IN THE HIGH COURT OF JUDICATURE AT BOMBAY
NAGPUR BENCH AT NAGPUR

WRIT PETITION NO. 5377 OF 2021

1. M/s.TCI Infrastructure Limited, a company registered under the Companies Act and having its Registered Office at Flat No. 306 and 307, 1-8-271 to 273, 3rd Floor, Ashoka Bhoopal Chambers, S. P. Road, Secunderabad (A. P.), through its authorized representative

   And Corporate office at : TCI House, 69, Institutional Area, Section 32, Gurugram – 122001, Haryana.

2. M/s. Transport Corporation of India Limited, a registered under the Companies Act, 1956, having is Zonal Office TCI Freight, Near TCI Petrol Pump, Wardhamana, Amravati Road, Nagpur 440023, through its Power of Attorney Holder & the Zonal Manager, Sh. Radhey Shyam Dhaka

.. Petitioners

Versus

1. M/s. Kirby Building Systems (Uttaranchal) Private Limited, Plot No.2, Sector 11, SIDCUL, Integrated Industrial Estate (IIE), BHEL, Haridwar – 249403, Uttarakhand, Through Regional Manager.

2. M/s. Kirby Building Systems India Private Limited (KBSIPL), Plot No.B-15, IDA Phase II, Pashamylaram – 502307, District Medak, Talngana Through Asstt. General Manager

.. Respondents

Ms. Neelam Biala, Advocate for petitioners.
Mr. Rahul Bhanarkar, Advocate for respondents.

CORAM : MANISH PITALE, J.
DATED : 19/09/2022

ORAL JUDGMENT

Rule. Rule made returnable forthwith. Heard finally with the consent of the learned counsel appearing for the rival parties.

(2) By this writ petition, the petitioners (original plaintiffs) have challenged order dated 01/12/2018, passed at Exh.1 and 24 by the Court of 6th Joint Civil Judge, Senior Division, Nagpur (hereinafter referred to as the **"trial Court"**). Exh.24 was an application filed by the respondents (original defendants) under Section 8 of the Arbitration and Conciliation Act, 1996 (**Act of 1996**), for referring the matter to arbitration by contending that there was an arbitration agreement between the parties. As a consequence of the said application being allowed, order was passed on Exh.1 on the same date, whereby it was observed that in view of the application at Exh.24

being allowed, the suit itself stood disposed of, with the parties to go for arbitration in terms of the arbitration agreement.

(3) It appears that aggrieved by the said orders, passed by the trial Court, the petitioners filed Regular Civil Appeal No.93 of 2019, before the Court of Principal District Judge, Nagpur. By judgment and order dated 12/02/2021, the said Court dismissed the appeal as untenable. The said judgment and order is also made subject matter of challenge in the present writ petition.

(4) The petitioners filed Special Civil Suit No. 324 of 2017 against the respondents for recovery of a specific amount, claiming that the respondents while executing a contract and constructing a warehouse, had used sub-standard material and that in such circumstances, the petitioners were entitled to specific amount claimed in the said suit.

(5) The respondents filed application under Section 8(1) of the Act of 1996, claiming that there was an arbitration clause/ agreement between the parties, if the purchase order / contract dated 16/07/2012, was to be read with proposal dated 26/06/2012,

forwarded by the respondents. Reliance was placed on Clause (14) in the proposal, to assert that there was an arbitration clause and that therefore, the suit ought to be disposed of by directing the parties to go for arbitration. The said application was marked as Exh.24. As noted herein above, by the impugned order dated 01/12/2018, the trial Court allowed the application at Exh.24 and consequently passed order on the same date on Exh.1, disposing of the suit, leaving the parties to go to arbitration. The appeal filed against the same failed on the ground of tenability.

(6) Ms. Neelam Biala, learned counsel appearing for the petitioners submitted that a perusal of the documents on record would show that there was no arbitration clause in the concluded contract between the parties. It was submitted that even if there was an arbitration clause in the proposal forwarded by the petitioners on 26/06/2012, when the petitioners communicated their response to the same, by the document dated 12/07/2012, styled as a letter of intent, the proposal was only referred to and the aforesaid document specifically laid down the manner in which the respondents would execute the project for which they were being engaged by the

petitioners. It was submitted that this was the only document signed on behalf of both the parties and admittedly the said document did not contain any arbitration clause. Reference was also made to a purchase order dated 16/07/2012, virtually reiterating the clauses and terms and conditions stated in the letter of intent, in pursuance of which, the respondents proceeded to execute the project. On this basis, it was submitted that the trial Court failed to appreciate the true nature of the documents executed between the parties and that in the absence of an arbitration clause / agreement, power under Section 8(1) of the Act of 1996, was erroneously exercised by the trial Court and therefore, the suit was also wrongly disposed of. A feeble attempt was made to claim that the judgment and order passed by the District Court dismissing the appeal as untenable, deserved to be set aside.

(7) On the other hand, Mr. Bhanarkar, learned counsel appearing for the respondents submitted that the case of the respondents before the Courts below was that the purchase order / contract dated 16/07/2012, had to be read with proposal dated 26/12/2012 and the two documents read together clearly justified the impugned order passed by the trial Court referring the parties to

arbitration by exercising power under Section 8(1) of the Act of 1996. It was submitted that when there was clear reference to the proposal dated 26/06/2012, in the purchase order dated 16/07/2012, the clauses of the proposal ought to be read as having been incorporated in the purchase order for concluding that an arbitration clause/ agreement did exist between the parties. It was submitted that the appellate Court was justified in dismissing the appeal as untenable and that therefore, the writ petition itself deserved to be dismissed.

