SUPREME COURT OF INDIA

M/s. Unissi (India) Pvt. Ltd.

Vs.

Post Graduate Institute of Medical Education & Research

C.A.No.6039 of 2008

(Tarun Chatterjee and Dalveer Bhandari JJ.)

01.10.2008

JUDGMENT

Tarun Chatterjee, J.

1. Delay in filing this special leave petition is condoned.

2. Leave granted.

3. This appeal is directed against the Judgment and order dated 3rd of August, 2005 in Arbitration Case No. 45 of 2004 passed by the Additional District Judge, Chandigarh, dismissing the application filed by the appellant for appointment of an Arbitrator on the ground that no Arbitration Clause was in existence between the parties.

4. The brief facts leading to the filing of this appeal may be summarized as under :- A tender was floated by the Post Graduate Institute of Medical Education and Research (in short, "the PGI") on 21st of December, 2000 for the purchase of Pulse Oxymeters, the format of which contained an arbitration clause. The appellant gave an offer for the tender on 15th of January, 2001, which was accepted by the PGI. Purchase orders were placed and in compliance with the said order, the appellant had supplied equipments. The delivery of equipments was also accepted by the PGI and the machineries were installed. The PGI demanded the execution of an agreement containing an arbitration clause on a non-judicial stamp paper duly signed. The appellant signed the agreement and sent it to the PGI but the signature of the authorities of the PGI was never acquired. It is true that although the appellant duly signed the agreement and sent it to PGI but the signature on the agreement had never reached the appellants. According to the appellant, an agreement containing an arbitration clause was executed between the parties. No payment was made by the PGI against delivery of goods worth Rs. 22,16,853.60 though the equipments were installed and put in use. The PGI, on the other hand, however, forfeited the earnest money of Rs.2,12,160/-, which was encashed by them. Eventually, the PGI got the equipments lifted and it was found by the appellant that the equipments had been mis-handled and were no longer fit to be used/resold in the market. A notice was served on behalf of the appellant of the matter to the PGI but no reply was received. It was the case of the PGI that no agreement was executed. The appellant was

alleged to have committed fraud on the PGI by representing themselves of being the manufacturers of the equipments, which were in fact, according to the PGI, were imported from Korea. A Technical Committee of the PGI on 14th of January, 2003, however, did not approve the purchase and installation of the equipments and thus, by a letter issued in the year 2003, the appellant was informed that the tender was rejected. According to the PGI, the supply, not being in accordance with the specification, was rejected after use and the appellant was debarred from dealing with the PGI for the next two years. Therefore, it was alleged by the PGI that no arbitration agreement was executed between the parties and, therefore, question of appointing an Arbitrator in the present case could not arise at all.

5. Finding no other alternative, the appellant filed an application before the Additional District Court at Chandigarh under Section 11(4) (a) of the *Arbitration and Conciliation Act, 1996* (in short, "the Act") for a direction upon the PGI to appoint an Arbitrator. The Additional District Judge, Chandigarh, by the impugned order dated 3rd of August, 2005, held that as there was no agreement executed between the parties, the question of appointing an Arbitrator under the Act could not arise at all. It was held by the learned Addl. District Judge, Chandigarh that since the photocopy of the proposed agreement bears the signature of only the appellant and not that of the PGI, it could not be held that an arbitration agreement was executed between the parties and since there was no signature of the PGI on the said agreement, which was sent after signature of the appellant, remained only as an offer. Therefore, according to the learned Additional District Judge, Chandigarh, in the agreement containing an arbitration clause, it could not be held that the appellant was entitled to ask for appointment of an Arbitrator under Section 11 of the Act. It is this order, which is under challenge in this Court, which on grant of leave, was heard in presence of the learned counsel for the parties.

6. This special leave petition, as initially filed, came up for consideration for admission on 9th of May, 2006 when a question arose whether the said special leave petition was maintainable in this court against an order of the Additional District Judge, Chandigarh purported to have acted in the exercise of its power under Section 11 (4)(a) of the Act. While issuing notice, this Court passed the following order:-

"This special leave petition has been filed by the petitioner against the order dated 3.8.2005 passed by the Addl. District Judge, Chandigarh in Arbitration Case No.45 dated 2.6.2004. According to the learned counsel for the petitioner, the special leave petition is maintainable in view of the recent judgment of the *Constitution Bench in SBP & Co. vs. Patel Engineering Ltd. & Anr.*[1]. In this regard, he invited our attention to paragraph 47 sub-clause (vii), (x) and (xi). In our view, there is a clear indication in the said judgment that against the order passed by the Additional District Judge, the special leave petition under Article 136 of the Constitution of India is entertainable by this Court. (emphasis supplied) We, therefore, issue notice to the respondent on the question of maintainability of the special leave petition in this Court against the order passed by the Additional District Judge, Chandigarh. Issue notice on the application for condonation of delay also."

