IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION
IN IT'S COMMERCIAL DIVISION
COMMERCIAL ARBITRATION APPLICATION NO.211 OF 2022

Bennett Coleman & Co. Ltd .. Applicant

Versus

MAD (India) Pvt.Ltd .. Respondent

WITH

COMMERCIAL ARBITRATION PETITION (L) NO.29338 OF 2022

Bennett Coleman & Co. Ltd .. Petitioner

Versus

MAD (India) Pvt.Ltd .. Respondent

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Mr. Ashish Kamat with Mr.Pradeep Mane, Ms.Huzan Bhumgara and Mr.Dhruv Dandekar i/b Desai & Diwanji for the applicant/petitioner.
Mr.Girish Kedia with Mr.Kushang Kedia for the respondent.

CORAM: BHARATI DANGRE, J.
DATED : 22nd DECEMBER, 2022

JUDGMENT:-

1 The primary issue that arises for consideration in the present Arbitration Application is, whether a clause contemplating reference of disputes and differences arising out of,

or in relation to a contract or order of advertisement, bill or otherwise breach thereof, to be referred to Sole Arbitrator, printed at the back of the tax invoice would amount to an arbitration clause.

2 The applicant, a news media Company indulging into various activities like news publishing, T.V, internet, radio and outdoor domain, had an interface with the respondent, an advertising agency, to be approached by various advertisers to place advertisements in the applicant's newspapers, channels, radio and other outdoor publications via release orders.

Based on such release orders received from the respondent, the applicant would publish the requisite advertisement in distinct media platforms, physical and virtual and subsequently raise an invoice upon the respondent for payment towards issuance of such advertisement.

The respondent was then expected to discharge his obligations to make the payment to the applicant within a period of 120 days from receipt of the invoices. Payment made thereafter would attract interest @ 18% p.a.

3 As the respondent was granted accreditation by Indian Newspaper Society (INS), an independent Association of newspaper publications, authenticating advertisements, circulation of newspaper and periodicals in India and by virtue of the said accreditation, the respondent was in a position to obtain special rates/commissions specified by INS from time to time for

placing print advertisements on behalf of the advertisers in the INS Member publications, including the applicant's publication. An important condition of the arrangement clearly cast an obligation upon the respondent to make payment of advertisements placed upon Member publications, irrespective whether he has received the payment from its end customers. Between July 2017 to April 2019, the respondent issued various release orders on the applicant and it is the claim of the applicant that advertisement were put in the print and non-print media and corresponding to this, invoices were raised upon the respondent for the work done under the release orders in a timely manner. However, the respondent defaulted in making the payments in a timely manner and the applicant allege that the default continued from July 2017 to April 2019, despite the invoices being raised and an attempt on part of the applicant to recover the overdue payment failed on every occasion. The correspondence exchanged between the parties is placed on record and the case of the applicant, as reflected in the application is, an amount of Rs.11,49,23,640/- was due and payable till 30/4/2022. The applicant invoked the arbitration on 11/7/2022, seeking appointment of the sole arbitrator as contemplated in the Dispute Resolution Clause, which is a part of the tax invoice.

This gives rise to debate whether the said clause can be construed as an arbitration clause.

4 Mr.Kamat, learned counsel representing Bennett Coleman and Co. Ltd, would submit that the respondent in pursuance to the understanding reached between the parties, issued purchase orders and correspondingly, the respondent, an agent for bringing advertisement from third parties to be published by the applicant issued purchase orders, pursuant to which, the corresponding invoices were raised by the applicant. The submission of Mr.Kamath is, the tax invoices which are placed on record, clearly referred to the nature of transaction between the parties with all the necessary details about the manner in which the publication is to take place with the corresponding rate for printing the material in print ad and magazine ads, and overleaf the tax invoice, the business terms and conditions are found to be ingrained, which include clause (F) which read thus :-

