

HIGH COURT OF MADHYA PRADESH

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1	Case No.	FIRST APPEAL NO.514/2018
2	Parties Name	M/s.Anik Industries Ltd Vs. M/s.DCM Shriram Consolidated Ltd
3	Date of Judgment	22/11/18
4	Bench constituted of	Hon'ble Shri Justice Prakash Shrivastava
5	Judgment delivered by	Hon'ble Shri Justice Prakash Shrivastava
6	Whether approved for reporting	Yes
7	Name of counsels for parties.	Shri R.T.Thanewala, learned counsel for the appellant. Shri Vinay Saraf, learned Sr.Counsel with Shri Amit Bhatia, learned counsel for respondent.
8	Law laid down	[a] If the arbitration clause is contained in the annexure to the contract document and the annexure is specifically mentioned therein, then the arbitration agreement exists between the parties. [b] Sec.8 of the Act mandates a judicial authority to refer the parties to arbitration in case whether pending action is subject matter of an arbitration agreement and in such cases the judicial authority does not commit any error in disposing of the civil action while referring the parties to arbitration.
9	Significant paragraph numbers	[a] Paragraph 8 to 16 [b] Paragraph 18 to 22

(PRAKASH SHRIVASTAVA)
J u d g e

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consideration amount was paid, hence the recovery of the balance consideration amount was sought in the plaint.

[3] Respondent had filed the application under Section 5 & 8 of the Arbitration Act read with Order 7 Rule 11 of the CPC for dismissing the suit as not maintainable and referring the parties to arbitration on the ground that the arbitration clause exists. The said application was opposed by the appellant by filing the reply.

[4] Trial Court in the order under challenge has reached to the conclusion that Annexure G(I) to the supply order dated 28.11.2008 is a part of the arbitration agreement between the parties and since the arbitration agreement exists, therefore, in terms of Section 5 & 8 of the Arbitration Act the jurisdiction of the civil court is barred. Hence by allowing the application, trial Court has dismissed the suit for want of jurisdiction permitting the parties to approach the arbitrator in terms of the arbitration clause.

[5] Learned counsel appearing for the appellant submits that in the purchase order signed by the parties there is no arbitration clause and general terms on which the respondent is relying upon, cannot be referred and cannot be treated to be incorporation by reference, hence on that basis it cannot be held that the arbitration clause exists. He has further submitted that general terms were not supplied to the appellant. In support of his submission he has placed reliance upon the judgment of the Supreme Court in the matter of **M.R. Engineers and Contractors Pvt. Ltd. Vs. Som Datt Builders Limited reported in (2009) 7 SCC 696** and in the case of **M/s. Elite Engineering and Constructions (Hyd) Pvt. Ltd. Vs. M/s. Techtrans**

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Construction India Pvt. Ltd. vide judgment dated 23.2.2018 passed in Civil Appeal No.2439/2018. He has also tried to distinguish the judgment in the case of **M/s. Inox Wind Ltd. Vs. M/s. Thermocables Ltd. vide judgment dated 5.1.2018 passed in Civil Appeal No.19/2018** on the ground that it is a subsequent judgment of the equal strength of judges taking a different view, therefore, it is per incurium. He has also submitted that under Section 8, Court was required to refer the matter to the arbitrator instead of dismissing the suit.

[6] Learned counsel for the respondent submits that the general terms are not incorporated by reference but the arbitration clause is contained in the general terms which is an annexure to the purchase order, hence it is not a case of relying upon the arbitration clause incorporated by reference. He has further submitted that the purchase order is signed by the parties and it is not necessary to sign the annexure and that the purchase order was issued in the year 2008 and till the filing of the reply to the application under Order 7 Rule 11 of the CPC, appellant had never raised any issue that the annexure to the purchase order was not supplied. He has placed reliance upon **M/s. Inox Wind Ltd. Vs. M/s. Thermocables Ltd. vide judgment dated 5.1.2018 passed in Civil Appeal No.19/2018** and the judgment in the matter of **Groupe Chemique Tunisien SA Vs. Southern Petrochemicals Industries Corpn. Ltd. reported in (2006) 5 SCC 275**, in the matter of **Atlas Export Industries Vs. Kotak & Company reported in (1999) 7 SCC 61** and in the matter of **Brahan Dutt Shukla Vs. Ashok Leyland Finance reported in 2003(4) MPHT 564**. He has also submitted that once the trial Court finds that the arbitration clause exists, in

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view of Section 5 of the Arbitration Act the suit is required to be dismissed permitting the parties to act in accordance with the arbitration clause.

