitioner has filed the present petition stating therein that there is an outstanding of Rs. 36,40,006/- (Rupees Thirty Six Lakhs Forty Thousand Six Only). The petitioner also stated that the respondent issued an email dated 22.05.2023 and requested the petitioner to settle the matter at lesser rate on the coercive ground that the management and control of the company would soon be taken over by the Insolvency Resolution Professional as appointed by the Hon'ble National Company Law Tribunal.

10. The petitioner also claimed to have sent legal demand notice dated 01.06.2023. The petitioner stated that the respondent had informed that

the insolvency proceedings have been initiated against him by M/s Synergy Group and further shared a screenshot of the filing details. Therefore, in order to bring a quietus to the matter, the petitioner accepted the offer of the respondent vide consent letter dated 12.06.2023. However, later on it was revealed that no insolvency petition has been filed.

11. Learned counsel for the petitioner stated that the settlement is thus *void-ab-initio* as having been made on the misrepresentation by the respondent.

12. Learned counsel for the respondent submitted that the petitioner thereafter invoked the arbitration vide notice dated 01.08.2023 which was replied vide reply dated 24.08.2023.

13. Learned counsel for the petitioner submitted that there is an arbitration clause in the invoices with the jurisdiction of the Delhi Courts. Learned counsel for the petitioner submitted that it is a settled preposition that an arbitration clause on the invoices can be taken into account for appointing an Arbitrator. It has further been stated that the plea taken by the respondent that the arbitration clause as contained in the invoices of the petitioner stood novated by virtue of the settlement as recorded in document dated 12.06.2023 is liable to be rejected. It has been submitted that the document dated 12.06.2023 cannot obviate the arbitration clause in the invoice.

14. Learned counsel further submitted that it is a settled preposition that if an original contract remains in existence, for the purposes of disputes in connection with issues of repudiation, frustration, breach, etc., the Arbitration Clause therein continues to operate for these purposes.

Learned counsel submits that the settlement letter has been obtained by playing fraud on the petitioner and there is no new contract executed between the parties.

15. Learned counsel for the respondent submitted that the petitioner have been supplying bad quality of the goods and the respondent was forced to return the good to the tune of Rs. 10,23,117/- (Rupees Ten Lakhs Twenty Three Thousand One Hundred Seventeen Only). It has been submitted that thereafter the parties entered into a settlement agreement dated 12.06.2023 thereby deciding the terms of the payments to be to the petitioner after mutual discussion between the parties.
16. Learned counsel submitted that the petitioner upon realising the defects and quality issues in the goods sold by the Petitioner to the Respondent on its own volition agreed to settle the accounts amicably after discussions and deliberations with the Respondent.
17. Learned counsel for the respondent submitted that after the settlement as recorded in letter dated 12.06.2023, there is no live *lis* between the parties and therefore in absence of any dispute, the matter cannot be referred to the arbitration. Learned counsel further submitted that once the parties to any arbitration agreement enter into a settlement thereby discharging the original agreement, the jurisdiction under Section 11 of the Arbitration and Conciliation Act cannot be invoked.
18. Reliance has been placed upon ***Payana Reena Saminathan v. Pana Lana Palaniappa[1].1913 SCC Online Pc40,*** wherein it was inter alia held as under:

[1] ***1913 SCC OnLine PC 40***

"The 'receipt' given by the appellants, and accepted by the respondent, and acted on by both parties proves conclusively that all the parties agreed to a settlement of all their existing disputes by the arrangement formulated in the 'receipt'. It is a clear example of what used to be well known in common law plea ding as "accord and satisfaction by a substituted agreement". No matter what were the respective rights of the parties inter se they are abandoned in consideration of the acceptance by all of a new agreement. The consequence is that when such an accord and satisfaction takes place the prior rights of the parties are extinguished. They have in fact been exchanged for the new rights; and the new agreement becomes a new departure, and the rights of all the parties are fully represented by it."

