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

% ***Reserved on: 19.12.2019***
Pronounced on: 12.05.2020

\+ ARB.P. 674/2018

GALAXY INFRA AND ENGINEERING PVT. LTD .... Petitioner

Through Ms. Minakshi Jyoti and Ms. Poorvi Singh, Advocates.

versus

PRAVIN ELECTRICALS PVT. LTD ..... Respondent

Through Mr. Gaurav Mitra, Mr. Saswat Pattnaik and Mr. Adit Singh, Advocates.

CORAM:
HON'BLE MS. JUSTICE JYOTI SINGH

J U D G E M E N T

1. Present petition has been filed under Section 11(6) of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as an 'Act') for appointment of a Sole Arbitrator for adjudication of the disputes between the parties.

2. Petitioner is in the business of providing Consultancy services for promotion of electrical supplies and installation, electric design and build, electrical testing and commissioning, power transfer and distribution project, EPC and Turnkey projects in various State Governments. Respondent operates in Key industrial, commercial and retail sectors with

many projects in multi-story offices, hotels, super stores etc. and provides services of electrical supplies etc.

3. On 26.05.2014 an online tender with RFP identification number was invited by Chief Engineer, South Bihar Power Distribution Company Limited (SBPDCL) for appointment of implementing agency for execution of R-APDRP (Part-B) Scheme on turnkey basis, for strengthening, improvement and augmentation of distribution system capacity of 20 towns, in Patna and the date of online submission of tender was extended to 08.07.2014.

4. Respondent submitted its technical and financial bid and the various business understandings between the parties were recorded in an Agreement dated 07.07.2014. During the negotiations, according to the petitioner, it was conveyed to the petitioner that as per the terms of the Consultancy Agreement, if the contract is awarded to the respondent, then its Joint Venture, namely, Process Construction and Technical Services Private Limited (PCTSPL) will execute the project. On 10.07.2014 respondent submitted its technical and financial bids with respect to RFP No. 56/2014.

5. Respondent was declared L-1 bidder. It is the case of the petitioner that it had made substantial efforts under the Consultancy agreement to facilitate the respondent in getting the contract and respondent had made payment of Rs.75,000/-, accepting its liability for the consultancy services, rendered under the said Agreement.

6. Thereafter, two letters of Award, both dated 22.09.2014 were issued by SBPDCL in favour of the respondent. In terms of the Consultancy Agreement, petitioner raised an invoice dated 27.09.2014 for

an amount of Rs. 25 lakhs plus service tax against which the respondent paid Rs. 25,59,000/-. The invoice was raised on PCTSPL because it had undertaken the execution of the project. An agreement was signed between the respondent and SBPDCL pursuant to the Letters of Award.

7. As per the Consultancy Agreement, petitioner had to raise a second invoice only upon advance of mobilization funds to the respondent/the Joint Venture, subject to tendering of Bank Guarantees to SBPDCL.

8. Petitioner states that it continuously followed up with the respondent to tender Bank Guarantee for functioning of the project and to enable the petitioner to raise the second invoice. However, the respondent did not furnish the Bank Guarantee due to which the mobilization funds were not advanced and the petitioner was not paid its consultancy fees.

9. Petitioner was subsequently requested by the respondent that instead of an invoice for Rs. one crore, an invoice for Rs.20/- lakhs plus service tax be raised for the present, which the petitioner did and the respondent paid Rs. 18 lakhs to the petitioner. After much follow-up, respondent made a further payment of an amount of Rs. 4,71,500/- only.

10. Petitioner further avers that a final invoice for balance payment of Rs. 5,54,14,318/- was raised on 01.07.2017 which was duly received by the respondent, but no payment was made thereafter and all attempts for amicable settlement also failed. Petitioner thereafter sent a demand notice dated 09.03.2018, in response to which the respondent on 22.03.2018 sought a copy of the Consultancy Agreement.

11. Petitioner invoked the Arbitration Agreement by a notice dated 26.04.2018 and nominated a sole arbitrator to adjudicate the disputes between the petitioner, respondent and Engineering Private Limited.