[7] Having heard the learned counsel for the parties and on perusal of the record, it is noticed that the following two issues arise for consideration of this court in this appeal.

(i) Whether, the arbitration agreement as stipulated in Section 7 of the Arbitration Act exists between the parties?

(ii) Whether, the trial Court has rightly dismissed the suit directing the parties to act in accordance with the arbitration clause under Section 8 of the Arbitration Act?

[8] So far as the first issue is concerned, the record reflects that in the suit the appellant has based his case on the purchase order dated 28.11.2008 which clearly mentions at the end of it that general terms and conditions shall be as per Annexure G(I). The annexure G(I) placed on record by the respondent contains clause 7 as the arbitration clause, which reads as under:-

“7. ARBITRATION

All disputes arising out of or in connection with present contract shall be finally settled under the rules of Arbitration of the International Chamber of Commerce by one or more arbitrators appointed in accordance with the said Rules. The venue of the arbitration will be Delhi, India and the arbitration proceedings will be governed by the Indian law. The language of the arbitration proceedings will be English.”

[9] It has been pointed out by counsel for the respondent that the parties are in regular business and earlier also

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similar purchase orders were issued. The appellant being a company in the regular business of sale, it is difficult to accept that appellant would not have demanded a copy of Annexure G(I) if the same was not supplied along with the purchase order though the purchase order specifically mentions that the general terms and conditions will be as per Annexure G(I) to the purchase order, hence the plea of the appellant that annexure G(1) was not supplied to it along with the purchase order cannot be accepted.

[10] The purchase order dated 28.11.2008 is signed by the parties which itself mentions Annexure G(I), hence this annexure cannot be excluded from consideration merely on the ground that it was not signed. Trial Court in this regard has rightly disbelieved the plea of the appellant that Annexure G(I) was not within its knowledge. The plea relating to non signing of Annexure G(I) has also rightly been rejected by the trial Court by assigning due reasons in Para 17 of the order.

[11] Section 7(5) of the Arbitration Act in clear terms provides that 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 the arbitration clause part of the contract. The present case is on a much better footing since the arbitration clause is contained in the annexure which form part of the purchase order itself.

[12] The Supreme Court in the matter of **M/s. Inox Wind Ltd** (supra) dealing with the issue of incorporation by reference has held that though general reference to an earlier contract is not sufficient for incorporation of an arbitration clause in the later contract but a general reference to a

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standard form would be enough for incorporation of the arbitration clause. It has further been clarified that a general reference to a standard form of contract of one party along with those of trade associations and professional bodies will be sufficient to incorporate the arbitration clause.

[13] In another judgment in the matter of **Atlas Export Industries Vs. Kotak & Company (1999) 7 SCC 61** where the contract between the parties was not denied and the arbitration clause in the contract was incorporated by reference having contained in the Standard Contract 15 of GAFTA, apex court has upheld the contention of existence of the arbitration clause placing reliance upon the earlier judgment in the matter of **Alimenta S.A. Vs. National Agricultural Coop. Marketing Federation of India Ltd. (1987) 1 SCC 615.**

[14] Similarly in the matter of **Groupe Chimique Tunisien SA Vs. Southern Petrolchemicals Industries Corpn. Ltd (2006) 5 SCC 275** in a case where the purchase order was placed subject to FAI terms and conditions which provide for arbitration, the supreme court has held that:-

“7.-- The purchase orders placed by the respondent with the petitioner are the contracts between the parties and they are subject to FAI Terms which contain the arbitration clause. Sub-section (5) of Section 7 specifically provides that where there is reference in a contract (in this case, the purchase order) to a document containing an arbitration clause (in this case, FAI Terms), such reference constitutes an arbitration agreement, if the contract is in writing and the reference is such as to make that arbitration clause a part of the contract. The case squarely falls under Section 7(5) of the Act and there is an arbitration agreement between the parties as per clause 15 of FAI Terms.