19. Learned counsel for the respondent has also placed reliance upon ***Union of India vs. Kishorilal Gupta & Bros.***[2] wherein it was inter alia held as under:

"10. The following principles relevant to the present case emerge from the aforesaid discussion (1) An arbitration clause is a collateral term of a contract as distinguished from its substantive terms; but nonetheless it is an integral part of it; (2) ***however comprehensive the terms of an arbitration clause may be, the existence of the contract is a necessary condition for its operation; it perishes with the contract****; (3) the contract may be non est in the sense that it never came legally into existence or it was void ab initio, (4)* ***though the contract was validly executed, the parties may put an end to it as if it had never existed and substitute a new contract for it solely governing their rights and liabilities thereunder;*** *(5) in the former case, if the original contract has no legal existence, the arbitration clause also cannot operate, for along with the original contract, it is also void;* ***in the latter case, as the original contract is extinguished by the substituted one, the arbitration clause***

[2] ***AIR 1959 SC 1362***

of the original contract perishes with it; *and (6) between the two falls many categories of disputes in connection with a contract, such as the question of repudiation, frustration, breach etc. In those cases it is the performance of the contract that has come to an end, but the contract is still in existence for certain purposes in respect of disputes arising under it or in connection with it. As the contract subsists for certain purposes, the arbitration clause operates in respect of these purposes."*

(emphasis supplied)"

20. Reliance has also been placed upon ***Nathani Steels Ltd. vs. Associated Constructions***[3] wherein it was inter alia held as under:

> *"3...once the parties have arrived at a settlement in respect of any dispute or difference arising under a contract and that dispute or the difference is amicably settled by way of a final settlement by and between the parties, unless that settlement is set aside in proper proceedings, it cannot lie in the mouth of one of the parties to the settlement to spurn it on the ground that it was a mistake and proceed to invoke the Arbitration clause..."*

21. Learned counsel for the respondent submitted that the law with respect to the novation of the agreement vis-a-vis the invocation of arbitration proceedings can be summed as under:

a. An arbitration clause contained in an agreement which is void ab initio cannot be enforced as the contract itself never legally came into existence.

b. A validly executed contract can also be extinguished by a subsequent agreement between the parties.

c. If the original contract remains in existence, for the purposes of disputes in connection with issues of repudiation, frustration,

[3] ***1995 Supp (3) SCC 324***

breach, etc., the arbitration clause contained therein continues to operate for those purposes.

d. Where the new contract constitutes a wholesale novation of the original contract, the arbitration clause would also stand extinguished by virtue of the new agreement.

22. Learned counsel for the respondent submitted that therefore in light of the novation of the purported agreement entered between the parties by virtue of invoices issued by the Petitioner, the arbitration clause existing therein has ceased to exist. Learned counsel has further submitted that there is no arbitration clause in the settlement agreement dated 12.06.2023 and therefore the matter cannot be referred to the learned Arbitrator.

23. Learned counsel submits that though the scope of judicial intervention at the stage of exercising jurisdiction under Section 8 and 11 of the Arbitration and Conciliation Act is limited, yet, the matter can be referred only if there is a dispute between the parties. Learned counsel submits that the petitioner having settled the dispute with the respondent, the matter cannot be referred to the learned Arbitrator.

24. In the arguments advanced by learned counsel for the respondent predominantly the case of the petitioner has been challenged on the ground that in view of the settlement agreement dated 12.06.2023 there is no arbitrable dispute between the parties. The plea of the learned counsel for the respondent is that the matter also cannot be referred to the arbitration as the settlement agreement dated 12.06.2023 does not contain any arbitration clause.

