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

% Date of Decision: 04.03.2025

\+ **ARB.P. 1560/2024**

RADICO KHAITAN LIMITED .....Petitioner

Through: Mr.Kamal Garg, Advocate

versus

HARISH CHOUHAN .....Respondent

Through: None

CORAM:
HON'BLE MR. JUSTICE MANOJ KUMAR OHRI

JUDGMENT (ORAL)

1. By way of present petition filed under Section 11(6) of the Arbitration and Conciliation Act, 1996 (hereinafter, referred to as the '*A&C Act*'), the petitioner seeks appointment of an Arbitral Tribunal comprising of a Sole Arbitrator, to adjudicate upon the disputes that have arisen between the parties.

2. The respondent along with his son, *Mr. Sumit Chauhan*, entered into a business transaction with the petitioner wherein against the purchase orders issued the petitioner supplied alcoholic beverages to the respondent and his son. In pursuance of the same, various tax invoices were issued in the name of the respondent, either by the petitioner or by its subsidiary, associated or sister concerns/units and the subject goods were supplied thereof.

3. Disputes arose between the parties with respect to the various tax

invoices dated 29.11.2020, 09.12.2020, 15.12.2020, 28.12.2020 and 22.01.2021. Under the 'Terms & Conditions' printed on the aforesaid invoices, Clause 5 provided for reference of disputes arising between the parties to arbitration by a Sole Arbitrator and further stipulated Delhi to be the seat of arbitration. The same is reproduced hereinunder:

> *"5. Any dispute (whether contractual or otherwise) arising out of this transaction between the parties or arising out of or relating to or in connection with this invoice shall be referred for arbitration in terms of Arbitration and Conciliation Act, 1996 or any amendment thereof. The arbitration shall be conducted by a sole arbitrator to be appointed by Radico Khaitan Limited in its sole discretion. The seat of Arbitration shall be Delhi. This invoice shall be governed the laws of India and Court of Delhi shall have exclusive jurisdiction over matters arising from this transaction/invoice. The Buyer shall be deemed to have accepted all terms and conditions contained in the invoice including the arbitration agreement by accepting the goods delivered under this invoice"*

4. It is the case of the petitioner that at the time of entering into the aforenoted business transactions, it was mutually agreed between the parties that all the business transactions between the parties will be governed as per the 'Terms & Conditions' printed on the subject invoices and that any dispute arising between the parties thereto, whether contractual or otherwise, shall be the referred to arbitration in terms of the provisions of the A&C Act.

5. Learned counsel for the petitioner submits that the petitioner continuously supplied the subject goods to the respondent and his son, statedly to their satisfaction, against which, they made part-payments to the petitioner on a running account basis towards partial discharge of their

outstanding liability. The petitioner even maintained record of all the transactions in the form of ledger account in regular course of business. It is further submitted that in March of 2022, the respondent's son/*Mr. Sumit Chauhan* approached the petitioner to resume business transactions and agreed to make outstanding payment pending against him and the respondent. Subsequently, he issued a cheque bearing no. 100444 dated 15.03.2022 drawn on The Catholic Syrian Bank, Greater Kailash, New Delhi, for an amount of Rs. 18,16,155/- towards collective and complete discharge of the outstanding liability. However, upon presentation of the cheque at the bank, the same was dishonoured with the remarks, '*funds insufficient*'. Resultantly, the petitioner issued a legal notice dated 18.06.2022 under Section 138(b) of the Negotiable Instruments Act ('NI Act') to *Mr. Sumit Chauhan* and thereafter, a complaint under Section 138 NI Act was filed against him. Disputes arose between the parties in the aforenoted context, following which, in regard to the respondent's outstanding liability to the extent of Rs. 8,03,621/-, the petitioner issued a notice dated 05.02.2024 invoking arbitration under Section 21 of the A&C Act.

Learned counsel submits that the arbitration clause, as contained in the subject tax invoices, governs the present dispute. Furthermore, it constitutes a valid arbitration agreement inasmuch as when the said invoices were raised upon the respondent, the respondent not only understood and acknowledged the import of the same, but also continued to transact business with the petitioner and even made part payments to the petitioner against them, in the regular course of business. It is therefore contended that

the conduct of the respondent goes on to indicate consent to be governed by the said arbitration clause. Moreover, reference is made to the arbitration clause itself, which specifically mentions that by accepting the goods delivered in pursuance of the said invoices, the buyer (respondent herein) shall be deemed to have accepted all terms and conditions contained in the invoices, including the arbitration agreement. In support of his submissions, learned counsel places reliance on the decision of a Coordinate Bench of this Court in Swastik Pipe Ltd. v. Shri Ram Autotech Pvt. Ltd., **reported as 2021 SCC OnLine Del 3604**, to submit that if the parties intend to be governed by the arbitration clause as contained in an invoice, the same would be valid and binding in the capacity of an arbitration agreement.

