

A M/S. GROUPE CHIMIQUE TUNISIEN SA
v.
SOUTHERN PETROCHEMICALS INDUSTRIES CORPN. LTD.

MAY 24, 2006

B [R.V. RAVEENDRAN, J.]

Arbitration and Conciliation Act, 1996 :

C *Sections 2(b) and 7(5)—Incorporation of arbitration agreement by reference—Purchase orders being subject to arbitration clause 15 of FAI—Signed by purchaser and counter signed by supplier—Held, purchase orders are contracts between parties and they being subject to FAI terms which contain arbitration clause, the case falls w/s 7(5) of the Act and there is an arbitration agreement between the parties as per clause 15 of FAI terms—Fertilizer Association of India Terms and Conditions (FAI)—Clause 15—*
D *Interpretation of Statutes—Incorporation by reference.*

E *Sections 10 and 11(4)—Petition for appointing arbitrator to arbitral tribunal—Number of arbitrators—Arbitration clause providing for reference of dispute to two arbitrators and upon their not agreeing appointment of an umpire by them—Held, having regard to Section 10, arbitral tribunal shall consist of three arbitrators (one to be appointed by each of the two parties and the Presiding Arbitrator)—Court constituting arbitral tribunal by appointing a Presiding Arbitrator and two more arbitrators as were nominated by each of the parties.*

F *Arbitration:*

Limitation—Held, is an issue which can be decided by the arbitral tribunal.

G *Estoppel—Petitioner taking stand in a foreign court that there was no arbitration agreement between parties—That Court not accepting the plea and dismissing suit for want of jurisdiction—Petitioner now proceeding on the basis that arbitration agreement existed between parties—Held, if on account of mistake or wrong understanding of law a party takes a particular stand (i.e., there is no arbitration agreement) he is not barred from changing*
H *his stand subsequently or estopped from seeking arbitration.*

U.P. Rajkiya Nirman Nigam Ltd. v. Indore (P) Ltd., [1996] 2 SCC 667, **A**
relied on.

CIVIL APPELLATE JURISDICTION: Arbitration Petition No. 4 of 2006.

Under Section 11(4) of the Arbitration and Conciliation Act. **B**

Sanjeev Sachdeva, Adv., for the Appellant.

K.K. Mani, Adv., for the Respondent. **C**

The Order of the Court was delivered :

ORDER

The petitioner has filed this petition under Section 11(4) of the Arbitration and Conciliation Act, 1996 (for short 'the Act') for appointment of an Arbitral Tribunal for adjudication of its claims and settlement of the disputes between the parties. **D**

2. The facts, in brief, as stated by petitioner are as follows: **E**

2.1. Petitioner is a company incorporated under the laws of Tunisia. The respondent placed purchase orders dated 10.11.2000, 17.11.2000, 4.12.2000, 20.12.2000 and 13.7.2001 on the petitioner for supply of various quantities of Phosphoric Acid. Each purchase order stipulated the quantity to be supplied, the price, the payment terms and shipment particulars. All the purchase orders stated that all other terms and conditions are as per FAI terms (that is, the "Fertilizer Association of India Terms and Conditions for Sale and Purchase of Phosphoric Acid"). Clause 15 of FAI terms provided for settlement of disputes by arbitration. **F**

2.2. The petitioner effected the supplies in pursuance of the purchase orders and raised invoice for such supplies. The respondent failed to pay the invoice amounts aggregating to US \$ 1,50,15,913.38 in respect of the supplies against the said purchase orders, and went on seeking extension of time for making payment on the ground of financial difficulties. **G**
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A 2.3. The petitioner, therefore, filed a suit in the Amman Court of First Instance, Jordan, in Case No. 223/2002 for recovery of the amounts due. The respondent contested the jurisdiction of the said court, firstly, on the ground that the courts at Jordan did not have jurisdiction and, secondly, on the ground that there was an arbitration agreement between the parties, as per clause 15 of the FAI terms. The Amman Court of First Instance, dismissed the petitioner's case on 20.3.2003 on the ground of lack of jurisdiction. The petitioner challenged the same before the Amman Court of Appeal in case No. 1229/2003 which was also dismissed on 25.6.2003.

