INTERPRETATION AND ENFORCEMENT OF PARALLEL ARBITRATION CLAUSES

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INTRODUCTION:

The Hon'ble Supreme Court of India **("SC"/"Apex Court")** in one of its most recent judgment laid down the law on interpretation and enforcement of parallel arbitration clauses. In the case of *Balasore Alloys Ltd. Vs Medima LLC*[1] decided on 16.09.2020, the Apex Court held that in such a situation, principle of harmony and reconciliation should be used as to determine as to which of the clauses would be relevant. In this case, the SC was faced with a situation where there were following two arbitration clauses:

1. Clause 23 in the Agreement dated 31.03.2018 **("Main Agreement" /Pricing Agreement")**, which reads as under:

> 23. *GOVERNING LAW; DISPUTES*
> *This Agreement shall be governed by and construed in accordance with the laws of the United Kingdom. Any claim, controversy or dispute arising out of or in connection with this Agreement or the performance hereof, after a thirty calendar day period to enable the parties to resolve such dispute in good faith, shall be submitted to arbitration conducted in the English language in the United Kingdom in accordance with the Rules of Arbitration of the International Chamber of Commerce by 3 (Three) arbitrators appointed in accordance with the said Rules, to be conducted in the English language in London in accordance with British Law. Judgment on the award may be entered and enforced in any court having jurisdiction over the party against whom enforcement is sought."*

2. Clause 7 forming part of the several Purchase Orders issued pursuant to the Main Agreement, for supply of specified quantities of High Carbon Ferro Chrome by Applicant to the Respondent. Clause 7 of the Purchase Order reads as under:

> "7. *ARBITRATION:*

[1] MANU/SC/0691/2020 :: 2020(4) RCR (Civil) 433– A three Judge's Bench Judgement.

Disputes and differences arising out of or in connection with or relating to the interpretation or implementation of this contract/order shall be referred to the Arbitral Tribunal consisting of 3 Arbitrators of which each party shall appoint one Arbitrator, and the two appointed Arbitrators shall appoint the third Arbitrator who shall act as the Presiding Arbitrator as per the provisions of the Arbitration and Conciliation Act, 1996 and any modification or reenactment thereto. The venue of the arbitration proceedings shall be at Kolkata and language of the arbitration shall be English. The arbitration award shall be final and binding upon the parties and the parties agree to be bound thereby and to act accordingly. When any dispute has been referred to arbitration, except for the matters in dispute, the parties shall continue to exercise their remaining respective rights and fulfil their remaining respective obligations."

Invoking Clause 7 of the Purchase Order, the Applicant i.e. Balasore Alloy had approached the Apex Court for appointment of an Arbitrator under Section 11(6), read with Section 11 (2) (a) of the Arbitration and Conciliation Act, 1996. The Respondent on the other hand, submitted before the SC that disputes between the parties already stood referred to arbitration in terms of Clause 23 of the Main Agreement and a tribunal had already been constituted by the ICC. The Apex Court noticed that there was no dispute between the parties that certain disputes had arisen between them and that such disputes were to be resolved through arbitration. However, the only point of contention between the parties was as to whether the arbitration is to be conducted pursuant to Clause 7 of the Purchase Order or Clause 23 of the Main Agreement.

At the outset, the Apex Court concurred with its earlier judgment in the case of *Olympus Superstructures Pvt. Ltd. Vs. Meena Vijay Khetan & Ors.*[2] wherein the SC was confronted with the same issue. After noticing the law laid down in the case of *Olympus Superstructures (supra),* the SC held that it would be necessary to refer to the manner in which arbitration clause was invoked and the nature of dispute that was sought by the parties to be resolved through arbitration. The Apex Court noted that it was the Respondent, who had invoked Clause 23 of the Main Agreement vide notice dated 13.03.2020. It was only while giving response to the arbitration notice, the Applicant referring to the nature of their claims indicated that constitution of arbitral tribunal and the conduct of the arbitration proceedings would be in accordance with Clause 7 of the Purchase Order. The Hon'ble Court thus held that in such a situation where two arbitration clauses subsist between the parties, which are not similar to one and another, the said two clauses would have to be read in harmony or reconciled to take note of dispute that had arisen between the parties to decide the nature of arbitration proceedings.