25. Learned counsel for the respondent has not pressed the arguments

regarding the absence of arbitration agreement between the parties. However, for the completeness it is pertinent to mention here the question regarding the validity of terms on the invoice containing arbitration clause came up for consideration before the coordinate bench of this court in ***Swastik Pipe Ltd. v. Shri Ram Autotech Pvt. Ltd.***[4] . The coordinate bench of this court after considering the entire law on this point inter alia held as under:

> *"11. For any agreement, the real intent of the parties is germane. In the event the written arbitration agreement is not signed by the parties, it is essential to ascertain if there is an intention on the part of the parties to settle their disputes through arbitration. Since the terms and conditions printed on an invoice are generally inserted unilaterally by the party issuing the invoice, the Court had called upon SPL to validate the mutual intention of the parties to settle the disputes. through arbitration. In fact, this 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. Let us briefly examine the legal position that emerges from the case-laws on the subject:*
>
> *a) In Caravel Shipping (supra), a suit was filed in which a Bill of Lading was expressly stated to be a part of the cause of action. The Defendant filed an application under Section 8 of the Act, relying upon the arbitration clause included in the printed terms annexed to the Bill of Lading. The court rejected the application, holding that the arbitration clause, being a printed condition, showed no intention to arbitrate and there was nothing to show that the clause was brought to the notice of the other party. The same reasoning was also affirmed by the High Court. The Supreme Court, however, set-aside the order of the High Court, by holding that the respondent therein has expressly agreed to be*

[4] ***2021 SCC OnLine Del 3604***

bound by the arbitration clause despite the fact that it is a printed condition annexed to the Bill of Lading. The Bill of Lading itself was not in dispute, and the Supreme Court specifically observed that since respondent had itself relied upon the Bill of Lading (though unsigned) as part of its cause of action in the suit, it cannot blow hot and cold and contend that, for the purpose of arbitration, the arbitration clause should be signed. The Court also reiterated the legal position noted above that the only pre- requisite to validity is that the arbitration agreement should be in writing, but Section 7(4) could not be rigidly construed to imply that in all cases an arbitration agreement needs to be signed.

b) In Trimex International (supra), the Supreme Court dealt with a petition under Section 11(6) of the Act, wherein, appointment of an arbitrator was sought as per the arbitration agreement contained in a Commercial Offer (Purchase Order) and also in a formal agreement that was exchanged between the parties. The respondent therein contested the petition on the ground that there was no concluded contract, and there was no ad idem of various essential features of transaction. The Supreme Court, after examining voluminous communications, including e-mails placed on record forming part of the text of the judgment, concluded that basic and essential terms had been accepted by the Respondent. The parties had arrived at a concluded contract, and accordingly, referred them to arbitration. In the said case, the Court held that in the absence of a signed agreement between the parties, the existence of the arbitration agreement can be inferred from various documents duly approved and signed by the parties in the form of exchange of e-mails, letters, telex, telegrams and other means of telecommunication.

c) A Division Bench of this Court in Scholar Publishing House Pvt. Ltd. v. Khanna Traders, while deciding an appeal against the order of a Single Judge deciding objections under Section 34 of the Act, dealt with the question of whether the award rendered on a dispute

referred to arbitration by the Respondent/Claimant was legal and binding, inasmuch as, did the parties enter into an arbitration agreement. The arbitration clause was contained in the invoice. The Court, relying upon the decision of Bombay High Court in Lewis W. Fernadez v. Jivatial Partapshi, held that the conduct of the parties was the relevant and determinative test. It was noted that there is no strait-jacket formula to say 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.

d) That said, the Court must note that there are a few cases wherein, on facts, the arbitration clauses printed on the invoices have not been held as valid. In the specific facts of such cases, the Court could not conclude that the parties were ad idem to render the arbitration clauses binding and enforceable. [See: Parmeet Singh Chatwal (supra), Taipack Ltd. v. Ram Kishor Nagar Mal, Alupro Building Systems Pvt. Ltd. v. Ozone Overseas Pvt. Ltd., IMV India Pvt. Ltd. v. Stridewel International and Kailash Nath Aggarwal v.. Aaren Exports].