Notice was received by the respondent, who again vide its letter dated 03.05.2018 sought a copy of the agreement.

12. Receiving no response from the respondent, the present petition has been filed.

13. Learned counsel for the petitioner contends that the Consultancy Agreement dated 07.07.2014 which contains the Arbitration Clause was executed between the parties. Respondent is denying the execution with malafide intent although on several occasions when correspondences were exchanged between the parties, respondent had not even once denied the existence of the Agreement. Referring to such correspondences, learned counsel has drawn the attention of this Court to an email dated 15.07.2014 sent by the petitioner to the respondent referring to payment term of 2.5%; an e-mail dated 27.10.2014 from the respondent asking the petitioner to complete the Agreement and start the survey, an email dated 17.12.2014 whereby the petitioner had emailed the soft copy of the Agreement to the respondent; email dated 30.06.2017 under which the petitioner had sent the final invoice for the full and final payment, due to it. Attention is also drawn to a Whatsapp message dated 25.04.2018 from the petitioner to the respondent communicating that it had an Agreement with 'Praveen' and not with the Joint Venture, as also an email dated 14.05.2018 from the petitioner's Advocate, whereby a scanned copy of the Agreement was sent.

14. It is further argued that respondent made part payment in accordance with the terms. Attention is drawn to the said payment terms, drawn out in the Agreement which are as under:-

> "*7.2 The commission payable by PRAVIN to the CONSULTANT is based on success-fee basis as detailed in Article 6.1. The agreed payment terms are:*
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> *PRAVIN shall pay Rs. 25,00,000/- (Rupees Twenty-Five Lakhs only) on receipt of the Firm Letter of Intent (LOI) OR Letter of Acceptance (LOA) to the Consultant immediately.*
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> *PRAVIN shall pay a sum of Rs. 1,00,00,000/- (Rupees: One Crore only) if Mobilization Advance is taken and Rs. 50,00,000/- (Fifty Lakhs only) on each Running Bills TILL COMPLETION OF 2.5% OF ORDER VALUE to the CONSULTANT on Mobilization of Advance from the end client for the Works Awarded, immediately."*

15. It is submitted that various invoices were raised from time to time and it was never denied by the respondent that these invoices were not payable. There is not a single document on record filed by the respondent which refutes the existence of the Agreement. The first time that the respondent denied the execution of the agreement was vide a letter dated 27.03.2018 by which time the petitioner had sent demand notice dated 09.03.2018. Even after the receipt of scanned copy of the Agreement on 14.05.2018, no dispute was raised regarding the alleged fabrication of the document.

16. Counsel for the petitioner further contends that the existence of the Arbitration Agreement further flows from the conduct of the parties and the documents exchanged between them. Respondent approached the petitioner for rendering its consultancy services vide email dated 15.07.2014 and the petitioner through reply dated 15.07.2014 duly accepted the offer, though with different payment terms.

17. The email sent to the department, by the respondent, was forwarded to the petitioner on 21.07.2014 for necessary action. Email dated 22.09.2014 at 7:26 PM regarding Award of Contract to the respondent was sent as a copy to the petitioner by the department. Email dated 23.09.2014 regarding draft PBG from the department was sent to the petitioner on 24.09.2014 and draft LOA was sent on 25.09.2014. Therefore, even assuming that the agreement was not signed by the parties, it was acted upon and dispute resolution mechanism was intended to be through Arbitration. Reliance is placed on the judgment in ***Louis Dreyfus Commodities vs. M/s Givind Rubber Limited, Bombay High Court, Arb Petition No. 174/2012***.

18. Per contra, learned counsel for the respondent as a preliminary objection argues that the present petition is not maintainable, as there is no Arbitration Agreement between the parties. Alleged Agreement dated 07.07.2014 is signed, stamped and notarized in Faridabad, Haryana. It is submitted that the petitioner is based in Bihar while the respondent is based in Mumbai as is evident from the Memo of Parties. The alleged Agreement is for works to be carried out in Bihar. Neither of the parties are based out of Faridabad and thus, it is highly unlikely that the parties would travel to Haryana to execute an Agreement for works in Bihar. Further, the respondent's Director has filed an affidavit that he has never travelled to Faridabad, to sign any agreement.