6. Notably, notice of the instant petition was issued to the respondent on 04.10.2024. Learned counsel for the petitioner states that the respondent was duly served by way of speed post on all available last known addresses. Attention of this Court is drawn to the affidavit of service, which is accompanied by a tracking report, as per which, the item stood delivered to the addressee. In view of the above, the respondent is held to be served. However, neither is the respondent represented today, nor any reply has been filed on his behalf. It appears that the respondent has no objection to reference of the present dispute to arbitration.

7. The only question that remains to be examined is whether an arbitration clause contained in an invoice, issued unilaterally by one of the parties to the dispute, amounts to a valid arbitration agreement between the parties. Fortunately, the same is no longer *res integra* and has been answered in the positive by the Supreme Court in its decision in Concrete

Additives and Chemicals Pvt. Ltd. v. S.N. Engineering Services Pvt. Ltd. in **Civil Appeal No. 7858/2023** dated 28.11.2023. While setting aside a decision of the Bombay High Court holding to the contrary, the Apex Court held, as reproduced hereinunder:

> *"We have perused the invoices annexed as Annexure P2 to IA No.34944 of 2022 filed for production of additional documents. In the invoices, terms and conditions have been incorporated. The invoices were issued by the appellant and acknowledgements of receipt of the invoices by the respondent also appear thereunder. Clause (1) of the terms and conditions printed on the invoices reads thus:*
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> > *"(1). All or any disputes or differences that may arise between the parties hereto shall be referred to the arbitration of a sole arbitrator to be appointed by CONCRETE ADDITIVES & CHEMICALS PVT. LTD. The arbitration proceedings shall be governed by the provisions of the Arbitration & Conciliation Act, 1996. The venue of the arbitration shall be at Mumbai."*
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> *Hence, we do not agree with the High Court that there was no arbitration clause. All issues canvassed by the respondent, while opposing the petition under Section 11 of the Arbitration Act can be always canvassed before the Arbitral Tribunal in accordance with law.*
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> *Therefore, we allow the appeal. The impugned order is set aside and the Arbitration Application (L) No.23207 of 2021 is hereby allowed. The disposed of Arbitration Petition shall be listed before the roster Judge of the High Court taking up Section 11 petitions under the Arbitration Act only for the purposes of appointing an arbitrator."*

8. A gainful reference may also be made to the decision of a Coordinate Bench of this Court in SRF Ltd. v. Jonson Rubber Industries Ltd., reported as **2024 SCC OnLine Del 1819**, wherein, while examining a similar case of an arbitration clause contained in an invoice, it has been held, as noted hereunder:

> *"17. Section 8 of the 1996 Act mandates that a judicial authority*

before whom an action is brought, which is the subject of an arbitration agreement between the parties, shall refer the parties to arbitration. The provision carves out a singular exception, stipulating that only if it is apparent prima facie, that no valid arbitration agreement exists, the Court shall refrain from directing the parties to arbitration.

18. A perusal of the decision of the Supreme Court in Vidya Drolia (supra) clearly shows that under Section 8 or Section 11 of the 1996 Act, unless a party has established a prima facie case of non-existence of a valid arbitration agreement, the parties are to be referred to arbitration. Thus, onus is on the person alleging that there is no valid arbitration agreement. The relevant portions of the said judgment is extracted hereinunder:

> *"244.3. The court, under Sections 8 and 11, has to refer a matter to arbitration or to appoint an arbitrator, as the case may be,* ***unless a party has established a prima facie (summary findings) case of non-existence of valid arbitration agreement, by summarily portraying a strong case that he is entitled to such a finding.***
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> *244.4. The court should refer a matter if the validity of the arbitration agreement cannot be determined on a prima facie basis, as laid down above i.e.* ***"when in doubt, do refer".***

19. Accordingly, as per the said decision, the Respondent has to show a strong case-that despite the presence of an arbitration clause in the invoices, the said agreement would not be valid and binding on parties.

