Vidya Amin

# IN THE HIGH COURT OF JUDICATURE AT BOMBAY
# ORDINARY ORIGINAL CIVIL JURISDICTION

## COMMERCIAL ARBITRATION APPLICATION NO. 235 OF 2021

Ingram Micro India Pvt. Ltd. .. Applicant
Vs.
Mohit Raghuram Hegde
Proprietor Creative Infotech .. Respondent

Mr. Kedar Wagle a/w. Sagar Wagle i/b. Riddhi A. Pandit for the applicant.
Mr. Nishant Sasidhar a/w. Viral Thakur i/b. L.J. Law for the respondent.

CORAM : G.S. KULKARNI, J.
RESERVED ON : JUNE 30, 2022.
PRONOUNCED ON : AUGUST 30, 2022

JUDGMENT.:

1. This is an application filed under section 11 of the Arbitration and Conciliation Act, 1996 (for short, “the Act”) whereby the applicant has prayed for appointment of an arbitral tribunal to adjudicate the disputes and differences between the parties, which have arisen under a Contract for supply *inter alia* of the computer products, communication device etc.

2. The relevant facts are required to be noted:

The applicant has contended that it is a leading distributor of computer products, communication devices and other hardware and software products. It also deals in I.T. related products and services. The respondent is a proprietory concern in the name and style of “Creative Infotech” and is also engaged in the business of IT hardware

and software products. The applicant contends that disputes and differences have arisen between the parties as regards non-payment of applicant's dues under various invoices as issued by the applicant to the respondent. It is in these circumstances, the applicant has invoked arbitration and has prayed for appointment of an arbitral tribunal.

3. It is the applicant's case that the arbitration agreement is contained in the "Sales terms and conditions" as accepted by the respondent which is available on its website www.imonline.co.in, which according to the applicant has been consciously accepted by the respondent. It is contended by the applicant that additionally arbitration clause is contained in the invoices raised by the applicant upon the respondent, which are also stated to have been accepted and acted upon. It is the case of the applicant that a standard business procedure is followed by the applicant in entering into contracts with all its customers like the respondent. It is stated that the respondent accepting such procedure had executed a KYC form as prescribed by the applicant. A copy of such KYC is annexed to the application as Exhibit 'B' under which the respondent has confirmed the acceptance of the enclosed sales terms and conditions by signing the following declaration:

> "I / we hereby confirm acceptance of the enclosed **Sales Terms and Conditions,** I / we hereby further confirm and certify that the information and attachments given herein are true and accurate, and that any subsequent changes would be duly communicated to Ingram Micro by submission of a fresh form alongwith attachments."

4. The Sales terms and conditions are also annexed as Exhibit A, which contain Clause 10 as 'Dispute Resolution Clause' and Clause 11 as 'Jurisdiction Clause', which reads thus:

> 10. **Dispute Resolution:**
>
> In case of disputes if any, company and the customer shall try to resolve the dispute(s) amicably. If the parties are unable to reach any resolution, the matter shall be referred to a sole Arbitrator to be appointed by the company. The sole arbitrator appointed by the company shall be deemed to have been accepted by the Customer and the customer undertakes not to object to such appointment. The order passed by such Arbitrator shall be final and binding on the customer and the same shall be deemed to be accepted by customer. Arbitration shall be held at Mumbai at a venue decided by the company and the proceedings shall be in English.
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> 11. **Court Jurisdiction:**
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> The Courts at Mumbai shall have exclusive jurisdiction to try disputes under this agreement.

5. It is the applicant's contention 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 with the applicant and accordingly, from time to time purchase orders were placed by the respondent on the applicant for supply of products as specifically set out in such purchase orders. According to the applicant these purchase orders were required to be executed as per the sales terms and conditions as accepted by the respondent, which contained an arbitration agreement as noted above, under which the parties also agreed to the jurisdiction clause wherein it was agreed that the Courts at Mumbai were to have exclusive jurisdiction to try the disputes under the agreement. The applicant contends that the purchase orders as placed

by the respondent were duly executed, and in pursuance thereto the applicant had raised invoices on the respondent demanding payment. It is stated that such invoices also contain an arbitration agreement as can be noted at two places. Firstly on the face of the tax invoice, wherein the tax invoice incorporated the Sales Terms and conditions which as noted above contained an arbitration agreement in Clause 10 and secondly in Clause 12 as contained in the Terms and Conditions of the invoices, which reads thus:

