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

% *Date of Decision: 15.11.2022*

+ **FAO (COMM) 169/2022 and CM Nos.48962/2022 & 48963/2022**

M/S HETAMPURIA TAX FAB Appellant
Through: Mr. Sanjeev Goyal & Mr.
Chaitannya Poonia, Advocates.

Versus

M/S DAKSH ENTERPRISES Respondent
Through: None.

CORAM:
HON'BLE MR. JUSTICE VIBHU BAKHRU
HON'BLE MR. JUSTICE AMIT MAHAJAN

VIBHU BAKHRU, J. (ORAL)

1. The appellant has filed the present appeal under Section 37 of the Arbitration and Conciliation Act, 1996 (hereafter '**the A&C Act**') impugning an order dated 19.07.2022 (hereafter '**the impugned order**') passed by the learned Single Judge. By the impugned order, the learned Commercial Court had allowed the respondent's application under Section 34 of the A&C Act [being **O.M.P. (Comm.) 41/2022** captioned **M/s Daksh Enterprises v. M/s Hetampur Tax Fab**] assailing an arbitral award dated 16.03.2020 (hereafter '**the impugned award**') passed by an Arbitral Tribunal comprising of three members constituted by Delhi Hindustani Mercantile Association (Registered),

Chandni Chowk, Delhi (Panel-II).

2. The respondent had challenged the impugned award on various grounds including that it was wholly without jurisdiction as there was no Arbitration Agreement between the parties. The learned Commercial Court had accepted the aforesaid contention and accordingly, set aside the impugned award.

3. The appellant claims that an Arbitration Agreement existed between the parties as both the invoices issued and the delivery of goods receipt (hereafter “**Delivery Challan**”) expressly provided that the dispute shall be resolved by arbitration. The learned Commercial Court had found that a clause set out in the Delivery Challan would not, in the given facts, constitute an Arbitration Agreement between the parties. Thus, the limited question to be addressed is whether the learned Commercial Court could be faulted in returning the said finding.

4. The appellant, Mr. Amit Aggarwal, is a sole proprietor of M/s Hetampur Tax Fab. He is, *inter alia*, engaged in the business of sale and supply of fabrics/shirts/textiles material under the name and style of his proprietorship concern (M/s Hetampur Tax Fab). The appellant claims that during the course of his business, he had supplied goods to the respondent under various invoices and *challans*. He claims that the invoices raised contained the terms of the contract of sale between the parties and specifically referred to an Arbitration Agreement.

5. He claims that during the year 2016-17, he had supplied goods of a value of ₹19,42,618/- under various invoices, the last being dated

01.10.2016. The respondent had received the goods in good condition, however, had failed to discharge the invoiced amounts in entirety. He claims that against the goods supplied, the appellant had received a sum of ₹12,74,200/- and the remaining amount of ₹6,68,518/- remained unpaid. The appellant's claim before the Arbitral Tribunal was, essentially, for the balance amount of ₹6,68,518/-, which according to the petitioner, was due and payable and interest at the rate of 24% per annum which the petitioner quantified at ₹3,60,999/- till 30.07.2019.

6. The invoices raised by the appellant included the following notation on the bottom left corner of the invoice:

“Declaration

(1). Subject to DELHI HINDUSTANI MERCANTILE ASSOCIATION delhi jurisdiction. (2). Sold and dispatched goods will not be taken back. (3) Payment should be made by payees accounts cheque or draft only. (4). Interest will be charged @ 24% after due date. (5). No complaint will be accepted once the goods are out. (6). No washing guarantee

For Hetampuriah Tex Fab
S/d
Authorised Signatory”

7. It is *ex facie* clear that the above notation cannot be considered as an Arbitration Agreement. There is no statement that the parties had agreed that the disputes would be referred to arbitration, or to accept that the arbitral award as final and binding. The statement, “*subject to Delhi Hindustani Mercantile Association delhi jurisdiction*” cannot be construed an agreement to refer the disputes to arbitration.