20. Vidya Drolia (supra) was followed in Swastik Pipe Ltd. I (supra) and Swastik Pipe Ltd. II (supra) by the ld. Single Judges of this Court. In Swastik Pipe Ltd.-I (supra), the parties were maintaining a running account. The challenge was on the ground that the invoices were not signed by the parties. ***The Court, after reviewing the entire case law, came to the conclusion that the invoices have been paid partly and the parties have been in transaction with each other for some time, hence, the disputes are liable to be referred to arbitration****…."*

(Emphasis Supplied)

9. At this juncture, this Court deems it apposite to refer to another decision of this Court in Dhawan Box Sheet Containers (P) Ltd. v. SEL

Manufacturing Co. Ltd., reported as **2024 SCC OnLine Del 4779**, whereby it has been observed that:

> *"9. In Swastik Pipe -1[3], the Court, while looking at the validity of an arbitration clause in an invoice, noted as follows:*
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> > *"15.* ***It must also be noted that the commercial dealing between the parties is demonstrated from the documents placed before this Court by SPL. Copy of the ledger of SPL, as placed on record, exhibits that the parties have been transacting with each other for some time, and some of the invoices raised by SPL have been paid by SRAPL during the same time period as well. Now, if there is sufficient material on record to establish that the condition/clause in the invoices were accepted and acted upon, the parties would be ad idem, and arbitration agreement could be safely inferred. However, in the opinion of the Court, this aspect has to be conclusively decided on the basis of evidence that the parties would lead as well as the surrounding facts and circumstances. However, the same cannot be done at this stage, having regard to the limited jurisdiction exercised by this Court under Section 11 of the Act****.....*
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> *xxx*
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> *10.* ***As noticed in Swastik Pipe-1[4], the judgment in Vidya Drolia v. Durga Trading Corpn.[5] lays down that, at the stage of proceedings under Section 11 of the Act, the Court is required only to form a prima facie view as to the existence of the arbitration agreement, leaving a detailed examination of this question to the Arbitral Tribunal.*** *In fact, Vidya Drolia[6] and subsequent authorities in BSNL v. Nortel Networks (India) (P) Ltd.[7], NTPC Ltd. v. SPML Infra Ltd.[8] and Interplay between Arbitration Agreements under the Arbitration & Conciliation Act, 1996 & the Indian Stamp Act, 1899, In re[9] are consistent in laying down the proposition that reference can be declined only if there is no vestige of doubt as to the non-existence of the arbitration agreement;* ***the default course in doubtful cases is to refer the matter to arbitration, leaving the question open for adjudication by the Tribunal.***
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> *xxx*
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> *13. In these circumstances, keeping in mind the limited jurisdiction*

of the Court at the pre-reference stage, I am of the view that the petitioner has made out a case for reference to arbitration, leaving all questions open for adjudication by the learned Arbitrator, including the defence, if any, with regard to the existence of the arbitration agreement."

(Emphasis Supplied)

To a similar extent are the other decisions, most notably in Swastik Pipe Ltd. v. Dimple Verma, reported as **2022 SCC OnLine Del 5148** and a decision of the Bombay High Court in Bennett Coleman & Co. Ltd. v. MAD (India) Pvt. Ltd., reported as **2022 SCC OnLine Bom 7807**.

10. Pertinently, it is now a settled position in law is that even if there is a doubt as to the existence of the arbitration agreement between the parties, the Court ought to refer the parties to Arbitration. All contentions as to the existence and validity of an arbitration agreement are to be looked into by the Arbitral Tribunal. Reference may be made to landmark judgments of the Supreme Court in this regard, in Vidya Drolia v. Durga Trading Corporation reported as **(2021) 2 SCC 1** as well as Cox & Kings Ltd. v. SAP India (P) Ltd., reported as **(2024) 4 SCC 1**. In the latter, it was observed, as reproduced hereunder:

"163. Section 16 of the Arbitration Act enshrines the principle of competence-competence in Indian arbitration law. The provision empowers the Arbitral Tribunal to rule on its own jurisdiction, including any ruling on any objections with respect to the existence or validity of arbitration agreement. Section 16 is an inclusive provision which comprehends all preliminary issues touching upon the jurisdiction of the Arbitral Tribunal. [Uttarakhand Purv Sainik Kalyan Nigam Ltd. v. Northern Coal Field Ltd., (2020) 2 SCC 455 : (2020) 1 SCC (Civ) 570] The doctrine of competence-competence is intended to minimise judicial intervention at the threshold stage. The issue of determining parties to an arbitration agreement goes to the very root of the jurisdictional competence of the Arbitral Tribunal.