> "12. The transaction under this Invoice shall be subject to laws of India and the Courts in Mumbai shall have exclusive jurisdiction. Any dispute pertaining to transaction under this invoice shall be referred to sole arbitrator appointed by IMPL and the decision of the said Arbitrator shall be final and binding on the parties. The Arbitration shall be conducted as per the provisions of Arbitration and Conciliation Act, 1996 and the place of Arbitration shall be in Mumbai, India."

6. The applicant contends that the delivery of the goods was accepted by the respondent without demur qua the quality and quantity, price of goods, etc. Also the invoices which were raised by the applicant upon the respondent were duly accepted by placing the respondent's stamp and signature and have been acted upon by the respondent. It is stated that the respondent in fact made part payment under some of the invoices.

7. It is the case of the applicant that in or around October, 2018, an amount of Rs.2,50,47,586.42/- was outstanding and payable by the respondent to the applicant, after the applicants gave a credit of Rs.2,07,581.76, the balance due from the respondent to the applicant

was Rs. 2,48,40,003/- against the unpaid invoices. The applicant accordingly made repeated demands to the respondent to make payment under such invoices, however, without any result. It is the applicant's case that in such situation, the applicant was constrained to exercise its rights in accordance with the agreed terms of supply as also the applicant was also not bound to honour any further supply to the respondent. In these circumstances, it is stated that the respondent had issued a cheque to the applicant for an amount of Rs.2,48,40,003/- drawn on the Syndicate Bank which was issued in accordance with the agreed terms of supply, being the outstanding amount due and payable (excluding interest as on that date). The applicant deposited the cheque with its banker HDFC bank, however, the cheque was dishonoured for want of funds and hence the amounts have remained unpaid.

8. On the above premise the applicant issued a notice dated 3 June, 2019 to the respondent under section 138 of the Negotiable Instruments Act. Such notice of the applicant was replied by the respondent's letter dated 21 June, 2019. According to the applicant, in its reply the respondent, did not dispute the supply as also the respondent did not dispute issuance of the cheque in question of a substantial amount of Rs.2,48,40,003/-. The applicant has contended that on 26 February, 2020, the respondent addressed an email to the applicant informing of its intention to repay the applicant within a stipulated timeline. The

respondent later alleged that the outstanding amount due to the applicant had been perpetuated by fraud. However, according to the applicant, the respondent did not dispute issuance of cheque and in fact it was never disputed by the respondent as also seen from the respondent's letter dated 21 June, 2019.

9. On 2 March, 2020, the respondent addressed an email to the applicant seeking further supplies from the applicant on upfront payment. The respondent represented to the applicant that it had applied to the bank for a loan which had been partially released, the respondent hence assured the applicant that the outstanding would be cleared in due course. By respondent's further email dated 18 May, 2020 addressed to the applicant, it was informed that the respondent was unable to make payments to the applicant. While admitting that an amount of Rs.2.5 crores was due and payable to the applicant, the respondent requested the applicant to resume supplies, so as to enable the respondent to clear all dues of the applicant. According to the applicant, this would show that there was no dispute on the amounts as payable to the applicant were concerned.

10. It is the applicant's case that in these circumstances and more particularly in view of the unequivocal admission of the respondent coupled with the respondent's inability to clear the amounts due and

payable to the applicant, and apprehending that the respondent may deal with its assets which would cause a serious prejudice to the applicant, the applicant was constrained to approach this Court by filing a petition under section 9 of the Act, seeking interim measures pending the arbitral proceedings. It is stated that the said petition was heard and disposed of by an order dated 29 July, 2021, passed by a co-ordinate Bench of this Court (K.R. Shriram, J.) whereby this Court passed an order interalia restraining the respondent from dealing in any manner, either by way of sale, transfer, alienation, mortgage or otherwise parting with its property or in any other way creating any third party rights in respect of the said property and assets of the respondent. The respondent was also directed to disclose on affidavit, its properties (movable/immovable). The observations as made by this Court, in the said order insofar paragraph 2, are as under:

> "2. Invoices have been raised on Creative Infotech and its sole proprietor is respondent. **Invoices raised by 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 and further states that Arbitrator shall be appointed by petitioner and the Arbitration shall be conducted as per the provisions of the Act. **Therefore, I am satisfied that there is Arbitration Agreement as covered by the invoices.**"
>
> (emphasis added)

11. The applicant has contended that on the backdrop of the said order dated 29 July, 2021 passed by the co-ordinate Bench of this Court, and as mandated under the Act, the applicant by its letter dated 5

August, 2021 addressed to the respondent, invoked the arbitration agreement (arbitration clause) as contained in the terms and the conditions of the invoice. The applicant in such letter called upon the respondent to concur to any one of the names as specified who can be appointed as a sole arbitrator to adjudicate the disputes and differences between the parties. Such notice invoking arbitration is stated to have been served on the respondent on 7 August, 2021. Even otherwise it is stated that in view of the applicant's email dated 5 August, 2021 as addressed to the respondent, the service of notice of invocation was complete. It is the applicant's case that despite the lapse of 30 days from the date of service of notice of invocation, the respondent had not concurred in appointment of a sole arbitrator nor the respondent had raised any objection in that behalf.

12. Insofar as the order dated 29 July, 2021 passed by the coordinate Bench of this Court on the Section 9 proceeding is concerned, the applicant has contended that the respondent filed an appeal against the said order. The Appeal Court by order dated 25 August, 2021, was pleased to continue the said order dated 29 July, 2021, except in so far as the disclosure referred to therein, which was required to be made to the "Court alone" and the respondent was permitted to file a reply. The appeal Court granted liberty to move the learned Single Judge for an early hearing. The relevant extract of the appeal Court's order reads

thus:

> "5. Considering the fact that the concerned Advocate on whose behalf a request was made is suffering from a serious illness as demonstrated before us, we are of the view that an opportunity needs to be granted, in these circumstances, to the Appellant to file their reply. Although we grant this indulgence, we do not deem it necessary to set aside the injunction and the directions in their entirety. According to us, it will meet the ends of justice if the impugned order is treated as an interim order, till the petition is heard and decided by the learned Single Judge upon restoration. As regard the direction to file an affidavit of disclosure is concerned, the Appellant will file an affidavit of disclosure to the Court, without copy to the Respondent at this stage.
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> 6. As a result, we dispose of the Appeal by the following order-
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> **ORDER**
>
> (a) The Arbitration Petition No.409/2021 stands restored to the file of learned Single Judge.
>
> (b) The order passed on 29 July 2021 will be treated as an interim order in the Petition No.409/2021 with the above modifications.
>
> (c) The learned counsel for the Appellant on instructions states that the reply will be filed within a period of two weeks from today. The statement is accepted.
>
> (d) After the reply is filed, as above, it is open to the parties to move the learned Single Judge for a early date.
>
> 7. We make it clear that we have passed the above order only in the above circumstances and it should not be considered as reflection on the merits of the impugned order.
>
> 8. With the disposal of the Appeal, the Interim Application is also disposed of."

13. It is thus the applicant's case that there are subsisting disputes between the parties which are required to be resolved in arbitral adjudication. The disputes are stated to have arisen under the unpaid invoices, which have been received, acknowledged and acted upon by the respondent. It is the applicant's case that the invoice contains the

terms of supply as made to the respondent, as also the Sales terms and conditions under it, provide that all the disputes be resolved through arbitration.

14. The applicant has contended that in the instant case, all efforts of the applicant to settle the disputes amicably have failed and therefore, the applicant was required to move this Court by the present proceedings praying for a sole arbitrator to be appointed, to adjudicate the disputes and difference which have arisen between the parties under the Sales Terms and Conditions.