19. It is argued that the signing and the stamping of the alleged Agreement is further suspect as the license of the Notary Public who has notarized the alleged Agreement, expired on 27.05.2012, as is evident from the document filed with the reply.

20. It is next contended that the first invoice dated 27.09.2014 relied upon by the petitioner was addressed to PCTSPL and not the petitioner and even the second invoice raised on 24.04.2016 was addressed to the same company. Neither of the two invoices even refer to the Agreement dated 07.07.2014. In so far as the ledger account relied upon by the petitioner is concerned, it is submitted that the same is also in the name of PCTSPL and not the respondent. No doubt, the petitioner has shown an invoice dated 01.07.2017 addressed to the respondent having a reference to the Agreement but the said invoice was never served upon the respondent and no acknowledgement has been placed on record. Petitioner had sent a legal notice on 09.03.2018 to the respondent referring to the Agreement and seeking payments but the respondent in its reply dated 22.03.2018 has clearly denied the existence of any such Agreement and sought a copy to verify its genuineness. Petitioner never responded to the said reply and instead invoked Arbitration. In reply to the notice of invocation, respondent again denied the execution of the agreement and sought a copy thereof. The petitioner for the first time supplied a copy vide email dated 14.05.2018 and the Director of the respondent has filed an affidavit dated 21.09.2018 categorically denying its signatures on the alleged agreement.

21. It is further contended that the petitioner is relying on an email dated 15.07.2014 by which it has allegedly sent a Draft Agreement to the respondent. This is incorrect on the face of it because if the agreement on the basis of which the petition has been filed is dated 07.07.2014, where was the necessity to send a Draft Agreement on 15.07.2014. There are

further discrepancies in the draft agreement, such as the compensation specified is different in the two agreements.

22. It is contended that this Court by an order dated 28.11.2018 had sent the alleged Agreement dated 07.07.2014 to CFSL for ascertaining the genuineness of the signatures of the respondent's Director. However, as per the report the signatures are not technically comparable and this fortifies the stand of the respondent that it had not signed the agreement.

23. Learned counsel for the petitioner in rejoinder argues that the petitioner had to execute a Draft Agreement on 15.07.2014 as there were some discrepancies in the payment terms and this was clearly mentioned in the reply e-mail to the respondent and the respondent has not placed any document evidencing the denial of this e-mail sent by the Petitioner. In so far as the invoices being addressed to PCTSPL is concerned, it was a sub-contractor of the respondent and the invoice was raised on the request of the respondent.

24. It is contended that the payments made by PCTSPL to the Petitioner were on instructions from the respondent and on its behalf. It cannot be argued by the respondent that these payments were on account of business relationships between PCTSPL and the Petitioner. Perusal of the invoices shows that they were with respect to the contract awarded to the respondent by the Department with which PCTSPL had no relationship and, therefore, the payments were clearly on behalf of the respondent. The payments made though partially on different occasions indicate that there were clear business dealings between the parties and the agreement was executed between them.

25. It is contended that even assuming that there are no signatures of the parties or that the signatures on the Agreement dated 07.07.2014 are not of Mr. Stephen, even then the petition is maintainable as the law does not mandate signatures on an Arbitration Agreement. Reliance is placed on the judgment in the case of ***Caravel Shipping Services Private Limited vs. M/s Premier Sea Foods Exim Pvt. Ltd, SCI, Civil Appeal No. 10800-10801/2018.*** It is further submitted that the CFSL report also does not contain any adverse finding and only states that the signatures are not technically comparable. In so far as the ground of the License of the Notary Public is concerned, counsel for the Petitioner argues that though the notarization of the agreement was not mandatory, yet without prejudice to this contention, it could not have been known to the Petitioner that the License of the Notary had expired.