C 2.4. The petitioner issued a statutory notice dated 2.8.2004 demanding payment of the amount due with interest @ 7.5% per annum. On respondent's failure to pay, the petitioner filed a petition for winding up in Company Petition No. 276/2004 on the file of the High Court of Madras, which is pending. The petitioner also issued a notice dated 30.8.2005 through its counsel informing the respondent that the disputes and differences between the parties on account of non-payment of amounts due by the respondent shall have to be settled by arbitration in terms of clause 15 of FAI terms and appointed Mr. Justice D.P. Wadhwa, former Judge, Supreme Court of India, as its Arbitrator, and called upon the respondent to appoint its Arbitrator in terms of the arbitration clause within 30 days of the receipt of the notice. The petitioner also informed the respondent that if the respondent failed to comply, appropriate proceedings will be initiated. In spite of it, the respondent did not comply, necessitating the filing of this petition for appointment of an second Arbitrator to the Arbitral Tribunal for adjudication and settlement of the claims.

F 3. The respondent entered appearance and has filed its counter, resisting the petition on the following grounds :

G (i) The petitioner, having denied before the Jordanian Courts (Amman Court of First Instance and Amman Court of Appeals), the existence of arbitration agreement between the parties, is estopped from contending in this petition, that there is an arbitration agreement between the parties, or that the disputes should be settled by arbitration.

H (ii) The claim of the petition is barred by limitation as the amounts claimed are in respect of goods dispatched as per the Bills of Lading dated

19.11.2000, 28.11.2000, 10.12.2000, 22.12.2000 and 13.7.2001, and the last of the correspondence from Respondent was on 17.4.2002.

(iii) The petitioner's contention that there is an arbitration agreement between the parties in accordance with clause 15 of the FAI terms is not tenable.

Without prejudice to the said contention, the respondent has submitted that in the event of this Court coming to the conclusion that there is a binding arbitration agreement, Mr. Justice S. Ratnavel Pandian, former Judge of the Supreme Court, he nominated as its nominee on the Arbitral Tribunal.

4. The respondent has not disputed the fact that it had placed five purchase orders (referred to above) on the petitioner for supply of Phosphoric Acid, or the fact that each of these purchase orders specifically provided that "all other terms and condition are as per FAI terms". It is also not disputed that clause 15 of FAI terms provides for settlement of disputes by arbitration (extracted below) :

"In the event of any question or dispute arising under or out of these conditions or in connection with or relating to this contract (except as to any matter(s) the decision of which is specially provided for in these conditions), the matter in dispute shall be referred to two arbitrators, one to be nominated by the seller and one to be nominated by the buyers or in the case of said arbitrators not agreeing, then to an Umpire to be appointed by the Arbitrators in writing before proceeding on the reference and the decision of the Arbitrators or in the event of their not agreeing, of the said Umpire shall be final and conclusive and the provisions of Indian Arbitration and Conciliation Act, 1996 and any modification thereon and the rules thereunder shall be deemed to apply to the proceedings. The arbitrators or the Umpires as the case may be shall be entitled with the consent of the parties to enlarge the time, from time to time for marking the award. The arbitrator/Umpire will give a reasoned award.

The venue of the Arbitration shall be Delhi."

5. All the purchase orders were signed on behalf of the respondent and the same had been counter-signed by the petitioner in token of acceptance

A of the purchase orders. In fact, in its reply filed the Amman Court of First Instance, the respondent specifically contended that in view of the arbitration agreement between the parties (as per Clause 15 of FAI terms), the dispute will have to be settled by arbitration and therefore, the suit was not maintainable. It is also significant to note that in the counter statement filed in this case, the Respondent has neither denies having placed 5 purchase orders on the petitioner nor denied the fact that the purchase orders were all placed subject to the FAI terms and conditions, including clause 15 of FAI terms which provides for arbitration. On the other hand, the contention of the respondent is that the petitioner having denied the arbitration agreement before the Jordanian Court, cannot now contend that there is an arbitration agreement. Respondent also contends that in the absence of any letter from the petition specifically referring to or agreeing to arbitration and in view of petitioner's denial of the existence of arbitration agreement in its pleadings before the Jordanian Court, there is no *consensus ad idem* between the parties to refer the disputes to arbitration and therefore there cannot be any reference to arbitration.