7. On a plain reading of this order passed by this Court on 9th of May, 2006, it is evident that this Court was of the view that an application under Article 136 of the Constitution was maintainable against an order passed by the Additional District Judge, Chandigarh. Furthermore, the learned counsel appearing for the parties have also argued the case before us on merits, that is to say, on the question whether an arbitration agreement exists between the parties for which an Arbitrator could be appointed. Such being the stand taken by the learned counsel for the parties and in view of the aforesaid order passed by this Court, we do not intend to go into the question whether a petition under Article 136 of the Constitution would at all be entertainable by this Court as the Special Leave petition was entertained and notice was issued. However, keeping this question open for decision in an appropriate case, we would like to go into the merits of the case, that is to say, whether an Arbitrator can be appointed in view of existence of an arbitration agreement between the parties, although in such agreement the PGI had not executed agreement by putting their signature on the same.

8. In view of the aforesaid stand being taken by the learned counsel for the parties, let us now examine the merits of this appeal. As noted herein earlier, the learned Additional District Judge, Chandigarh held that their did not exist any arbitration agreement between the parties and, therefore, question of appointing an Arbitrator could not arise at all. Therefore, in order to decide whether the order of the Additional District Judge was correct or not, we have to consider the relevant facts as well as Section 7 of the Act for the purpose of coming to a proper conclusion whether the agreement containing an arbitration clause did exist between the parties or not. Before we proceed further, we may examine Section 7 of the Act which runs as under :

> "Section 7 - Arbitration agreement
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> (1) In this Part, "arbitration agreement" means 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 legal relationship, whether contractual or not.
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> (2) An arbitration agreement may be in the form of an arbitration clause in a contract or in the form of a separate agreement.
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> (3) An arbitration agreement shall be in writing.
>
> (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.

(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."

9. We have carefully examined the provisions made under Section 7 of the Act which deals with arbitration agreement. In *Smita Conductors Ltd. vs. Euro Alloys Ltd.*[2], Article II Para 2 of New York Convention came up for consideration before this Court. The provisions of Article II, Para 2 of New York Convention is in pari materia to the aforequoted provisions of Section 7 of the Act. The provision of Article II, Para 2 of New York Convention is being quoted herein now. Para 2 runs as under:-

"Para 2 - The term "agreement in writing" shall include an arbitral clause in a contract or an arbitration agreement, signed by the parties or contained in an exchange of letters or telegrams."

10. This Court, while interpreting the aforequoted para 2 in the New York Convention held in para 6 at pages 734-735 in Smita Conductors (supra) the following: -

"6. What needs to be understood in this context is that the agreement to submit to arbitration must be in writing. What is an agreement in writing is explained by para 2 of Article II. If we break down para 2 into elementary parts, it consists of four aspects. It includes an arbitral clause (1) in a contract containing an arbitration clause signed by the parties, (2) an arbitration agreement signed by the parties, (3) an arbitral clause in a contract contained in exchange of letters or telegrams, and (4) an arbitral agreement contained in exchange of letters or telegrams. If an arbitration clause falls in any one of these four categories, it must be treated as an agreement in writing. In the present case, we may advert to the fact that there is no letter or telegram confirming the contract as such but there is certain correspondence which indicates a reference to the contract in opening the letters of credit addressed to the Bank to which we shall presently refer to. There is no correspondence between the parties either disagreeing with the terms of the contract or arbitration clause. Apart from opening the letters of credit pursuant to the two contracts, the appellant also addressed a telex message on 23.4.1990 in which there is a reference to two contracts bearing Nos. S.142 and S. 336 in which they stated that they want to invoke force majeure and the arbitration clauses in both the contracts which are set forth successively and thus it is clear that the appellant had these contracts in mind while opening the letters of credit in the bank and in addressing the letters to the bank in this regard. May be, the appellant may not have addressed letters to the respondent in this regard but once they state that they are acting in respect of the contracts pursuant to which letters of credit had been opened and they are invoking the force majeure clause in these two contracts, it obviously means that they had in mind only these two contracts which stood affirmed by reason of these letters of credit. If the two contracts stood affirmed by reason of their conduct as indicated in the letters exchanged, it must be held that there is an agreement in writing between the parties in this regard."