**Respondent's Reply Affidavit**

15. A reply affidavit has been filed to the present application by the respondent *inter alia* contending that the application is required to be dismissed primarily on the ground that there does not exist an arbitration agreement between the parties. It is contended that the purchase orders and the invoices relied upon by the applicant to plead existence of an arbitration agreement between the parties, are not issued or signed by the respondent. It is stated that the respondent being the sole proprietor had not given any authority to any other person to enter into an arbitration agreement with the applicant. It is next contended that the reliance placed by the applicant on the alleged purchase orders and/or the alleged invoices is also misconceived inasmuch as one of the applicant's employees and two of the employees of respondent have

cheated both the applicant and the respondent by forging and fabricating documents and records to misappropriate goods supplied under the purported purchaser orders and the invoices. It is contended that the respondent never intended and in fact never entered into the transactions as reflected under these documents. It is hence contended that there is no arbitration agreement between the parties and the existence of such arbitration agreement is based on fraud which has no basis in law, as fraud vitiates the alleged contract as also renders the arbitration agreement void. It is contended that this is a case involving serious questions of fraud and therefore the disputes cannot and ought not be referred to arbitration. The respondent has next contended that the subject matter of dispute is non-arbitrable as the respondent has initiated criminal proceedings, by registering FIR No. 421 of 2018 against the applicant's former employee. It is contended that adjudication of such criminal case is vital to determine whether the respondent has entered into the alleged agreement, namely, the purchase order and the invoices. Such adjudication can only be done by Criminal Court and not by private tribunal such as an arbitral tribunal. It is next contended that no cause of action has arisen within the jurisdiction of this Court as the respondent has its address at Bengaluru, also the goods were allegedly supplied at Bengaluru, the purported invoices were allegedly raised at Bengaluru, the alleged payment was

also to be made at Bengaluru, even the alleged purchase orders on the basis of which the goods are alleged to be supplied to the respondent are subject to the exclusive jurisdiction of the Court at Bengaluru and it is for such reason, this Court would not have jurisdiction.

16. It is next contended that the arbitration agreement was invoked on 5 August, 2021, whereas the claim of the applicant was alive upto 2018 and hence the claim is barred by limitation. It is contended that the applicant has not disclosed that the respondent's cheque was deposited by the applicant in the year 2019 which the respondent states that it given as a security deposit in the year 2012 and the applicant's case that it was issued by the respondent to satisfy the applicant's claim under the invoices is thus misconceived and not tenable.

17. It is contended that it was also confirmed by the respondent's bankers that the said cheque of the respondent is from a cheque book which was issued on 5 November, 2012. Paragraphs 5 to 23 of the reply affidavit are contentions of the respondent on merits of the disputes mainly to establish that the claim of the applicant is not maintainable, as the transactions are in reality not the transactions between the applicant and the respondent, but brought about on a cheating by the employees from both the sides. It will be, however, appropriate to note the contents of paragraph 29 of the reply affidavit which deals with the case of the

applicant on the existence of an arbitration agreement as contained in the sales terms and conditions, which reads thus:

> "29. With reference to paragraph nos. 4 to 6 of the application, I deny that the alleged invoices have been allegedly raised or accepted or acknowledged or acted upon by the respondent as alleged or otherwise. I deny that the parties are bound by the Arbitration Clause contained in the "Sales Terms and Conditions" available at www.imonline.com as alleged or otherwise. I deny that the clause contained in the invoice binds the parties to the Arbitration Clause available at www.imonline.com as alleged or otherwise. I deny that the clause contained in the alleged invoices or the alleged invoices have been allegedly accepted or allegedly acted upon by the respondent. I deny that the contract between the parties as available at www.imonline.com is concluded and the parties are bound by the same as alleged or otherwise. I deny that the transactions between the parties have continued without any demur as regards the terms and conditions mentioned and reproduced as alleged or otherwise."

18. In paragraph 30 of the reply the respondent has denied having signed the KYC and having placed the purchase orders on the applicant for supply of the products. This is the defence of the respondent to the applicant's case.

## Applicant's Rejoinder Affidavit

19. There is a rejoinder affidavit filed on behalf of the applicant denying the contentions as urged on behalf of the respondent in the reply affidavit and reiterating the contentions as urged in the memo of the Section 11 application to contend, that KYC form along with Clause 10 as contained in the "terms and conditions of the sales", constitute an arbitration agreement between the parties as also the arbitration clause as contained in the invoices.