6. Whether there is an arbitration agreement or not, has to be decided with reference to the contract documents and not with reference to any contention raised before a court of law after the dispute has arisen. Reference to pleadings before the Jordanian Courts would have been relevant if the plea was that the arbitration agreement between the parties is contained in the exchange of statement of claim and defence in which the existence of the agreement is alleged by one party and not denied by the other (as contemplated under section 7(4)(c) of the Act). Be that as it may. Section 2(b) of the Act defines 'arbitration agreement' as meaning an agreement referred to in Section 7 (extracted 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) a document signed by the parties;

(b) an exchange of letters, telex, telegrams or other means of telecommunication which provide a record of the agreement; or B

(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." C

7. The purchase orders placed by the respondent on 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, the 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 the FAI terms. D E

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. F G

9. It is true that the petitioner had contended before the Jordanian Court that there was no arbitration agreement between the parties. But the said contention was not accepted and the suit filed by the petitioner has been dismissed on the ground of want of jurisdiction. Thereafter, on reconsidering H

- A the matter and taking legal advice, with reference to the contentions of the respondent, the petitioner has now proceeded on the basis that an arbitration agreement exists between the parties. If, on account of mistake or wrong understanding of law, a party takes a particular stand (that is, there is no arbitration agreement), he is not barred from changing his stand subsequently or estopped from seeking arbitration. (See *U.P. Rajkiya Nirman Nigam Ltd. v. Indore (P) Ltd.*, [1996] 2 SCC 667, where the contention based on estoppel was negated while considering a reserve situation).
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10. In regard to limitation, the petitioner submitted that having regard to the acknowledgements contained in the series of letters written by Respondent requesting for time and the acknowledgements contained in the balance-sheets where these amounts are shown as 'due and outstanding', the petitioner's claim is not barred by limitation. It is, however, unnecessary to examine this aspect as the learned counsel for the respondent fairly conceded that this is a question which can be examined by the Arbitral Tribunal, in the event of a reference to arbitration being made. It is now well-settled that the limitation is an issue that can be considered and decided by the Arbitration Tribunal.
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11. The next question is whether the respondent has lost its right to appoint its nominee to the Arbitral Tribunal in view of its failure to comply with the demand of the petitioner to appoint the arbitrator within 30 days from the date of receipt of notice dated 30.8.2005. It is apparent that the respondent did not appoint an Arbitrator as it was under a *bona fide* impression that there cannot be an arbitration. Further without prejudice to its contentions, it has nominated its Arbitrator.
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12. Section 10 of the Act provides that the number of Arbitrators shall not be 'even'. The arbitration clause provides that the dispute shall be referred to two Arbitrators and in the event of Arbitrators not agreeing then an Umpire to be appointed by the Arbitrators in writing before proceeding to the reference. Having regard to section 10 of the Act, the Arbitral Tribunal shall consist of three Arbitrators (one to be appointed by each of the two parties and the Presiding Arbitrator).
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13. For the aforesaid reasons, this petition is allowed and the following Arbitral Tribunal is constituted to adjudicate upon the claim made by the petitioner against the Respondent and to settle the disputes between the parties :
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- (i) Mr. Justice R.C. Lahoti, Former Chief Justice of India, Noida (U.P.) - Presiding Arbitrator; A
- (ii) Mr. Justice S. Ratnavai Pandian, Former Judge of Supreme Court, Chennai - nominee of respondent;
- (iii) Mr. Justice D.P. Wadhwa, Former Judge of Supreme Court, New Delhi - nominee of petitioner. B

14. Registry is directed to communicate the constitution of the Arbitral Tribunal to the three Arbitrators to enable them to enter upon the reference and decide the matter expeditiously. C

R.P.

Petition allowed.