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166. ***The above position of law leads us to the inevitable conclusion that at the referral stage, the Court only has to determine the prima facie existence of an arbitration agreement. If the referral court cannot decide the issue, it should leave it to be decided by the Arbitral Tribunal. The referral court should not unnecessarily interfere with arbitration proceedings, and rather allow the Arbitral Tribunal to exercise its primary jurisdiction.*** *In Shin-Etsu Chemical Co. Ltd. v. Aksh Optifibre Ltd. [Shin-Etsu Chemical Co. Ltd. v. Aksh Optifibre Ltd., (2005) 7 SCC 234] , this Court observed that there are distinct advantages to leaving the final determination on matters pertaining to the validity of an arbitration agreement to the Tribunal…"*

(Emphasis Supplied)

11. From a perusal of the aforenoted legal position, it is evident that in cases where an arbitration clause is contained in an invoice generated by one of the parties to the dispute, the same binds both the parties as a valid arbitration agreement as long as the parties intend to be governed by it. In light of this principle, when examining the factual matrix at hand, it is noted that the parties were engaged in continuous business transactions in 2020 and 2021, and had a running account maintained between them. As against the subject invoices issued by the petitioner, not only were the subject goods accepted by the respondent without any complaints/claims, but also part payment was made to discharge part liability arising out of the said transactions. The conduct of the parties point towards intention to be governed by the terms of the invoices. Moreover, the arbitration clause contained in the invoice itself is clear to the extent that acceptance of subject goods delivered under the invoice would amount to accepting the terms governing it, including the arbitration clause contained therein. The same

was in knowledge of the respondent, who, at no point, objected to the same.

12. Be that as it may, the settled position in law favours reference of disputes to arbitration even in cases of doubt as to the existence and/or validity of the arbitration agreement. This Court has limited jurisdiction at the stage of referral, while considering a petition under Section 11 A&C Act, in deciding the validity of the arbitration agreement. So long as a *prima facie* opinion can be formed as to the existence of an arbitration agreement between the parties and the facts point to mutual consent between them to be governed by it, the Court is bound to refer the dispute to arbitration. Thereafter, it is within the ambit of the Arbitral Tribunal's powers to conduct a detailed examination as to the validity and existence of the same. Simply speaking, even if there exists a doubt as to the existence of the arbitration agreement, the Court must refer the matter to arbitration.

13. As noted above, at this stage, the respondent is not represented, nor a reply has been filed on his behalf, despite being duly served. In light of the same, it appears that the respondent has no objection if the present dispute is referred to arbitration.

14. Considering the above noted facts and legal position, as well as keeping in mind the limited jurisdiction of the Court at the present stage, this Court is of the considered opinion that the petitioner has made out a *prima facie* case as to existence of the arbitration agreement between the parties. Accordingly, the present petition is disposed of with the following directions:-

i) The disputes between the parties under the said agreement are referred to the Arbitral Tribunal.

ii) Ms. Prema Priyadarshini, Advocate (Mob: 9818107970) is appointed as the Sole Arbitrator to adjudicate upon the disputes between the parties.

iii) The arbitration will be held under the aegis of the Delhi International Arbitration Centre, Delhi High Court, Sher Shah Road, New Delhi (hereinafter, referred to as the 'DIAC').

iv) The remuneration of the learned Arbitrator shall be in terms of DIAC (Administrative Cost and Arbitrators' Fees) Rules, 2018 or as the parties may agree.

v) The learned Arbitrator shall furnish a declaration in terms of Section 12 of the A&C Act prior to entering into the reference.

vi) It is made clear that all the rights and contentions of the parties, including on the existence and validity of the Arbitration agreement, arbitrability of any of the claim/counter claim, any other preliminary objection, need and legality of interim relief, as well as contentions on merits of the dispute by either of the parties, are left open for adjudication by the learned arbitrator.

viii) The parties shall approach the learned Arbitrator within four weeks from today.

MANOJ KUMAR OHRI
(JUDGE)

MARCH 4, 2025/*ik*