> "(F) All disputes and differences arising out of or in relation to a contract or order or advertisements, bill in connection therewith or otherwise, or breach thereof shall be referred to the sole arbitration in accordance with the Arbitration and Conciliation Act, 1996 for any modifications thereof, BENNETT, COLEMAN & CO.LTD, shall have the right to nominate such arbitrator. The award made in pursuance thereof shall be final and binding on both parties"

5 The other relevant clauses upon which Mr.Kamath lay his hands are clause nos.(g) and (h) which record thus :-

> "(G) Contents of the bill will be considered as correct if no error is reported within 21 days from the date of the bill.
> (H) By accepting this invoice, the agency confirms it has, directly or indirectly, charged only the gross amount as offered by BENNETT, COLEMAN & CO.Ltd to its client(s) and will not charge any amount over and above gross amount as specified by BENNETT, COLEMAN & CO.LTD. In case of breach of this clause, the agency shall indemnify BENNETT, COLEMAN & CO. Ltd and its Directors for any third party claim".

By inviting my attention to the pleadings in the application, Mr.Kamat would submit that the respondent was obligated to make payments of the advertisement placed upon the Member Publications of INS, but there was a default, and in fact, there was a complete neglect even to respond to the correspondence from the applicant and a demand notice was raised by indicating clearly that legal proceedings could be instituted if there is failure to deliver the amount. But despite all strenuous efforts, there was no response, as a consequence, the arbitration was invoked.

The submission of Mr.Kamath is pursuant to the purchase orders, the work was done at the level of the applicant company and therefore, invoices were raised and the amount under the invoices remained due and payable. His submission is, there is no denial of the liability at the end of the respondent and therefore, the Court must exercise it's jurisdiction. Furthermore, there is no denial of the existence of the arbitration clause in the

tax invoice which has been acted upon and hence, the clause has to be construed as a mutually agreed clause which bind both the parties, whatever may be the wording applied in the said clause.

6 Per contra, the learned counsel for the respondent would deny the existence of the arbitration agreement and he would place reliance upon the decision of the learned Single Judge (Justice G.S. Kulkarni) in *Concrete Additives and Chemicals vs. S.N. Engineering Services Pvt.Ltd*. (Arbitration Application (L) No.23207/2021). By relying upon the ratio to be derived from the judgment, the submission advanced on behalf of the respondent is, there is no conscious agreement between the parties to refer the disputes for adjudication and merely because the tax invoice which was issued in respect of the purchase orders provided for an arbitration, such invoices would not bring about an arbitration agreement.

7 The Arbitration and Conciliation Act, 1996, define "Arbitration Agreement" as an agreement referred to in Section 7 of the Act.

Section 7 describe 'Arbitration Agreement' to mean an agreement by the parties to submit to arbitration all or certain disputes, which have arisen or which may arise between them, in respect of a defined relationship, whether contractual or not. An Arbitration Agreement may be in the form of arbitration clause, in a contract or it may exist in the form of separate agreement, the rider being it shall be in writing.

Sub-section (4) of Section 7 has expanded the scope of sub-section (1) in the following manner :

> (4) An arbitration agreement is in writing if it is contained in—
> (a) a document signed by the parties;
> (b) an exchange of letters, telex, telegrams or other means of telecommunication which provide a record of the agreement; or
> (c) an exchange of statements of claim and defence in which the existence of the agreement is alleged by one party and not denied by the other.

Sub-section (5) of Section 7 offer a further clarification as under :-

> "(5) The reference in a contract to a document containing an arbitration clause constitutes an arbitration agreement if the contract is in writing and the reference is such as to make that arbitration clause part of the contract".

8 Under the scheme of the Arbitration Act, the Arbitration clause is separable from the other clauses and the Arbitration clause constitutes an agreement by itself.

A strict format is not prescribed as to what would contemplate an arbitration agreement, but the essentials of it are by now well settled, and in order to constitute an arbitration agreement, it must comply with the following requirement.

(a) There must be a present or future difference in connection with some contemplated affairs.

(b) There must be intention of the parties to settle such differences by private Tribunal

(c) The parties must agree in writing to be bound by decision of the Tribunal.