26. Learned counsel further submits that under Section 7(4)(b) of the Act, an Arbitration Agreement can be proved by way of other documents and correspondences exchanged between the parties or by showing that the parties acted upon the Agreement which contains the Arbitration Clause. In the present case, it is clear that the parties acted on the Agreement and exchanged several emails and payments were also made to the petitioner on behalf of the respondent. The parties were thus ad idem for submission of disputes to Arbitration.

27. I have heard the learned counsels for the parties and examined their rival contentions.

28. In a petition under Section 11(6) of the Act, the only issue that the Court is required to examine is the existence of an Arbitration Agreement

between the parties. This is clear from reading of Section 11(6A) of the Act, which is reproduced as under :-

> *"(6A) The Supreme Court or, as the case may be, the High Court, while considering any application under sub-section (4) or sub-section (5) or sub-section (6), shall, notwithstanding any judgment, decree or order of any Court, confine to the examination of the existence of an arbitration agreement."*

29. This position of law has been recently crystalized by a judgment of the Supreme Court in the case of ***Mayavati Trading (P) Ltd. v. Pradyuat Deb Burman, (2019) 8 SCC 714***. Relevant part of the judgment reads as under :-

> *"10. This being the position, it is clear that the law prior to the 2015 Amendment that has been laid down by this Court, which would have included going into whether accord and satisfaction has taken place, has now been legislatively overruled. This being the position, it is difficult to agree with the reasoning contained in the aforesaid judgment [United India Insurance Co. Ltd. v. Antique Art Exports (P) Ltd., (2019) 5 SCC 362 : (2019) 2 SCC (Civ) 785] , as Section 11(6-A) is confined to the examination of the existence of an arbitration agreement and is to be understood in the narrow sense as has been laid down in the judgment in Duro Felguera, SA [Duro Felguera, SA v. Gangavaram Port Ltd., (2017) 9 SCC 729 : (2017) 4 SCC (Civ) 764] — see paras 48 & 59.*

In the case of ***Duro Felguera, SA v. Gangavaram Port Ltd., (2017) 9 SCC 729 : (2017) 4 SCC (Civ) 764,*** Supreme Court held as under:

> *"48. Section 11(6-A) added by the 2015 Amendment, reads as follows:*
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> > *"11. (6-A) The Supreme Court or, as the case may be, the High Court, while considering any application under sub-section (4) or sub-section (5)*

or sub-section (6), shall, notwithstanding any judgment, decree or order of any court, confine to the examination of the existence of an arbitration agreement."(emphasis supplied) From a reading of Section 11(6-A), the intention of the legislature is crystal clear i.e. the court should and need only look into one aspect—the existence of an arbitration agreement. What are the factors for deciding as to whether there is an arbitration agreement is the next question. The resolution to that is simple—it needs to be seen if the agreement contains a clause which provides for arbitration pertaining to the disputes which have arisen between the parties to the agreement.

* * *

59. The scope of the power under Section 11(6) of the 1996 Act was considerably wide in view of the decisions in SBP & Co. v. Patel Engg. Ltd., (2005) 8 SCC 618 and National Insurance Co. Ltd. v. Boghara Polyfab (P) Ltd., (2009) 1 SCC 267 : (2009) 1 SCC (Civ) 117. This position continued till the amendment brought about in 2015. After the amendment, all that the courts need to see is whether an arbitration agreement exists—nothing more, nothing less. The legislative policy and purpose is essentially to minimise the Court's intervention at the stage of appointing the arbitrator and this intention as incorporated in Section 11(6-A) ought to be respected."

30. Seen from this perspective, the only issue that this Court needs to examine in the present petition is the existence of an Arbitration Agreement between the parties. The contention of the petitioner is that there exists a concluded contract between the parties which contains an Arbitration Clause while the stand of the respondent is that no agreement was executed between the parties and the agreement sought to be relied upon by the petitioner is a forged and fabricated document. Detailed

submissions have been made by both sides in support of their respective stands.