The Apex Court dismissed the Application filed by the Applicant holding that the arbitration proceeding would be governed by the arbitration clause contained in the Main Agreement and not in the Purchase Orders, for the following reasons:

(i) Respondent issued notice of arbitration on 13.03.2020 referring to breach of the Main Agreement.

(ii) In its reply dated 13.04.2020 to the abovesaid arbitration notice, the Applicant disputed the contentions put forth by the Respondent under the Main Agreement (which was referred to as Pricing Agreement by the Applicant). The Applicant then contended that the arbitration proceeding would be in accordance with Clause 7 of the Purchase Order.

(iii) After extracting the contents of the Applicant reply notice, the Apex Court held that the Applicant's reference to the price and terms of reference governing individual contracts

[2] MANU/SC/0359/1999:: (1999) 5 SCC 651- A judge by two judges' bench

was in fact a reference to the Pricing Agreement, which was the Main Agreement dated 31.03.2018.

(iv) The Main Agreement provided for mechanism relating to purchase and sale, final price, payment of provisional price and adjustment of advance, determination of final sale price and monthly accounting and payment. On the other hand, Purchase Order did not provide for such determination of pricing except referring to the price of quantity ordered for and special terms relating to provisional price etc.

(v) Disputes raised by the Applicant in its reply notice are to be determined in terms of the provisions contained in the Main Agreement, which would be relevant for payment to be made under each of the Purchase Order.

(vi) Arbitral Tribunal constituted under the Main Agreement, can go into the issues arising under the terms individual Purchase Order as well.

(vii) Mere fact that the transactions had commenced as far back on 08.08.2017 and 21 Purchase Orders having already been placed up to 30.03.2018 i.e. prior to signing of the Main Agreement on 31.03.2018 is of no relevance because the Main Agreement was commencing with effect from 31.03.2017 and was to end on 31.03.2021. This clearly indicates that the intention of the parties was that the terms contained in the Main Agreement would govern all transactions including those which had commenced from 08.08.2017.

(viii) Main Agreement was entered into on long term basis fixing the time period for which it was valid. The individual Purchase Orders were to be issued for specific quantities ordered under each transaction, the price whereof was to be ultimately determined as provided under the Main Agreement.

(ix) When parties entered into the Main Agreement, there was a consensus *ad idem* to the terms and conditions contained therein including the arbitration clause, which was different from the arbitration clause provided under the Purchase Orders.

On the basis of the aforesaid reasoning, the Hon'ble Apex Court came to a conclusion that it would not be appropriate for the Applicant to invoke Clause 7 of the Purchase Order, more particularly, when the Arbitral Tribunal had already been constituted. With the aforesaid reasoning, Hon'ble Apex Court dismissed the application seeking appointment of arbitrator filed by the Applicant.

CONCLUSION:

Entire law on arbitration is based on party autonomy. Therefore, it becomes of paramount importance to find out the intention of the parties by having regard to the terms of the arbitration agreement. In this case, the SC held that mere fact that arbitration notice was first issued invoking arbitration clause under the Main Agreement was not decisive but the nature of claim/dispute should be looked into for deciding which of the two arbitration clauses would be relevant. Similarly, in the case of *Olympus Superstructures (supra)* the SC was dealing with a situation where there were two arbitration clauses i.e. one in the main agreement relating to sale of flat and other in the interior design agreement. Both the agreements were of the same date and were executed between the same parties but arbitration clauses were dissimilar. The builder contended that the jurisdiction of the arbitrator was confined to issues arising out of the main agreement and he could not have decided issues relating to the interior design agreement. The SC rejected the contention of the builder *inter alia* holding that arbitration clause in the main agreement was wider and included matter connected with the main agreement within in its sweep. On a harmonious reading of the said two clauses, the SC concluded that arbitration clause under the interior design agreement would come into play only if the dispute and difference are solely confined to interior design agreement, however, if the dispute and difference are concerning both the main agreement as well as the interior design agreement, the arbitration clause under the main agreement would apply.