12. Under Section 7(4)(c) of the Act, an arbitration agreement can also be inferred from the exchange of statement(s) of claim and defence in which existence of the agreement is alleged by one party and not denied by the other. What constitutes as statement of claim. and defence has been explained by the Supreme Court in the case of S.N. Prasad v. Monnet Finance Ltd. 1. Therein, the Court while deciding an appeal arising out of the order deciding objections under Section 34 of the Act, was faced with a question as to whether a guarantor, who is not a party to a Loan Agreement containing the arbitration agreement, can

be made a party to a reference to arbitration. While deciding this question, the Court also examined the contention whether an arbitration agreement could be inferred from the exchange of statements of claim and defence as contemplated under 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. It would thus be apposite to note the views of the Supreme Court, which read as under:

"10. But the words, 'statements of claim and defence' occurring in section 7(4) (c) of the Act, are not restricted to the statement of claim and defence filed before the arbitrator. ***If there is an assertion of existence of an arbitration agreement in any suit, petition or application filed before any court, and if there is no denial thereof in the defence/counter/written statement thereto filed by the other party to such suit, petition or application, then it can be said that there is an "exchange of statements of claim and defence" for the purposes of section 7 (4)(c) of the Act. It follows that if in the application filed under section 11 of the Act, the applicant asserts the existence of an arbitration agreement with each of the respondents and if the respondents do not deny the said assertion, in their statement of defence, the court can proceed on the basis that there is an arbitration agreement in writing between the parties****."*

(Emphasis Supplied)"

13. As held by the Supreme Court, 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. In the instant case, although there is no exchange of statements of claim and defence, in the sense that there is no reply from SRAPL, but the fact remains that the existence of the arbitration agreement specifically alleged by SPL with the narration of transaction, has not been refuted by SRAPL. Pertinently, the

existence of the arbitration agreement between the parties has also been categorically asserted in the precursor to the present petition, being the notice invoking arbitration, which was duly served upon SRAPL at two of its addresses in terms of the tracking reports annexed with the petition, but there was no response from SRAPL and thus, the assertion stood not-denied."

26. In view of the view expressed by the coordinate bench of this court, I consider that this issue may not further detain this court any longer. Thus it is inter alia held that the invoices issued by the petitioner contain the arbitration clause with the jurisdiction at Delhi.

27. The jurisdiction of the court at the stage of Section 8 or 11 is also very well settled in ***Vidya Drolia v. Durga Trading Corpn.,***[5] and ***DLF Home Developers Ltd. v. Rajapura Homes (P) Ltd.,***[6] it has repeatedly been held by the Apex Court and this court that if there is an agreement which contains the arbitration clause, the matter should be referred to the arbitration unless and until there are exceptional reasons for not making such reference.

28. It is a settled preposition that if there is a doubt regarding the reference of the matter to the arbitration, the golden rule is to refer the matter to the arbitration. The arguments as advanced by the learned counsel for the respondent that though the jurisdiction of court at the stage of making reference is very limited, but at the same time the matter can be referred to the arbitration only if there is arbitrable dispute between the parties has substance and there cannot be any doubt to this preposition. However, the matter can be refused to be referred to the arbitration if

[5] ***(2021) 2 SCC 1***
[6] ***(2021) 16 SCC 743***

there is no arbitrable dispute between the parties. The question is whether the consent letter dated 12.06.2023 can be taken as the settlement of the dispute between the parties. The 'Consent Letter' dated 12.06.2023 is reproduced here as under:

Document P-7

Shreyansh Healthcare Pvt Ltd S3

Registered Office: - F-44, Phase-1st, RIICO Industrial Area, Silora, Kishangarh - 305802
Email: - shreyans.healthcare@gmail.com , Website :- www.shreyanshhealthcare.com
CIN : U85110RJ2011PTC035262

Date :- 12/06/2023

To,

M/S Dhawan Box Sheet Containers Pvt Ltd,
GST No :- 08AACCD1972D1ZW

Subject :- Consent letter of your financial transaction in our books of account as on 30th April 2023.

Dear Sir,

This is with reference to your discussion and a mediation had where in it is mutually agreed to accept a payment of Rs. 12,51,000.00 , through RTGS/ NEFT in your bank account with in 2 working days of receipt of your consent letter against your dues till 30th April 2023. No further interest will be charged on the balance amount.

Balance amount will be payable to you in a proportionate manner on recovery of our dues / Debtors which includes government entities against whom we have initiated legal remedies as available with us and all kind of cases filed till 30th April 2023.