31. Arbitration Agreement has been defined under Section 2(b) of the Act to mean an agreement referred to in Section 7 of the Act. Section 7 clearly stipulates that an Arbitration Agreement shall be in writing and an agreement is in writing if it is contained either in a document signed by the parties or in an exchange of letters, telegram etc. which provide record of the agreement or an exchange of statements of claim and defence in which one party alleges the existence of the Agreement and the other party does not deny the same. Section 7(5) further provides that the reference in a contract to a document containing an Arbitration Clause constitutes an Arbitration Agreement, if the reference is such as to make the Arbitration Clause part of this contract. It is thus evident that it is not necessary that the Arbitration Agreement must necessarily be a signed document. Also in view of Sections 7(4) and 7(5) of the Act, it is clear that the intent of the parties to have entered into an Arbitration Agreement can be inferred from the exchange of correspondence between them or where the parties act on the terms and conditions of the agreement. Supreme Court in the case of ***Shakti Bhog Foods Limited v. Kola Shipping Limited, (2009) 2 SCC 134,*** held that from the provisions made under Section 7 of the Act, it is clear that the existence of the Arbitration Agreement can be inferred from a document signed by the parties or exchange of letter, telex or other means of communication which provide a record of the agreement. Relevant part of the judgment reads as under :

"Therefore, it is clear from the provisions made under Section 7 of the Act that the existence of an arbitration agreement can be inferred from a document signed by the parties, or an exchange of letters, telex, telegrams or other means of telecommunication, which provide a record of the agreement."

32. In the case of ***Dresser Rand S.A. v. Binda Agro Chern, (2006) 1 SCC 751***, Supreme Court held that the cardinal principle to remember is that it is the duty of the Court to construe correspondence with a view to arrive at a conclusion whether there was any meeting of mind between the parties, which could create a binding contract between them. The Court is required to review what the parties wrote and how they acted and from that material to infer whether the intention as expressed in the correspondence was to bring into existence a mutually binding contract. In case the expressions used in the correspondence show that there was a meeting of mind and they had actually reached an agreement then it can be said that a binding contract came into existence between the parties.

33. In the case of ***Smita Conductors v. Euro Alloys Ltd., (2001) 7 SCC 728***, Supreme Court spelt out the parameters required to come to a finding that there was an Arbitration Agreement between the parties. The relevant part of the judgment is as under :

"6. What needs to be understood in this context is that the agreement to submit to arbitration must be in writing. What is an agreement in writing is explained by para (2) of Article II. If we break down para (2) into elementary parts, it consists of four aspects. It includes an arbitral clause (1) in a contract containing an arbitration clause signed by the parties, (2) an arbitration agreement signed by the parties, (3) an arbitral clause in a contract contained in exchange of

letters or telegrams, and (4) an arbitral agreement contained in exchange of letters or telegrams. If an arbitration clause falls in any one of these four categories, it must be treated as an agreement in writing. In the present case, we may advert to the fact that there is no letter or telegram confirming the contract as such but there is certain correspondence which indicates a reference to the contract in opening the letters of credit addressed to the bank which we shall presently refer to. There is no correspondence between the parties either disagreeing with the terms of the contract or arbitration clause. Apart from opening the letters of credit pursuant to the two contracts, the appellant also addressed a telex message on 23-4-1990 in which there is a reference to the two contracts bearing Nos. S-142 and S-336 in which they stated that they want to invoke force majeure and the arbitration clauses in both the contracts which are set forth successively and thus it is clear that the appellant had these contracts in mind while opening the letters of credit in the bank and in addressing the letters to the bank in this regard. Maybe, the appellant may not have addressed letters to the respondent in this regard but once they state that they are acting in respect of the contracts pursuant to which letters of credit had been opened and they are invoking the force majeure clause in these two contracts, it obviously means that they had in mind only these two contracts which stood affirmed by reason of these letters of credit. If the two contracts stood affirmed by reason of their conduct as indicated in the letters exchanged, it must be held that there is an agreement in writing between the parties in this regard."

The Supreme Court in the said case after considering the correspondence between the parties held that the contract stood confirmed by the conduct of the parties and the letters they exchanged.