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8.-- The respondent next contended that in the invoices for the supplies, there is no reference to FAI Terms or arbitration agreement and, therefore, the disputes are not arbitrable. As noticed above, the purchase orders are the contracts. Invoice is a document which is prepared with reference to the supplies made under the contract. When the contract (purchase order) incorporates an arbitration agreement by reference, the invoice need not contain a provision for arbitration.”

[15] Counsel for appellant has placed reliance upon the judgment of the supreme court in the matter of **M.R. Engineers and Contractors Private Limited Vs. Som Datt Builders Limited (2009) 7 SCC 696** wherein the view was taken that a general reference to another contract will not be sufficient to incorporate the arbitration clause from the referred contract into the contract under consideration and that there should be a special reference indicating a mutual intention to incorporate the arbitration clause from another document into the contract. Appellant is not entitled to the benefit of this judgment because in the subsequent judgment in the case of **M/s. Inox Wind** (supra) the judgment in the case of **M.R. Engineers** (supra) has duly been considered and in the subsequent judgment **M.R. Engineers** (supra) has been approved with a modification that a general reference to a standard form of contract of one party along with those of trade associates and professional bodies will be sufficient to incorporate the arbitration clause. Appellant is also not entitled to the benefit of the judgment in the case of **M.R. Engineers** (supra) because present is not a case of incorporation by reference but Annexure G(I) containing the

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arbitration clause is part of the undisputed purchase order itself.

[16] Having regard to the aforesaid factual and legal position, I am of the opinion if the arbitration clause is contained in the annexure to the contract document and the annexure is specifically mentioned therein, then the arbitration agreement exists between the parties. In the present case since the arbitration clause exists in Annexure G(I) to the purchase order, therefore, the arbitration agreement exists between the parties and it is not open to the appellant to contend that there is no arbitration agreement.

[17] The next issue is about rejection of the plaint and dismissal of suit with direction to the parties to approach for arbitration in terms of the arbitration clause.

[18] Section 8 of the Arbitration Act mandates a judicial authority to refer to the parties to arbitration in case where the pending action is subject of an arbitration agreement. Section 5 of the Arbitration Act restricts the intervention of judicial authorities in the matters covered by Part 1 of the Act.

[19] Hon'ble Supreme Court in the matter of **P.Anand Gajapathi Raju and others Vs. P.V.G. Raju (Dead) and others (2000) 4 SCC 539** in this regard has held that the language of the Section is peremptory and court is under an obligation to refer the parties to arbitration and effect of the reference is that once the matter is referred to arbitration, the proceedings in civil action stands disposed of.

[20] In the matter of **Groupe Chimique Tunisien SA Vs.Southern Petrochemicals Industries Corpn. Ltd (2006) 5 SCC 275** Hon'ble Supreme Court has reiterated the same

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position by holding that once the condition precedent are satisfied the judicial authority u/S.8 of the Act is statutorily mandated to refer the matter to arbitration.

[21] The division bench of this court in the matter of **B.D.Shukla Vs. Ashok Leyland Finance 2003(4) MPHT 564** considering the earlier judgment on the point as well as the provisions of Sec.5 and 8 of the Arbitration and Conciliation Act in cases where trial court had refused to entertain the suit holding it to be not maintainable in view of the existence of the arbitration clause in the agreement, has upheld that order.

[22] Present case stands on the same footing. In the present case also the arbitration clause exists between the parties in respect of the subject matter of the dispute. Hence, the trial court has not committed any error in dismissing the suit by directing the parties to invoke the arbitration clause for settling the dispute by approaching the arbitrator.

[23] Hence the judgment of the trial court does not suffer from any error and no case for interference in the first appeal is made out which is accordingly dismissed.

[24] No costs.

(Prakash Shrivastava)
Judge

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