**Submissions on behalf of the Petitioner**

20. Mr. Wagle, learned counsel for the applicant has contended that there is clearly an arbitration agreement between the parties as contained in the "terms and conditions of sales" which forms part of the KYC and which was duly accepted by the respondent as seen from the declaration as signed by the respondent thereby agreeing to the Sales Terms and Conditions. It is his contention that an arbitration agreement between the parties is also explicit in Clause 12 of the terms and conditions of the invoice, which according to Mr.Wagle is not only accepted by the respondent but fully acted upon. Mr.Wagle would submit that the supplies as made by the applicant to the respondent were accepted by the respondent and accordingly the invoice amounts had become due and payable. It is his submission that the respondent have acknowledged his liability to pay the amounts due and payable to the applicant under the invoices by issuing a cheque dated 16 May, 2019 in favour of the applicant for a amount of Rs.2,48,40,003/-which came to be dishonoured. It is his submission that the defence as taken by the respondent is totally untenable and in any event such contentions can only form subject matter of defence before the arbitral tribunal, to be ascertained on evidence. It is his submission that it is for the arbitral tribunal to consider the evidence on such issues, so as to ascertain

whether the stand of the respondent in denying the liability is correct. Mr. Wagle has submitted that it is quite clear on record, that there is no dispute in respect of the invoices and the terms and conditions as contained therein as also the Sales Terms and Conditions which forms part of the KYC. Mr. Wagle has also referred to the order dated 29 July, 2021 passed by the co-ordinate Bench of this Court on the Section 9 proceeding as filed by the applicant as also the order of the Appeal Court (as noted above), to contend that even, in the Section 9 proceedings the Court has recorded that there exists an arbitration agreement between the parties and which is very vaguely disputed by the respondent in the appeal filed against the order passed on the Petition 9 proceedings. It is on these submissions, Mr. Wagle would contend that the application deserves to be allowed. In support of his submissions, Mr. Wagle has referred to the decision of this Court (R.D. Dhanuka, J.) in the case of applicant itself in Arbitration Application (L) No. 874 of 2012 decided on 5 November, 2012 to contend that in an identical situation, the Court had accepted that an arbitration agreement exists between the parties. Mr. Wagle has also relied on 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).**

**Submissions on behalf of the Respondent**

21. On the other hand, Mr. Sasidhar,, learned counsel for the respondent referring to the pleadings would submit that this is a case which is entirely vitiated by fraud. There is no arbitration agreement between the parties as contended by the respondent in the reply affidavit. It is submitted that the fraud would vitiate everything and thus, the arbitration agreement as alleged by the applicant ought not to be recognized and an arbitrator ought not to be appointed. The primary contention as urged by Mr. Sasidhar is that the purchase orders are fake, as they are issued by the employee of the respondent against whom an FIR has been lodged, as also the invoices are issued by the employee of the applicant and hence there is no transaction between the applicant and respondent in relation to the invoices on the basis of which a claim is being made by the applicant against the respondent. In support of his submission, Mr.Sasidhar has drawn the Court's attention to the various documents as also the detailed submissions as made in the reply affidavit. Mr. Sasidhar has extensively referred to the documents on record to buttress his submissions in opposing the present proceeding.

**Analysis and Conclusion**

22. Having heard the learned counsel for the parties and having perused the record, considering that the proceedings are filed under Section 11 of the Act, the primary question which would fall for

consideration of the Court is whether there exists an arbitration agreement between the parties. It appears that the applicant and respondent had long standing business relations. It also appears that for the purpose of entering business transactions with the applicant, the respondent was required to follow the applicant's procedure to file an online KYC form, a copy of which is placed on record. Such KYC form was duly signed by the respondent. Perusal of the KYC form indicates that there is declaration as made by the respondent that the respondent is agreeable to accept the terms and conditions which are set out on the website of the applicant, which also forms an integral part of the contract between the parties. The arbitration agreement is contained in the terms and conditions as already been noted above. This apart, it appears to be also quite clear that the invoices issued by the applicant to the respondent, which are in relation to the purchase orders, also contain an arbitration clause as noted above, namely, Clause 12. There does not appear to be any denial by the respondent on any of these documents prior to the disputes and differences having arisen between the parties, and more particularly, that such documents did not bring about an arbitration agreement between the parties.