34. To the same effect is the judgment in the case of ***Visa International Limited v. Continental Resources (USA) Limited, (2009)***

2 SCC 55, where the Supreme Court held that an Arbitration Agreement is not required to be in any particular form. Relevant part of the judgment reads as under :-

> *"18. That an arbitration agreement is not required to be in any particular form has been reiterated in more than one decision. [See Bihar State Mineral Development Corpn. v. Encon Builders (I) (P) Ltd. [(2003) 7 SCC 418]] What is required is to gather the intention of the parties as to whether they have agreed for resolution of the disputes through arbitration. What is required to be decided in an application under Section 11 of the Act is whether there is any arbitration agreement as defined in the Act? It needs no reiteration that Section 7 of the Act does not prescribe any particular form and it is immaterial whether or not expression "arbitration" or "arbitrator" or "arbitrators" has been used in the agreement.*"

35. In this context, it is useful to refer to an erudite judgment by the Supreme Court in ***Trimex International FZE Limited, Dubai v. Vedanta Aluminium Limited, India, (2010) 3 SCC 1***, wherein the Court after perusing the various emails exchanged between the parties including an email attaching a draft contract held as under :-

> *"44. From the materials placed, it has to be ascertained whether there exists a valid contract with the arbitration clause. It is relevant to note that on 15-10-2007 at 4.26 p.m. the petitioner submitted a commercial offer wherein Clause 6 contains the arbitration clause i.e. "this contract is governed by Indian law and arbitration in Mumbai courts". At 5.34 p.m. though the respondents offered their comments, as rightly pointed out by Mr K.K. Venugopal, no comments were made in respect of the "arbitration clause". It is further seen that at 6.04 p.m., the petitioner sent a reply to the comments made by the respondent. Again, on 16-10-2007 at 11.28 a.m., though the respondents suggested certain additional*

information on the offer note, here again no suggestion was made with regard to the arbitration clause.

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49. In the light of the details which have been extracted in the earlier paragraphs, I am unable to accept the stand of the respondent. It is clear that if the intention of the parties was to arbitrate any dispute which arose in relation to the offer of 15-10-2007 and the acceptance of 16-10-2007, the dispute is to be settled through arbitration. Once the contract is concluded orally or in writing, the mere fact that a formal contract has to be prepared and initialled by the parties would not affect either the acceptance of the contract so entered into or implementation thereof, even if the formal contract has never been initialled.

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57. ...It is essential that the intention of the parties be considered in order to conclude whether the parties were ad idem as far as adopting arbitration as a method of dispute resolution was concerned. In those circumstances, the stand of the respondent that in the absence of signed contract, the arbitration clause cannot be relied upon is liable to be rejected.

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60. It is clear that in the absence of signed agreement between the parties, it would be possible to infer from various documents duly approved and signed by the parties in the form of exchange of e-mails, letter, telex, telegrams and other means of telecommunication."

36. At this stage, it is also useful to refer to the judgment of the Supreme Court in the case of ***Govind Rubber Ltd. v. Louis Dreyfus***

Commodities Asia (P) Ltd., (2015) 13 SCC 477, wherein the Supreme Court held as under :-

> ***"****12. There may not be any dispute with regard to the settled proposition of law that an agreement even if not signed by the parties can be spelt out from correspondence exchanged between the parties. However, it is the duty of the court to construe correspondence with a view to arrive at the conclusion whether there was any meeting of mind between the parties which could create a binding contract between them. It is necessary for the court to find out from the correspondence as to whether the parties were ad idem to the terms of contract.*
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> *15. A perusal of the aforesaid provisions would show that in order to constitute an arbitration agreement, it need not be signed by all the parties. Section 7(3) of the Act provides that the arbitration agreement shall be in writing, which is a mandatory requirement. Section 7(4) states that the arbitration agreement shall be in writing, if it is a document signed by all the parties. But a perusal of clauses (b) and (c) of Section 7(4) would show that a written document which may not be signed by the parties even then it can be arbitration agreement. Section 7(4)(b) provides that an arbitration agreement can be culled out from an exchange of letters, telex, telegrams or other means of telecommunication which provide a record of the agreement.*
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> *16. On reading the provisions it can safely be concluded that an arbitration agreement even though in writing need not be signed by the parties if the record of agreement is provided by exchange of letters, telex, telegrams or other means of telecommunication. Section 7(4)(c) provides that there can be an arbitration agreement in the exchange of statements of claims and defence in which the existence of the agreement is alleged by one party and not denied by the other. If it can be prima facie shown that the parties are at ad idem, then*