(d) The parties must be at ad idem.

9 Though no particular form is needed to bring into existence an arbitration agreement, but one thing is certain that the words "must unequivocally" indicate the agreement between the parties to be referred for arbitration, whatever may be the words of choice, they chose to apply. The intention of the parties to be referred for arbitration is the most fundamental and this conclusion can be gathered from either one document or several documents in form of correspondence consisting of letters, facts, messages etc. Parties must clearly contemplate determination of their substantive rights by the agreed Tribunal, who shall make a decision upon the dispute which is formulated at the time when the reference is made. The parties must have conceded to a situation where the decision of the Tribunal will bind them.

10 It, therefore, becomes necessary to determine whether the present clause contained in a tax invoice, would be construed as an 'arbitration clause'. The Bombay High Court in case of *Lewis W. Fernandez vs Jivatlal Partapshi And Ors. AIR 1947 Bom 65*, dealing with the Old Arbitration Act, on being confronted with the issue of existence of arbitration agreement

contained in a contract note issued after delivery of the goods, agreeing to submit disputes to arbitration in terms of bye-laws of an association, clearly ruled that the conduct of the parties was relevant and determinative factor. It repelled the contention that in order to construe an arbitration agreement, the agreement must be signed by both the parties. The view of a Division Bench presided over by Rankin, C.J, in case of *Radha Kanta Dass vs Baerlein Bros. Ltd AIR 1929, Cal. 97*, was gainfully referred to and it read as under :-

> "In my judgment, the law is the other way. The Arbitration Act of 1889 and the Indian Registration Act, for the best of good reasons have not required that the agreement to submit should be signed by both the parties"

This decision is relied upon by the Delhi High Court in Swastik Pipe Ltd vs. Dimple Verma, (ARBP 100/2021), where it was held as under :

> "8. Having heard the learned counsel for the parties, the issue which arises is, whether the tax invoice stipulating an arbitration clause as referred to above can bind the parties and consequently the dispute inter-se be referred to arbitration. The issue is no more res-integra in view of the Judgment of the Division Bench of this court in the case Scholar Publishing House Pvt. Ltd. (supra), wherein this Court in paragraphs 5 and 6 held as under:
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> > 5. Learned Senior Counsel for the respondents submitted that the appeal lacks in merit. He relied on the observations in Newsprint Sales Corporation (supra), as well as the decisions reported as Lewis W. Fernandez v Jivatlal Partapshi & Ors AIR 1947 Bom 65 and Ram

Chandra Ram Nag Ram Rice & Oil Mills Ltd v Howrah Oil Mills Ltd. and Anr. AIR 1958 Cal 620. The respondent/claimants also urge that the history of transactions between the parties clearly showed that the appellant had accepted by his conduct, the invoices which contained the arbitration clause, and on most occasions honored them. It was therefore, not open for him to contest the existence of an arbitration agreement. Reliance was also placed on the findings and observations of the arbitrator in the award published by him.

6. In the award, while dealing with the question of whether the parties had entered into an arbitration agreement, the arbitrator held as follows:

".....The bills filed with the petition clearly show that there is an arbitration clause between the parties and the claimant is the member of the Paper Merchant Association. The bills/invoices issued by the claimant have been duly received and acknowledged by the defendants. The claimant and defendants are working together since 1996 and the opposite party has made payment against the supplies made by the claimant prior to the arising of the present controversy. From 1996 when the business dealings were started the claimant and defendants were duly placing orders and were receiving goods and was making the payments. The bills issued were having arbitration clause as per which this Arbitrator has got power to adjudicate the dispute. The rates and terms mentioned on all the bills have been acknowledged and accepted by the defendants. The statements of accounts have been signed by the Director and confirmed by the defendants. The Debit Notes for interest issued by the claimant were accepted and the required TDS was deducted and TDS certificates were issued. The defendants have never made any objection with regard to the bills, rates and terms or the adjudication of the dispute by this tribunal, thus, it can be easily said that defendants have nothing to say in their defence....."