11. Again in *Nimet Resources Inc. vs. Essar Steels Ltd.*[3] at Para 5], this Court observed as follows:-

> "If the contract is in writing and the reference is made to a document containing arbitration clause as part of the transaction, which would mean that the arbitration agreement is part of the contract. Therefore, in a matter where there has been some transaction between the parties and the existence of the arbitration agreement is in challenge, the proper course for the parties is to thrash out such question under Section 16 of the Act and not under Section 11 of the Act."

12. Keeping the aforesaid principles, as quoted hereinabove, in the aforesaid decisions of this Court in kind, in fact what constitutes an arbitration agreement between the parties, we have to examine whether there exists an arbitration agreement between the parties or not in the facts and circumstances of the case. Let us, therefore, consider the gist of the facts involved in this case. A tender enquiry No.2PGI/OGL/2K/6281 dated 21.12.2000 for purchase of Pulse Oxymeters was floated by the PGI. It is an admitted position that the appellant submitted their tender vide their offer No.UIPL/331177/00-01 dated 15.2.2001. The tender of the appellant was accepted by the PGI vide their letter No.PGI/P-61/02/477/11936-51 dated 29.9.2002 for supplying 41 Pulse Oxymeters to their different departments. The tender documents itself contain an arbitration clause and by reason of acceptance of the tender of the appellant by the PGI, it must be held that there was a valid arbitration agreement between the parties. The appellant supplied 41 Pulse Oxymeters and the receipt thereof was duly acknowledged on behalf of the PGI on the delivery challans. The service/installation reports of the aforesaid machines were duly signed on behalf of the PGI. In the letters issued by the PGI, there was an apparent acknowledgement of supply of the aforesaid meters by the appellant and also reference to the aforementioned tender enquiry number. It is an admitted position that the appellant had sent the agreement containing the arbitration clause, as per the format provided by the PGI, after duly signing the same on requisite value of stamp paper for signing of the same by the PGI. The PGI though admittedly received the same, did not send back the agreement to the appellant after signing it as per the agreement between the parties. The PGI admittedly had used the machines for about an year and thereafter returned the same to the appellant. Subsequently, the bank guarantee furnished by the appellant for Rs.2,13,160/- and the earnest money deposit of Rs.45,000/- was encashed and forfeited by the PGI.
In view of the aforesaid facts and the correspondences between the parties, particularly the tender offer made by the appellant dated 15.1.2001 and supply order of the PGI dated 29.9.2002, and, in our view, to constitute an arbitration agreement between the parties and the action taken on behalf of the appellant and in view of Section 7 of the Act and considering the principles laid down by the aforesaid two decisions of this Court, as noted herein earlier, we are of the view that the arbitration agreement did exist and therefore the matter should be referred to an Arbitrator for decision. That apart, as we have already noted herein earlier that in this case, the documents on record, in our view, apparently show supply of materials by the appellant and acceptance thereof by the PGI in pursuance of the tender

enquiry by the PGI, wherein tender of the appellant containing an arbitration clause was admittedly accepted by the respondent. In that view of the matter, it cannot be said that the PGI should now be allowed to wriggle out from the arbitration agreement between them.

13. We may reiterate that in this case admittedly the documents which are on record apparently show supply of the material by the appellant to the PGI and acceptance thereof by the PGI in pursuance of the tender enquiry by them wherein tender of the appellant containing the arbitration clause was admittedly accepted by the PGI. Accordingly, we hold that arbitration agreement did exist and, therefore, dispute between the parties would be referred to an Arbitrator for decision.

14. Therefore, considering the above aspects of the matter in this case, we must come to this conclusion that although no formal agreement was executed, the tender documents indicating certain conditions of contract contained an arbitration clause. It is also an admitted position that the appellant gave his tender offer which was accepted and the appellant acted upon it. Accordingly, we are of the view that the learned Additional District Judge, Chandigarh erred in holding that their did not exist any arbitration agreement between the parties and, therefore, the order passed by him is liable to be set aside.

15. For the reasons aforesaid, the impugned order is set aside and the appeal is allowed. We now direct that the matter may be placed before the Hon'ble Chief Justice of the High Court of Chandigarh to appoint an Arbitrator in accordance with law to resolve the dispute between the parties. The appeal is thus allowed. There will be no order as to costs.

[1]*(2005) 8 SCC 618*
[2]*2001 (7) SCC 728*
[3]*2000 (7) SCC 497*