the mere fact of one party not signing the agreement cannot absolve him from the liability under the agreement. In the present day of e-commerce, in cases of internet purchases, tele purchases, ticket booking on internet and in standard forms of contract, terms and conditions are agreed upon. In such agreements, if the identity of the parties is established, and there is a record of agreement it becomes an arbitration agreement if there is an arbitration clause showing ad idem between the parties. Therefore, signature is not a formal requirement under Section 7(4)(b) or 7(4)(c) or under Section 7(5) of the Act."

37. In ***Unissi (India) Pvt. Ltd. v. Post Graduate Institute of Medical Education and Research, (2009) 1 SCC 107***, Supreme Court clearly held that even in the absence of a signed formal agreement between the parties, the Arbitration Agreement would be deemed to have come into existence when otherwise discernible from the conduct of the parties or the correspondences exchanged between them.

38. Applying the aforesaid law, what is now required to be seen is whether through the correspondence exchanged between the parties or their conduct, can it be concluded that an Arbitration Agreement existed in the absence of a signed contract.

39. Learned counsel for the petitioner has drawn the attention of the Court to various emails which indicate that a Consultancy Agreement was executed between the parties on 07.07.2014. In the said agreement, the parties agreed on the percentage of fee that the petitioner would get in case the respondent succeeded in getting the tender from SBPDCL. On 15.07.2014 the respondent had sent an email with soft copy of the agreement suggesting a certain percentage of the consultancy fee. Subsequent emails are also placed on record which show that payment

terms were being discussed between the parties. Email dated 30.06.2017 is also on record by which a final invoice was sent by the petitioner clearly making a reference to the Agreement dated 07.07.2014. None of these documents have been denied by the respondent. Learned counsel for the petitioner has also pointed out that the respondent even made payments in accordance with the terms of the Agreement. As per the payment terms, Rs.25 Lakhs was payable on receipt of LOI by the respondent from SBPDCL. Admittedly on 22.09.2014, LOI was awarded to the respondent and on the petitioner raising an invoice for Rs.25 Lakhs on 27.09.2014, respondent actually made payment on 29.09.2014. Counsel for the petitioner has also shown the email dated 27.09.2014 whereby the respondent had asked the petitioner to raise the invoice on its letter head. These documents in my view clearly indicate that the parties had entered into an Agreement pursuant to which the parties had acted. The petitioner had assisted the respondent in the award of the LOI and the respondent had initially made payments in terms of the said agreement dated 07.07.2014. Learned counsel for the Petitioner is also right in submitting that on 15.07.2014, the respondent had itself sent an email containing a Draft Consultancy Agreement which contained Article 14, which was the Arbitration Clause. The parties were thus *ad idem* regarding submission of disputes to Arbitration.

40. The fact that there was an Agreement between the parties is also fortified by the fact that the information sent by the Department to the respondent regarding award of the Contract to the respondent was also sent to the petitioner vide email dated 22.09.2014. Draft letter of acceptance sent by the Department to the petitioner through email dated

25.09.2014 was sent by the petitioner to the respondent on the same day, by an email.

41. Learned counsel for the respondent in my view is not correct in its contention that since a draft agreement was emailed by the respondent, there was no executed agreement dated 07.07.2014. From the email dated 15.07.2014, it is apparent that the respondent had executed an Agreement prior to 15.07.2014. Petitioner had categorically stated in the email dated 15.07.2014 that the payment terms in the draft agreement were different and there is no document on record filed by the respondent evidencing denial of the contents of this email.