11 The Delhi High Court also make a reference to the decision of the Apex Court in case of *MTNL vs. Canara Bank, Civil Appeal 6202-6205 of 2019*, where the existence of a valid arbitration agreement, came to be reiterated in the following words:-

> 9.2. The arbitration agreement need not be in any particular form. What is required to be ascertained is the intention of the parties to settle their disputes through arbitration. The essential elements or attributes of an arbitration agreement is the agreement to refer their disputes or differences to arbitration, which is expressly or impliedly spelt out from a clause in an agreement, separate agreement, or documents/correspondence exchanged between the parties.
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> 9.3. Section 7(4)(b) of the 1996 Act, states that an arbitration agreement can be derived from exchange of letters, telex, telegram or other means of communication, including through electronic means.
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> The 2015 Amendment Act inserted the words "including communication through electronic means" in Section 7(4)(b). If it can prima facie be shown that parties are ad idem, even though the other party may not have signed a formal contract, it cannot absolve him from the liability under the agreement.
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> 9.4. Arbitration agreements are to be construed according to the general principles of construction of statutes, statutory instruments, and other contractual documents. The intention of the parties must be inferred from the terms of the contract, conduct of the parties, and correspondence exchanged, to ascertain the existence of a binding contract between the parties. If the documents on record show that the parties were ad idem, and had actually reached an agreement upon all material terms, then it would be construed to be a binding contract.
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> The meaning of a contract must be gathered by adopting a common sense approach, and must not be allowed to be thwarted by a pedantic and legalistic interpretation.

> 9.5. A commercial document has to be interpreted in such a manner so as to give effect to the agreement, rather than to invalidate it. An „arbitration agreement‟ is a commercial document inter partes, and must be interpreted so as to give effect to the intention of the parties, rather than to invalidate it on technicalities."

By relying upon the aforesaid observation, the Delhi High Court with reference to the tax invoices raised against which the payments were made, held that it amounted to an arbitration clause, particularly when the petitioner has not disputed receipt of the tax invoices. Holding that the respondent cannot disown the clear stipulation in the tax invoice with regard to any dispute being referred to arbitration, an arbitrator came to be appointed.

12 A single Judge of this Court (Justice G.S. Kulkarni) on 30/8/2022 in case of *Ingram Micro India Pvt. Ltd vs. Mohit Raghuram Hegde, Proprietor Creative Infotech (Commercial Arbitration Application No.235/2021*) was dealing with a purported arbitration clause contained in the sale terms and conditions accepted by the respondent, being available on it's website and a specific contention, that the arbitration clause is contained in the invoices raised by the applicant upon the respondent, which are accepted and acted upon. The applicant contended before the Court that in pursuance of acceptance of such conditions which are uniformly applicable to all the customers of the applicant, the respondent entered into regular dealings and accordingly, from time to time, purchase orders were

placed by the respondent for supply of products as specifically set out in the purchase orders. The applicant also contended that these purchase orders were required to be executed as per the terms and conditions as accepted by the respondent which contained an arbitration agreement where the parties agreed to the jurisdiction clause.

Dealing with such a clause where the dispute had arisen under the unpaid invoices which have been received, acknowledged and acted upon by the respondent, which contained the terms of supply and also a process for being referred to arbitration, reliance was placed upon the decision of the Delhi High Court in *Scholar Publishing House Pvt.Ltd vs. M/s.Khanna Traders, ILR (2013) V Delhi 3343* and the Supreme Court in *Inox Wind Ltd. Vs. Thermocables Ltd, in Civil Appeal No.19 of 2018 (Arising out of SLP (Civil) No.31049 of 2016*.