8. The Delivery Challan, includes a statement at the bottom, which reads as: “*Any Dispute whatsoever arising out of this transaction will be settled as per rules of Delhi Hindustani Mercantile Association Delhi, and the award of the arbitrator appointed by the said association*

will be final and binding upon the parties.”

9. It is material to note that after the aforesaid clause, there is dotted line that separates the text below the line. The said text is reproduced below:

“This is Certified that the goods purchased from M/s. HETAMPURIA
TEX FAB, 1, bagh Diwar (Shop No.6), Fatehpuri, Delhi-6 Under their
Bill No. In good condition.

Dated.....

Signature”

10. The appellant claims that since the respondent had signed the Delivery Challan, he had also accepted the arbitration clause. This contention is unmerited. A plain view of the Delivery Challan indicates that the signature has been appended below the statement to the effect that the goods have been received in good condition. It is apparent that the signatures relate to the said certification. It is well settled that a unilateral document issued by a party cannot, absent anything more, be construed as a binding arbitration agreement.

11. Section 7 of the A&C Act defines an Arbitration Agreement. The said Section is set out below:

“7. Arbitration agreement.—(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.

(2) An arbitration agreement may be in the form of an arbitration clause in a contract or in the form of a separate agreement.

(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 including communication through electronic means 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.”

12. Sub-section (3) of Section 7 of the A&C Act expressly provides that an arbitration agreement shall be in writing. According to the appellant, the said condition is satisfied as the arbitration clause is set out in the Delivery Challan. There is no dispute that the clause has been set out in writing. However, this Court is unable to accept that the same was agreed to by the respondent. In order to constitute an agreement, there must be a consensus between the parties. This Court is unable to accept that the arbitration agreement had come into existence by the appellant unilaterally issuing a Delivery Challan and the respondent accepting delivery of the goods. As noted above, the respondent had accepted the goods and had signed the Delivery Challan indicating such

acceptance. However, the same cannot be construed as appending the signatures to the arbitration agreement or agreeing to the arbitration clause as set out in the Delivery Challan.

13. In terms of Section 7(4) of the A&C Act, an arbitration agreement may also be contained in exchange of letters, telex, telegrams and other means of telecommunication, which provide a record of the agreement. It can also be discerned by an exchange of the statement of claims and defence in which the arbitration clause is asserted by one party and not denied by the other. However, it is essential for the Court to find that the parties were *ad idem* for referring the disputes to arbitration.

14. In the present case, there is no contemporaneous material to indicate that the parties had agreed that the disputes would be referred to arbitration. The appellant merely relies on the invoices and the Delivery Challan. As stated above, the invoice does not record any arbitration agreement. The Delivery *Challan* is a unilateral document, which is issued for the purposes of recording the delivery of goods. As an instrument, it does not embody the terms of the contract between the parties. Thus, unilaterally including a clause in the printed Delivery Challan would not constitute an agreement between the parties merely because the counter party had accepted the delivery of the goods.

15. Mr Goyal, learned counsel for the appellant referred to the decision of the Division Bench of this Court in ***Scholar Publishing House Pvt. Ltd. v. Khanna Traders: ILR (2013) V Delhi 3343*** and on

the strength of the said decision contended that there was no specified form for an arbitration agreement. And, an arbitration agreement could also be recorded on an invoice.

16. There is no cavil with the proposition that there is no particular form of agreement or document, that is, required to be executed for an agreement to be construed as an arbitration agreement within the meaning of Section 7 of the A&C Act. It is possible to infer the existence of an arbitration agreement even through a series of correspondence exchanged between the parties. The question whether there exists an arbitration agreement between the parties would necessarily have to be construed by reference of facts of each case. In **Scholar Publishing House Pvt. Ltd. v. Khanna Traders** (*supra*), the Court found that there was extensive material, which indicated that an arbitration agreement existed between the parties. The Court had also noted that disputed invoices were not the only documents, which contained the stipulation to refer the disputes to arbitration.