Please send us a copy of cancelled cheque of the designated bank account if it has changed or confirm us your bank account once again on the mail.

Kindly reaffirm your consent on this letter.

Regards,

authorized Signatory

From :-
M/S Dhawan Box Sheet Containers Pvt Ltd,
GST No :- 08AACCD1972D1ZW

We give our consent on the above-mentioned terms of the letter.

(Authorized Signatory)
Contact No :-

Works - F-44, Phase-1st, RIICO Industrial Area, Silora, Kishangarh - 305802

29. This court is of the firm view that by no stretch of imagination the letter dated 12.06.2023 can be taken as the novation of an agreement or the settlement of the dispute between the parties. The document does not reveal at all that vide this document the dispute between the parties have totally been settled and there is no *Live Lis* between the parties.

30. In ***OMEGA Finvest LLP Vs. Direct News Private Limited***[7] the coordinate bench of this court while dealing with the petition filed under Section 11 of the Arbitration and Conciliation Act came across that earlier on the failure of the respondent to hand over the possession of 'Demised Premises', the petitioner filed a petition under Section 9 of the Arbitration and Conciliation Act. During this proceedings with the assistance of court, the parties arrived at a settlement and moved a Joint Application for placing the terms of settlement on record ('Terms of Settlement'). The court disposed of the petition in pursuant to the 'Terms of Settlement' arrived at between the parties.

31. The respondent in contravention to the 'Terms of Settlement' failed to hand over the possession on which the Contempt proceedings were initiated. Thereafter, again an 'Addendum to the Terms of Settlement' dated 26.02.2020 was entered into between the parties before the court. However, again the respondent failed to honour the same. This lead to the filing of again the Contempt petition. While the matter rested thus, the petitioner invoked the arbitration.

32. The respondent contested the petition on the ground that disputes which have arisen between the parties are not subject to any arbitration agreement between the parties. It was pleaded that the parties are only

[7] **2022 SCC OnLine Del 3418**

governed by the 'Terms of Settlement', which is an independent contract not comprising of any arbitration clause and not by the terms of the 'Second Rent Agreement'.

33. The coordinate bench of this court rejected the arguments of the respondent and examined the scope of the court under Section 8 and 11 of the Arbitration and Conciliation Act and placing reliance upon inter alia held that any issue with regard to the novation need to be considered by the learned Arbitrator.

34. It was further inter alia held that the limited jurisdiction of the court while considering an application under Section 11 of the Arbitration and Conciliation Act is to see the existence of an arbitration agreement and not its validity. This court considers that the consent letter dated 12.06.2023 cannot be taken as to have put an end to the arbitrable dispute between the parties.

35. While deciding such issues, the court has only to look at the prima facie view and the intention of the parties. In order to deny the arbitration, if the same is preferred mode of resolution of dispute, there has to be clear intent of the parties.

36. I do not consider that there is clear intent of the parties as reflected in the document dated 12.06.2023.

37. In view of the above, the present petition is disposed of with the following directions:

    i) The disputes between the parties under the said agreement are referred to the arbitral tribunal.

    ii) Mr. Brajesh Kumar Tamber, Advocate (Mobile No. 9891125411) is appointed as the Arbitrator to adjudicate the disputes between

the parties.

iii) The arbitration will be held under the aegis of the Delhi International Arbitration Centre, Delhi High Court, Sher Shah Road, New Delhi hereinafter, referred to as the 'DIAC'). The remuneration of the learned Arbitrator shall be in terms of fee rules of the DIAC Schedule or as the parties may agree.

iv) The learned Arbitrator is requested to furnish a declaration in terms of Section 12 of the Act prior to entering into the reference.

v) It is made clear that all the rights and contentions of the parties, including as to the arbitrability of any of the claim, any other preliminary objection, as well as claims on merits of the dispute of either of the parties, are left open for adjudication by the learned arbitrator.

vi) The parties shall approach the learned arbitrator within two weeks from today.

DINESH KUMAR SHARMA, J

May 20, 2024/AR/DG