13 After analysing the factual situation, in the backdrop of the decision of the Apex Court in case of Inox Wind Limited vs. Thermocables Ltd (supra), where the Supreme court had held that a general reference to a standard form of contract by one party will suffice for incorporation of arbitration clause, and where the purchase order mention that supply would be as per terms, mentioned therein, contained in standard terms and conditions, which contain arbitration clause, which was not disputed. The Supreme Court had set aside the High Court's order appointing the Tribunal. After making reference to the

scope of the powers to be discharged by this Court u/s.11(6) read with sub-section 6-A, the learned Single Judge has observed as under :-

> "Applying such principles the endeavour of the Court would be to examine whether an arbitration agreement exists between the parties. It is quite clear to me and as noted above, that there is sufficient documentary material to discern that there exists an arbitration agreement between the parties, namely, that the respondent subscribing to the KYC and agreeing to the "terms and conditions of sales" on the website of the applicant to be the pre-condition for any transaction with the applicant can be entered. It also appears to be quite clear that the parties, on such terms and conditions were having business transactions for a substantial period of time. Further in discharge of its contractual obligations, the respondent had issued a cheque of Rs.2,48,40,003/- in favour of the applicant which came to be dishonoured. There is no dispute in regard to such cheque being issued by the respondent, as to whether the cheque was issued under the invoices in question or otherwise is a subject matter of evidence in the adjudicatory process. It also clearly appears from the grounds as raised by the respondent in filing an appeal against the order dated 29 July, 2021 passed by the co-ordinate Bench of this Court in Commercial Arbitration Petition No. 409 of 2021 (supra), that it is not the respondent's case that there "does not exist" an arbitration agreement between the parties, when the learned Single Judge in paragraph 2 of the order has clearly observed that the invoices raised by the petitioner on its face provides for arbitration, so also the terms and conditions printed overleaf on the invoice provides that the Courts in Mumbai shall have exclusive jurisdiction.

14 Another decision upon which Mr.Kamat has laid his hands is, in case of *Skanska Cementation India Ltd Vs. Bajranglal*

Agrawal, 2002 SCC Online Bom, 1190, decided on 13/12/2002. The facts involved as narrated in the petition would reveal that the petitioners had placed purchase orders on the respondents and the dispute arose as regards the balance unpaid amount and the interest thereon. The petitioners contended that there was no Arbitration clause in the purchase order and when the respondent supplied the goods, it amounted to a contract which had come into force and it was invoked by the provisions of the terms and conditions of the purchase order, which contemplate that in case of any dispute, the decision of the Company shall be final and binding. Merely because the petitioners have signed some documents before the Arbitral Tribunal, was argued, not to confer jurisdiction on the Tribunal. Para-6 prefaces the background and in para-8, on analyzing the factual scenario, the discussion focus upon whether there existed an arbitration agreement. I deem it expedient to reproduce the same.

> "8 The main contention as raised on behalf of the petitioners is based on Clauses 1, 10 and 11 of the purchase order. The purchase order by itself would not be a contract between the parties. It is only on accepting the terms of the purchase order would a contract come into being. Clause 1 of the purchase order does provide that execution of this order shall be deemed to be acceptance of the conditions stated hereinabove. Clause 11 of the purchase order provided that the respondents could draw attention of the company to conditions which they find unacceptable. By the terms contained in the delivery challan the petitioner-company is deemed to have been informed that the

condition that their decision was final was not acceptable and that the dispute if any should be referred to Arbitration of the Bharat Chamber of Commerce. As such even though the purchase order was received, the respondents did not accept the purchase order and drew the attention of the company that the term of resolving the dispute was not acceptable by sending the goods under delivery challan which contained Clauses 4 and 7. Clause 4 made it clear, that it is in the nature of counter offer by the respondents to the petitioners for accepting the goods. In other words the respondents had not agreed to Clause 10 of the purchase order. Even otherwise considering Clause 11 the respondent had specifically informed the petitioners that they were sending the goods under the delivery challan with a different condition. The petitioners accepted the goods under the challan without protest. As such pursuant to the counter offer or counter proposal the terms of the delivery stood amended even considering Clause 11 of the purchase order and accordingly the contract apart from the terms and conditions of the purchase order which were agreed by the parties would contain additional terms under which the goods were dispatched and accepted by the petitioners. The petitioners also sent invoices. Under the invoices again there was an Arbitral clause. The invoices were accepted, money paid under the invoices without protest. To my mind, therefore, the contract between the parties clearly contemplated a provision for Arbitration, The order dated 1st August, 2001 of the Arbitral Tribunal has taken into account these terms in the delivery challan. To my mind, therefore, the issue having been in issue before the Arbitral Tribunal and the tribunal having taken decision, which it was capable of taking considering the construction of the terms the said view cannot be said to be a view impossible of being taken.