23. The defence as taken by the respondent is quite peculiar. It is contended that the invoice ought to be held to be vitiated by fraud inasmuch as it is not a real transaction between the applicant and the

respondent and in fact employees of both the parties namely of the applicant and the respondent have been cheated by their respective employees. In my opinion, such a contention would not be a relevant contention as far as the present proceedings are concerned for more than one reason. Firstly, prima facie, it appears to be quite clear that purchase orders were placed by the respondent on the applicant. It is the case of the applicant that pursuant thereto goods were supplied/ deliveries were effected under the purchase orders to the respondent, being subject matter of the invoices as raised on the respondent. If this be the factual position and placing of purchase orders and raising of invoices itself is on the basis of the contract as entered between the parties, the contract being the respondent agreeing to the terms and conditions as specified by the applicant in the KYC form as filled by the respondent, under which the respondent has agreed and accepted the terms and conditions of sales, as published on the applicant's website which interalia contained an arbitration clause under Clause 10 which stood accepted by the respondent, the moment the respondent signed the declaration accepting the sales terms and conditions. It would be required to be observed that such actions on the part of the parties which recognizes elements of contemporary "e-business" certainly are required to be given a due meaning.

24. Apart from above contractual position between the parties, the invoices which were issued by the applicant on the respondent also contained an arbitration clause. The purchase orders and the invoices issued in that regard were acted upon between the parties inasmuch as there was supply of materials by the applicant under the invoices which contained an arbitration agreement in Clause 12. Thus, the parties having acted upon on such terms and conditions, namely, the "Sales Terms and Conditions" which was the very foundation of the contractual relations between the parties as also the same being confirmed by the clause in the invoices, which also were acted upon, it cannot be said that an arbitration agreement does not exist between the parties. In this context, Mr. Wagle would be correct in relying on the decision of the co-ordinate Bench of this Court in the applicant's own case in Arbitration Application (L) No. 874 of 2012 (supra) in which the Court in a similar situation in deciding a Section 11(6) application filed by the applicant and considering the decisions of the Supreme Court, this Court observed thus:

> "3. In or around May 2009, the applicant and respondent started their business relations for supply of HP consumables and other information technology products. The respondent used to place various purchase orders on the applicant. It is the case of the applicant that the applicant used to supply goods to the respondent as per the requirements of purchase orders and raise invoices on the respondent for the same. The respondent always accepted the goods from the applicant without any demur or protest as to the quantity or specification of the goods. Though the respondent was regularly making payment towards invoices raised by the applicant, however since April 2009, the respondent became irregular in making payments of the invoices raised by the applicants. By letter dated 10th September

2009, the applicant called upon the respondent to make payment in respect of the outstanding invoices raised by the applicant. On 27th November 2009, respondent issued a cheque of Rs.1,76,56,956/- towards the discharge of its liability in respect of outstanding invoices. The said cheque, however, when presented by the applicant for payment was dishonoured with the remark "Exceeds Arrangement". The applicant thereafter issued a notice on 15th December 2009 under the provision of Negotiable Instruments Act, 1881 calling upon the respondent to make the payment which the respondent failed and neglected to make. The applicant has already filed proceedings under Section 138 of the Negotiable Instruments Act against the respondent before the Metropolitan Magistrate Court, New Delhi. By its letter dated 22nd February 2010, the applicant invoked the arbitration proceedings and constituted the Arbitral tribunal comprising of the sole Arbitrator Shri Justice S.D.Pandit, former Judge of this Court and called upon the respondent to concur upon the appointment of Shri Justice S.D. Pandit or to nominate another arbitrator. The respondent has neither concurred with the name suggested by the applicant nor suggested any other name. The respondent did not give any response to the said letter.

6. The learned counsel appearing for applicant relies upon copies of 21 invoices annexed to the application which are admittedly received by the respondent. On the reverse of all such invoices, terms and conditions of sale are provided. Clause 13 and declaration clause as under:

> 13. The Court at Mumbai shall have exclusive jurisdiction or deciding any disputes arising out of this sale.
>
> Declarations:
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> "Ingram Micro India Limited and the customer agree, in case of any dispute arising out of or in connection with this transaction shall be referred to a sole arbitrator appointed by Ingram Micro India Limited and his decision shall be final and binding on both the parties."