(8) Heard learned counsel for the rival parties and perused the material on record. In order to exercise power under Section 8 of the Act of 1996, there has to be an arbitration agreement between the parties. Such an agreement can certainly be a clause in a document executed between the parties. In any case, existence of such a clause or agreement is a *sine qua non* for the Court to exercise power under Section 8 of the Act of 1996. Therefore, it needs to be examined whether the documents on record, upon which the parties have placed reliance, demonstrate existence of such an arbitration clause/agreement.

(9) It is the case of the respondents that the purchase

order dated 16/07/2012, read with the proposal dated 26/06/2012, demonstrates that there was indeed an arbitration clause and that therefore, the trial Court was justified in exercising power under Section 8 of the Act of 1996, for referring the parties to arbitration and in that light disposing of the suit itself.

(10) This Court has perused the letter dated 26/06/2012, which forwarded a proposal dated 10/05/2012, from the respondents to the petitioners. In this document, which is signed unilaterally by the respondents, there is indeed an arbitration agreement at clause (14). It appears that in response thereto the petitioners issued a letter of intent on 12/07/2012, referring to the said letter dated 26/06/2012, as also subsequent discussions and then specifically stated that the petitioners were pleased to issue the letter of intent to the respondents for supply of pre-fabricated steel building against the offer made by the respondents. It is significant that this letter of intent, apart from stating the requirements of the prefabricated steel building in terms of its measurement and the material to be used, also incorporated certain terms and conditions and there was no reference at all to any arbitration clause or any kind of agreement between the

parties to refer disputes that may occur in the future for arbitration. This is the only document signed by the representatives of both the parties.

(11) Thereafter, on 16/07/2012, the petitioners issued the purchase order, again referring to the letter dated 26/06/2012, whereby the respondents had forwarded their proposal, as also to subsequent discussions and the letter of intent dated 12/07/2012. This is a document signed only on behalf of the petitioners and in this document, the specifications regarding the prefabricated steel building stated in the letter of intent were reiterated and terms and conditions were again specified which contained various clauses, including a clause concerning *force majeure*, but significantly it did not contain any clause specifying an arbitration agreement between the parties.

(12) The trial Court accepted the contentions raised on behalf of the respondents and proceeded on the basis that there was an arbitration agreement between the parties as stated in clause No. (14) of the proposal dated 10/05/2012, forwarded by letter dated 26/06/2012 on behalf of the respondents. Having concluded that there was an arbitration clause/agreement signed by the parties, the

trial Court proceeded to exercise power under Section 8 of the Act of 1996 and allowed the application, thereby relegating the parties to arbitration and in that light disposed of the suit itself.

(13) This Court is of the opinion that the trial Court committed a grave error in failing to appreciate the true purport of the documents on record. For an arbitration agreement to come into existence between the parties, there ought to be a document executed on behalf of both the parties, showing consensus ad-idem, incorporating such an arbitration clause/agreement. The only document signed on behalf of both the parties is the letter of intent dated 12/07/2012, which admittedly contains no arbitration clause/agreement. Similarly, even the purchase order dated 16/07/2012, which is signed only on behalf of the petitioners does not contain such an arbitration clause. This Court is of the opinion that merely because the proposal forwarded on behalf of the respondents, by letter dated 26/06/2012, contained an arbitration clause, which was unilaterally signed only on behalf of the respondents and there was reference thereto in the letter of intent dated 12/07/2012 and the purchase order dated 16/07/2012, it cannot be said that an arbitration

agreement came into existence between the parties. The only document i.e. the letter of intent dated 12/07/2012, signed by both the parties, merely referred to the proposal and specifically and independently recorded terms and conditions for the execution of the project by the respondents, which did not contain an arbitration clause/agreement. Mere reference to the proposal, without incorporation of the arbitration clause/agreement in the letter of intent dated 12/07/2012 and the purchase order dated 16/07/2012, would not amount to an arbitration agreement coming into existence. The trial Court failed to appreciate this aspect of the matter while exercising power under Section 8 of the Act of 1996.

(14) In this context, reliance placed by the learned counsel appearing for the respondents on judgment of the Hon'ble Supreme Court in the case of ***Sundaram Finance Limited and another vs. T. Thankam, (2015) 14 SCC 444,*** particularly paragraph 8 thereof, cannot be of any assistance to the respondents, for the reason that in the said case, the Hon'ble Supreme Court found on facts that there was indeed an arbitration agreement existing between the parties.

(15) In view of the above, it becomes clear that the

orders dated 01/12/2018, passed on Exhs.1 and 24 by the trial Court are unsustainable.

(16) Insofar as the judgment and order dated 12/02/2021, passed by the District Court is concerned, since this Court is inclined to allow the present writ petition and set aside the aforesaid orders of the trial Court, any discussion and findings on the impugned judgment and order of the District Court is unnecessary and in the light of the orders of the trial Court being set aside, the occasion to file the appeal itself would cease to exist. Therefore, this Court is not inclined to delve upon the contentions raised by the rival parties in the context of the impugned judgment and order dated 12/02/2021, passed by the District Court.

(17) In view of the above, the Writ Petition is allowed.

(18) The impugned orders dated 01/12/2018, passed by the trial Court on Exh.1 and 24 are quashed and set aside. As a consequence, the suit filed by the petitioners before the trial Court stands restored. The trial Court shall now proceed further in accordance with law. As a consequence of setting aside of the

aforesaid orders passed by the trial Court, the judgment and order dated 12/02/2021, passed by the District Court is rendered meaningless and, on that ground, it is also set aside. The trial Court to proceed expeditiously in the matter.

(19) Rule is made absolute in above terms.

[MANISH PITALE J.]

KOLHE