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

+ ARB.P. 26/2024

M/S DHAWAN BOX SHEET CONTAINERS
PVT LTD

.....Petitioner

Through: Mr. Aayush Malhotra and Mr.
Shobhit Garg, Advocates.

versus

M/S SEL MANUFACTURING CO LTD

.....Respondent

Through: None.

CORAM:

HON'BLE MR. JUSTICE PRATEEK JALAN

ORDER

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10.07.2024

1. By way of this petition, under Section 11 of the the Arbitration and Conciliation Act, 1996 [“the Act”], the petitioner seeks appointment of an arbitrator to adjudicate disputes between the parties in terms of an arbitration clause contained on invoices issued by the petitioner to the respondent.

2. The petitioner is a manufacturer and supplier of corrugated boxes, cartons, rolls and other packaging materials. It is stated in the petition that it made certain supplies to the respondent on the terms and conditions mentioned in its invoices, but the respondent has failed to make payment against the invoices in full. By a legal notice dated 06.11.2023, the petitioner called upon the respondent to pay the balance sum of Rs.



1,25,80,425/- due on 15.09.2023, and also invoked the arbitration clause contained in the invoices. The petitioner proposed the name of an arbitrator.

3. Learned counsel for the respondent replied to the notice on 05.12.2023 [wrongly mentioned as 05.11.2023], *inter-alia* contesting the existence of an arbitration agreement. The petitioner has, therefore, approached this Court for appointment of an arbitrator.

4. Notice was issued in this petition on 08.01.2024, pursuant to which the respondent entered appearance through counsel on 14.03.2024, and sought time to file a reply. Time was also granted to the parties to file written submissions on the question of whether an arbitration clause in an invoice can constitute an arbitration agreement under Section 7 of the Act.

5. The respondent, however, remained unrepresented on the next date of hearing, i.e. 07.05.2024 and it was directed Court Notice be issued to the respondent. It was made clear that, if the respondent does not appear despite notice, the petition will be taken up for hearing in its absence. The Registry reports that Court Notice has been served upon the respondent at one of the addresses mentioned in the memo of parties and also through e-mail.

6. At the request of the Court, Mr. Aayush Malhotra, learned counsel for the petitioner, has also telephoned learned counsel who appeared on behalf of the respondent on 14.03.2024 at the telephone number available in the communication dated 05.12.2023. The matter was passed over to enable him to appear, but he has not appeared even on the second call. The respondent thus remains unrepresented today.



7. Although the letter dated 05.12.2023 was addressed to learned counsel for the petitioner by the same learned counsel who had appeared on behalf of the respondent on 14.03.2024, the respondent has neither filed a reply to the petition, for which it had been given two opportunities, nor filed written submissions in terms of the order dated 14.03.2024.

8. On the question of whether an arbitration clause contained in an invoice issued by one party, can be relied upon for the purposes of Section 7 of the Act, Mr. Malhotra relies upon two decisions of Coordinate Benches of this Court - *Swastik Pipe Ltd. v. Shri Ram Autotech Pvt. Ltd.*¹ [“*Swastik Pipe -1*”] and *Swastik Pipe Ltd. v. Ms. Dimple Verma.*² In both cases, the Court appointed arbitrators on the basis of such clauses.

9. In *Swastik Pipe -1*,³ the Court, while looking at the validity of an arbitration clause in an invoice, noted as follows:

*“15. It must also be noted that the commercial dealing between the parties is demonstrated from the documents placed before this Court by SPL. Copy of the ledger of SPL, as placed on record, exhibits that the parties have been transacting with each other for some time, and some of the invoices raised by SPL have been paid by SRAPL during the same time period as well. Now, if there is sufficient material on record to establish that the condition/clause in the invoices were accepted and acted upon, the parties would be ad idem, and arbitration agreement could be safely inferred. **However, in the opinion of the Court, this aspect has to be conclusively decided on the basis of evidence that the parties would lead as well as the surrounding facts and circumstances. However, the same cannot be done at this stage, having regard to the limited jurisdiction exercised by this Court under Section 11 of the Act.**”*

16. As noted above, SRAPL has elected to stay away from the present proceedings. Despite service of notice, they have chosen not to appear,

¹ 2021 SCC OnLine Del 3604.

² Order dated 06.07.2022 in Arb. P. 100/2021.

³ *Supra* note 1.



for reasons best known to them. They have not filed a reply to deny the assertion, both in response to the legal notice invoking arbitration, as well as to the present petition. The consequence of such non-appearance is that the assertion of existence of the arbitration agreement is un rebutted. Thus, prima facie, it can be inferred that the arbitration agreement exists between the parties.”

10. As noticed in *Swastik Pipe-1*,⁴ the judgement in *Vidya Drolia v. Durga Trading Corpn.*⁵ lays down that, at the stage of proceedings under Section 11 of the Act, the Court is required only to form a *prima facie* view as to the existence of the arbitration agreement, leaving a detailed examination of this question to the Arbitral Tribunal. In fact, *Vidya Drolia*⁶ and subsequent authorities in *BSNL v. Nortel Networks (India) (P) Ltd.*⁷, *NTPC Ltd. v. SPML Infra Ltd.*⁸ and *Interplay between Arbitration Agreements under the Arbitration & Conciliation Act, 1996 & the Indian Stamp Act, 1899, In re*⁹ are consistent in laying down the proposition that reference can be declined only if there is no vestige of doubt as to the non-existence of the arbitration agreement; the default course in doubtful cases is to refer the matter to arbitration, leaving the question open for adjudication by the Tribunal.

11. In the present case, the respondent placed various orders during the period between June 2021 and September 2023, and the petitioner raised invoices accordingly. The invoices issued by the petitioner contain various terms and conditions, including the following:

“All Disputes Subject to 'Delhi' Jurisdiction arbitratio only.”

⁴ *Supra* note 1.

⁵ (2021) 2 SCC 1.

⁶ *Supra* note 5.

⁷ (2021) 5 SCC 738.

⁸ (2023) 9 SCC 385.

⁹ 2023 SCC OnLine SC 1666.



The invoices placed on record are signed by the representative of the petitioner and the representative of the respondent.

12. Although a stand is taken in the reply dated 05.12.2023 that the respondent's signature was only in acknowledgement of receipt of the goods, and not in agreement with the terms and conditions, that is not a matter which can be decided in these summary proceedings. As stated above, the respondent has also not filed an affidavit to deny the case pleaded by the petitioner, despite being given opportunities for the same.

13. In these circumstances, keeping in mind the limited jurisdiction of the Court at the pre-reference stage, I am of the view that the petitioner has made out a case for reference to arbitration, leaving all questions open for adjudication by the learned Arbitrator, including the defence, if any, with regard to the existence of the arbitration agreement.

14. For the aforesaid reasons, the petition is allowed and the disputes between the parties are referred to arbitration of Ms. Priya Kumar, Advocate [Tel: 9811355512]. The arbitration will be held under the aegis of Delhi International Arbitration Centre, Delhi High Court, Shershah Road, New Delhi-110503 ["DIAC"], and will be governed by the Rules of DIAC, including as to the remuneration of the learned Arbitrator.

15. The learned Arbitrator is requested to furnish a declaration under Section 12 of the Act, prior to entering upon the reference.

16. As the respondent has not entered appearance today, it is clarified that it will be duly served in accordance with the DIAC Rules, in the arbitration proceedings also.

17. It is made clear that all rights and contentions of the parties, including on maintainability of the arbitration proceedings, are left open



for adjudication by the learned Arbitrator.

18. The petition is disposed of accordingly.

JULY 10, 2024
SS/

PRATEEK JALAN, J

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