9. In my view, the application under Section 11 filed by the applicant is not an application before the Court as defined under Section 2(1) (e) of the Arbitration and Conciliation Act 1996. The Supreme Court has held that powers under Section 11(6) of the Act is the power of a designate referred to under the section and not that of the Supreme Court. In my view, Clause 12 of the Letters Patent would apply to a suit for land or other immovable property or in all other cases if the cause of action shall have arisen either wholly, or in case the leave of the Court shall have been first obtained, in part, within the local limits of the Ordinary Original Jurisdiction of the High Court or if the defendant at the time of the commencement of the suit shall dwell or carry on business, or personally work for gain, within such limits. Clause 12 of the Letters Patent thus, makes it clear that it applies to High Court acting in exercise of its Ordinary Original Civil Civil Jurisdiction. In my view, application under Section 11 is not an application made before the Court and in this case before the High

> Court and thus, leave under Clause 12 of the Letters Patent is not required. I am therefore not inclined to accept the submission made by the learned counsel for the respondent that this application is not maintainable on the ground that no prior leave under clause 12 is obtained by the applicant.
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> 16. On reading of Section 7 of the Arbitration and Conciliation Act, it is clear that arbitration agreement may be in the form of arbitration clause in a contract. Such arbitration agreement in writing even if it is contained in a document which has been exchanged between the parties and it has been acted upon it satisfies the conditions of the arbitration agreement under Section 7 of the Arbitration and Conciliation Act, 1996. It is not in dispute that in this case, the respondent have received all 21 invoices from the applicant containing arbitration agreement. The learned counsel appearing for the respondent does not dispute that terms and conditions printed on all such invoices have been acted upon. The terms contained in the invoices, including arbitration clause, issued by the applicant are deemed to have been informed to the respondent. The respondent had received all such invoices but have not raised any objection to the terms and conditions and have acted upon the same. Under such invoices, there was arbitration clause. The respondent having accepted the invoices and have acted upon the same without any protest, thus, in my view, the contract between the parties clearly contemplates a provision for arbitration."

25. In the context of what Section 7 of the Act would provide that an arbitration agreement can be inferred through a series of correspondence or even on demur of one of the parties to an arbitration proceedings. Mr. Wagle would be correct to place his reliance on the decision of the Supreme Court in **Inox Wind Ltd. vs. Thermocables Ltd.** (supra), in which the Supreme Court has held that a general reference to a standard form of contract of one party will suffice for incorporation of arbitration clause. In such case dispute had arisen between the parties under a contract for supply of cables by respondent. - Thermocables Ltd. to appellants-Inox. The purchase order issued by Inox mentioned that supply would be as per the terms mentioned therein and in the attached

Standard terms and conditions which contained the arbitration clause, not disputed by Thermocables Ltd. The Supreme Court setting aside the High Court's order, appointed an arbitral tribunal to adjudicate the disputes between the parties. Also Mr.Wagle's reliance on the decision of the Division Bench of the Delhi High Court in **Scholar Publishing House Pvt. Ltd. vs. Khanna Traders** (supra) is apposite. In paragraph 8 the Court observed thus:

> "8. The Court also notices that Section 7 of the Act does not compel the parties to adhere to any particular form of agreement or document. An arbitration agreement can be inferred through a series of correspondence, or even on demur of one of the parties to an arbitration proceedings, who can otherwise object to it, on the ground of absence of agreement; if such party does not urge the contention in the reply to claim, the arbitration agreement is deemed to exist. In the present case, there is a wealth of material in the form of more than a decade of commercial relationship during which identically phrased invoices containing the arbitration stipulation were accepted and acted upon. It is not the appellant's case that the disputed invoices were the only documents containing such stipulations, which were freshly introduced. Having regard to these circumstances, the Court is of opinion that there is no merit in the appeal; it is therefore dismissed along with pending applications without any order as to costs."