17. However, in the facts of the present case, there is no material apart from a printed clause in the Delivery Challan indicating that any dispute would be referred to arbitration. As stated above, this Court is unable to accept that the respondent had agreed to the said stipulation by accepting the delivery of goods.

18. Mr. Sanjeev Goyal, also referred to the decision of the learned Single Judge of this Court in **Newsprint Sales Corporation v. The Daily Pratap: CS(OS) 2630-A of 1992 dated 01.09.2006**. He had submitted

that one of the reasons which persuaded the Court to hold that an arbitration agreement did not exist between the parties was that no such condition was mentioned in the delivery challans. He submitted that since in the present case, such a condition was mentioned on the Delivery Challan, the present case would fall within the exception as set out in the said case. He contended that, therefore, the impugned judgement, which holds otherwise is erroneous. The relevant observations made in the *Newsprint Sales Corporation v. The Daily Pratap* (*supra*) are set out below:

“32. None of the delivery challans refers that the supply made is on the condition that the disputes, if any, would be referred to the arbitration of an arbitrator appointed by the Paper Merchants Association (Regd.).

33. It is a case where pursuant to an oral contract where goods were delivered, post delivery, bills have been raised and in the said bills, referred to as debit memo, terms have been printed, one of which being the term, that disputes would be referred for sole arbitration.

34. Parties have to be ad idem on material terms of the contract when they enter into a contract and not post execution of the contract, unless of course, at the post execution stage, parties agree on certain terms to vary or modify terms of the contract.

35. Petitioner has not brought any material on record to show that before or at the time of effecting supply, it had made known to the respondent that delivery would be on a term that dispute, if any, would be referred to arbitration in terms of the rules and regulations or bye laws of the Paper Merchants Association. In that view of the matter, the inevitable conclusion is that the respondent objector cannot

be bound by the arbitration clause contained in the bye laws of the Paper Merchant Association for the reason parties were not *ad idem* that dispute would be referred to an arbitrator to be nominated by the Paper Merchants Association.”

19. Mr. Goyal, learned counsel for the appellant, relies heavily on the observations made in paragraph 32 of the decision in ***Newsprint Sales Corporation v. The Daily Pratap*** (*supra*). It is apparent that the observations made in paragraph 32 cannot be read in isolation. The Court had also observed that the parties were *ad idem* on material terms. The question whether the facts indicate that the parties had agreed to refer to arbitration would necessarily have to be determined in the factual context of each case. The conduct of the parties is also relevant.

20. The decision in ***Newsprint Sales Corporation*** (*supra*) is of little assistance to the appellant in the given facts of the case. In that case the court had emphasized that the parties must be *ad idem* on the material terms of the contract. According to the appellant, he had supplied goods on the respondent requisitioning the same. Admittedly, the requisitions did not contain any stipulation that the disputes would be referred to arbitration. The appellant had raised invoices on the basis of the price of the goods; but that too did not include any such stipulation to the effect that the disputes would be referred to arbitration. In this view of the matter, the inescapable conclusion is that the respondent is not bound by the arbitration clause in the pre-printed Delivery Challan.

21. In ***Priknit Retails Ltd. and Others v. Aneja Agencies: 2018 SCC***

OnLine Del 13424, this Court had allowed the petitioner's application under Section 34 of the A&C Act and had set aside an arbitral award delivered by an Arbitral Tribunal of three Arbitrators (Panel No.-I of Delhi Hindustani Mercantile Association). In that case, the respondent also had relied upon an arbitration clause as printed on the invoices. In the said context, the Court had observed that merely because delivery of the goods had been accepted, it would not imply that the petitioner had agreed to the arbitration clause as stated in the invoice.

22. We find no ground to fault the decision of the learned Commercial Court. The appeal is unmerited and, accordingly, dismissed. All pending applications are also disposed of.

VIBHU BAKHRU, J

AMIT MAHAJAN, J

**NOVEMBER 15, 2022
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