15 Since in the present case, it can be clearly seen that the parties have acted upon the invoices and there was no denial of the invoices raised by the applicant, the clause contained in the invoices which clearly stipulate a reference to arbitration, deserve to be construed as an arbitration clause. The decision of this Court in case of Concrete Additives (supra) is delivered in the peculiar facts of the case and the law being well crystallized to the effect that any document in writing exchanged between the parties which provide a record of the agreement and in respect of which there is no denial by the other side, would squarely fall within the ambit of Section 7 of the Arbitration and Conciliation Act, 1996 and would amount to an arbitration clause. The objection raised by the respondent thus stand overruled and by accepting that the clause contained in the tax invoice amount to an arbitration clause, I am persuaded to exercise the powers under sub-section 6 of Section 11 of the Act and pass the following order :

TERMS OF APPOINTMENT

(a) **Appointment of Arbitrator** : Justice Akil Kureshi (Retired Chief Justice), having office at 617, Raheja Chambers, Nariman Point, Mumbai, and email address as akil.kureshi@gmail.com, is hereby appointed as a Sole Arbitrator to decide the disputes and differences between the parties under the documents referred to above.

(b) **Communication to Arbitrator of this order :-**

(i) A copy of this order will be communicated to the learned Sole Arbitrator by the Advocates for the applicant/ petitioner within one week from the date this order is uploaded.

(c) **Disclosure :** The learned Arbitrator, within a period of 15 days before entering the arbitration reference, shall forward a statement of disclosure as per the requirement of Section 11(8) read with Section 12(1) of the Arbitration and Conciliation Act, 1996, to the Prothonotary & Senior Master of this Court, to be placed on record of this application, with a copy to be forwarded to both the parties.

(d) **Appearance before the Arbitrator** : The parties shall appear before the Sole Arbitrator within a period of two weeks from today and the learned Arbitrator shall fix up a first date of hearing in the week commencing from 07/1/2023. The Arbitral Tribunal shall give all further directions with reference to the arbitration and also as to how it is to proceed.

(e) **Contact and communication information of the parties :** Contact and communication particulars are to be provided by both sides to the learned Sole Arbitrator. This information shall include a valid and functional E-mail address as well as mobile numbers of the parties, participating in the process as well as of the Advocates.

(f) **Section 16 application :** The respondent is at liberty to raise all questions of jurisdiction within the meaning of section 16 of the Arbitration Act. All contentions are left open.

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(g) **Fees :** The Arbitrator shall be entitled to fees prescribed under Rules 2018 and the Arbitral costs and fees of the Arbitrator shall be borne by the parties in equal portion and shall be subject to the final Award that may be passed by the Tribunal.

(h) **Venue and seat of Arbitration** : Parties agree that the venue and seat of the arbitration will be in Mumbai.

(i) **Procedure :** These directions are not in derogation of the powers of the learned Sole Arbitrator to decide and frame all matters of procedure in arbitration.

All right and contentions of the parties are kept open.

16 Upon appointment of Arbitrator to adjudicate the disputes between the parties, the Petition filed under Section 9 of the Act is permitted to be converted into Application u/s.17 of the Act, before the learned Arbitrator, who is requested to take it for consideration at the earliest.

Commercial Arbitration Application No.211 and Commercial Arbitration Petition (L) No.29338/2022 stand disposed off in the aforesaid terms.

(SMT. BHARATI DANGRE, J.)

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