26. Insofar the respondent's contention is concerned, in my opinion, these are the contentions which are required to be urged by the respondent before the arbitral tribunal. It is always open to the respondent to raise such contentions to contend that the arbitration agreement was vitiated by fraud. It is for the arbitral tribunal to determine as to whether the case of fraud being pleaded by the applicant is such that the dispute is non arbitrable. It is now a settled principle of law that a mere allegation of fraud would not make the

dispute non arbitrable. The Supreme Court in the case of **Avitel Post Studioz Limited & Ors. vs. HSBC PI Holdings (Mauritius) Limited (2021) 4 SCC 713** considering its decisions in **A. Ayyasamy vs. A. Paramasivam (2016) 10 SCC 386, Ameet Lalchand Shah vs. Rishabh Enterprises (2018) 15 SCC 678** and **Rashid Raza vs. Sadaf Akhtar (2019) 8 SCC 710** has held that arbitration can be refused only when it is clear that "serious allegations of fraud" arise. The Supreme Court has held that only when either of the two tests as defined by it, are satisfied it can be said that serious allegations of fraud have arisen. The first test being, when it can be said that the arbitration clause or agreement itself cannot be said to exist in a clear case in which the Court finds that the party against whom breach is alleged cannot be said to have entered into the agreement in relation to arbitration at all. The second test is made out in cases in which allegations are made against the State or its instrumentalities of arbitrary, fraudulent or *mala fide* conduct, thus necessitating the hearing of the case by a Writ Court where questions arising in the public law domain are raised. The Supreme Court also held that merely because criminal proceedings are initiated would not make the civil dispute non arbitrable if it involves questions of fraud, misrepresentation etc. which can be appropriately raised as the subject matter of proceedings would fall under Section 17 of the Contract Act. Adverting to such position in law in its applicability to the facts in hand,

this is certainly not a case wherein the nature of the cause is such that the Court would be required to dissuade itself from refusing a reference to arbitration.

27. Insofar as the jurisdiction of this Court to appoint an arbitral tribunal by exercising powers under section 11(6) read with sub-section (6A) of the Act are concerned, the principles of law in that regard as laid down in the decision of the Supreme Court in **Duro Felguera, S.A. versus Gangavaram Port Limited, reported in (2017) 9 SCC 729, M/s. Mayavati Trading Pvt. Ltd. vs. Pradyuat Deb Burman, (2019) 8 SCC 714,** certainly become applicable. 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. However, the respondent's only relevant grounds in the said appeal in regard to the arbitration agreement are grounds (I) and (P) which reads thus:

> "(I) that the learned Judge erred in not appreciating that there is no arbitration agreement executed between the appellant and the respondent.
>
> (P) that the Learned Judge erred in not appreciating that the alleged invoices which allegedly contain the alleged arbitration agreement is the outcome of the fraud played upon the appellant for which FIR No. 421 of 2018 has been registered at the instance of the appellant *inter alia* against the ex-employee of the respondent and the charge sheet there has been filed

28. It is thus clear that there was no assail to the observations of the Co-ordinate Bench of this Court when the Court observed on the existence of an arbitration agreement. There was no elaboration whatsoever in ground (I) of the appeal, it is simplictor a ground that

there exists no arbitration agreement when the documents speaks otherwise. Ground (P) is in relation to an allegation of fraud and which is the subject matter of FIR. In my opinion, such stand taken by the respondent clearly indicates that the respondent is not in a position to out-rightly displace the case of the applicant that there exists no arbitration agreement. In the above circumstances, the application would be required to be allowed. It is accordingly allowed by the following order.

**ORDER**

(i) Mr. Naushad Engineer, Advocate is appointed as a sole arbitrator to adjudicate the disputes between the parties which have arisen under a Contract for supply inter alia of the computer products, communication device etc.

(ii) The learned sole arbitrator, 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;

(iii) At the first instance, the parties shall appear before the prospective arbitrator within 10 days from today on a date which may be mutually fixed by the learned sole arbitrator;

(iv) The fees payable to the arbitral tribunal shall be as prescribed under the Bombay High Court (Fees Payable to Arbitrators) Rules,2018 and shall be borne by the parties in equal proportion.

(v) All contentions of the parties on the arbitral proceedings are expressly kept open;

(vi) The application is disposed of in the above terms. No costs.

(vii) Office to forward a copy of this order to the learned Arbitrator on the following address:

Mr. Naushad Engineer, Adv.
1/D Lentin Chamber,
First Floor, Dalal Street,
Mumbai 400 023.
Tel No.226561159.

29. At this stage, learned Counsel for the respondent seeks stay of this order. Accepting his request, the order is stayed for a period of two weeks from today.

[G.S. KULKARNI, J.]