42. In so far as the argument that the invoices were raised on PCTSPL and not on the petitioner is concerned, petitioner is correct in its submission that PCTSPL was only a sub-contractor of the respondent. Petitioner had not raised the invoice on its own will. Counsel for the petitioner has pointed out the email dated 24.09.2019 sent by PCTSPL to the respondent i.e. Mr. Manoj Panikar to Mr. Stephen whereby PCTSPL had emailed the draft invoice to the respondent and sought confirmation whether it could be sent to the petitioner and finally, the revised draft invoice was sent to the petitioner on 27.09.2019 by PCTSPL.

43. The contention of the respondent that it was PCTSPL which had made payments to the petitioner and this was on account of their own inter se business relationships has no merit. The invoice placed on record clearly shows that this was with respect to the contract awarded to the respondent by the Department with which admittedly PCTSPL had no direct relationship. This itself is indicative of the fact that *dehors* the addressee of the invoices, the same were with respect to the contract

given by the department to the respondent and for which the petitioner was a consultant.

44. In so far as the contention of the respondent that the Consultancy Agreement dated 07.07.2014 did not have the signatures of Mr. M.G. Stephen and therefore, cannot be accepted as an agreement between the parties, is without merit. As mentioned in the earlier part of the judgment, it is not mandatory for an Arbitration Agreement that it must be signed by the parties. The Supreme Court in case of ***Caravel Shipping Services Pvt. Ltd. vs. M/s. Premier Sea Foods (2019) 11 SCC 461,*** has clearly held as under :

> *"**8.** In addition, we may indicate that the law in this behalf, in Jugal Kishore Rameshwardas v. Goolbai Hormusji [Jugal Kishore Rameshwardas v. Goolbai Hormusji, AIR 1955 SC 812] , is that an arbitration agreement needs to be in writing though it need not be signed. The fact that the arbitration agreement shall be in writing is continued in the 1996 Act in Section 7(3) thereof. Section 7(4) only further adds that an arbitration agreement would be found in the circumstances mentioned in the three sub-clauses that make up Section 7(4). This does not mean that in all cases an arbitration agreement needs to be signed. The only pre-requisite is that it be in writing, as has been pointed out in Section 7(3)."*

45. In my view, the documents placed on record by the petitioner clearly evidence that there exists an Arbitration Agreement between the parties as contained in the draft agreement exchanged by email dated 07.07.2014. The present case squarely falls within the ambit of Section 7(4)(b) of the Act. The inevitable result is that the parties must be referred to Arbitration for adjudication of their disputes.

46. The Arbitration Clause between the parties reads as under :

"Article 14- Governing Law and Dispute Resolution

The Agreement including the Arbitration Proceedings shall be governed by and interpreted in accordance with laws of India.

Any disputes, differences, whatsoever arising between the Parties out of or relating to the construction, meaning, scope, operation or effect of this contract shall be settled between the parties amicably. If however, the parties are not able to resolve their disputes/differences amicably as aforesaid the said dispute/differences shall be settled through arbitration. The Arbitration shall be governed in accordance with the Arbitration Act 1996 of India. The Arbitration shall be held at New Delhi, India. The language of arbitration shall be English.

During the pendency of the Arbitration proceedings both the parties shall continue to perform according to the AGREEMENT."

47. I accordingly appoint Mr. Justice G.S. Sistani, former Judge of this Court as a Sole Arbitrator to adjudicate the disputes between the parties. The address and mobile number of the learned Arbitrator is as under :-

Mr. Justice G.S. Sistani (Retd.),
19, Akbar Road,
New Delhi- 110011
Mobile: 9871300034

48. The learned Arbitrator shall give disclosure under Section 12 of the Act before entering upon reference.

49. Fee of the Arbitrator shall be fixed as per Fourth Schedule of the Act.

50. A copy of this order be sent to the learned Arbitrator for information.

51. Petition is allowed in above terms.

JYOTI SINGH, J

MAY 12, 2020
yo/yg