

(2019) 12 DEL CK 0401

In the Delhi High Court

Case No : Arbitration Petition No. 434 Of 2019

Prime Market Reach Pvt. Ltd.

APPELLANT

Vs

Supreme Advertising Pvt Ltd

RESPONDENT

Date of Decision : 17-12-2019

Acts Referred:

Arbitration And Conciliation Act, 1996 — Section 7, 7(3), 7(4), 7(4)(b), 7(4)(c), 7(5), 8, 11, 11(5), 11(6)(a), 34

Insolvency and Bankruptcy Code, 2016 — Section 8(2)(a), 9

Citation : (2019) 12 DEL CK 0401

Hon'ble Judges : Jyoti Singh, J

Bench : Single Bench

Advocate : Parag Tripathi, Apoorv Tripathi, Riya Kalra, Lall Taksh Joshi, Sonam Sharma, Arun Wighmal, Pronoy Chatterjee

Final Decision : Dismissed

Judgement

Jyoti Singh, J

I.A. 13278/2019 (for delay)

Present application has been filed by the respondent for seeking condonation of 21 days of delay in filing the reply.

For the reasons stated in the application, the same is allowed and the reply is taken on record.

ARB.P. 434/2019

1. This is a petition filed under Section 11(5) of the Arbitration & Conciliation Act, 1996 (â??Actâ?) for appointment of a Sole Arbitrator to adjudicate

the disputes and differences between the parties pursuant to an agreement entered into between the parties dated 11.07.2011 (hereinafter referred to

as â??2011 Agreementâ?).

2. Brief facts of the case as set out by the petitioner are as follows:

(a) An agreement was executed between the petitioner and respondent on 11.07.2011, wherein the Respondent agreed to give the petitioner marketing rights of advertisement space on the hoardings owned/held by the respondent in Delhi. The initial tenure/ duration of the Agreement was 3 months. As consideration, the petitioner was to be paid 10% of the net realised revenue of the respondent, w.e.f. 15.07.2011, for which invoices were regularly raised by the petitioner. The agreement contained an Arbitration Clause which reads as under:-

16. All disputes arising between the parties hereto in terms of this agreement shall be subject to arbitration in Delhi in accordance with the Indian Arbitration Act, 1940 and the rules framed thereafter. In case of any dispute, an arbitrator shall be at the mutual consent of the parties hereto be appointed as the Sole Arbitrator and his award shall be binding on both the Parties.

(b) Under the said agreement, Petitioner was authorised to book/ execute sales/ place purchase orders on behalf of the respondent with third parties; the proceeds of which were to go to the respondent. The invoices were to be directly raised by the respondent upon the third parties and the

respondent was solely responsible to realize/recover the monies from third parties. After the initial term of the contract ended on 10.10.2011, the parties still continued to work together. However on 01.04.2016, the percentage of commission of the petitioner was reduced from 10% to 8.5%.

(c) On 25.04.2017, it was agreed between the parties that their relationship would come to an end w.e.f. 01.05.2017.

3. It is the case of the petitioner that from July, 2011 to 25.05.2017, various invoices were raised by the Petitioner on Respondent, for a net total value of around Rs. 10.10 Crore. Out of the said amount, Respondent paid an amount of Rs. 8.49 Crore, with the last four (4) payments being made through cheques dated 11.07.2017, 08.08.2017, 05.10.2017 and 15.01.2018.

4. Petitioner issued a statutory notice dated 23.01.2018, under Section 9 of the Insolvency and Bankruptcy Code, 2016 (IBC) to the respondent.

Respondent replied to the same, and raised counter-claims. Petitioner filed a petition before the NCLT, Delhi, under IBC as an 'operational creditor'.

In the interregnum, petitioner presented a cheque bearing no. 921409 dated

15.01.2018 for an amount of Rs.10,62,506/- (Rupees Ten Lakh Sixty two Thousand Five Hundred and Six Only), which was tendered by the Respondent to the Petitioner. By an order dated 17.07.2018, the NCLT was

pleased to pass an order granting liberty to Petitioner to withdraw the petition with liberty to file a fresh petition on the same cause of action.

5. Petitioner sent a notice invoking arbitration to the respondent on 06.05.2019 under Clause 16 of the agreement dated 11.07.2011. The said notice

was received by the respondent and was replied on 31.05.2019. Reply was received by the petitioner on 01.06.2019. The amount sought to be

recovered by the petitioner in the Arbitration Proceedings, is Rs.2,42,56,288.93/- which includes interest @ 15%, computed from 01.05.2017 to

30.06.2019.

6. Learned Senior Counsel for the petitioner submits that even after the expiry of the initial term of the agreement, the parties mutually agreed to be

bound by the agreement and the terms thereof. He relies on a letter dated 03.09.2015, e-mails dated 30.03.2016 and 17.04.2017, sent by the

Respondent to the Petitioner as also two e-mails dated 09.03.2017 and 26.04.2017, in this regard.

7. Respondent company has vehemently opposed the present petition by contesting the existence and validity of the Arbitration Clause , as well as the

2011 agreement.

8. Learned Counsel for the respondent contends that the 2011 Agreement was neither validly executed nor the terms contained in it were ever

complied with by the parties, even during the period between 11.07.2011 to 10.10.2011. The said agreement was proposed only as a stop gap

arrangement for a period of 3 months to enable the parties to work out a joint venture agreement on mutually agreed terms and conditions at a future

date but the same never materialized. Attention is drawn to the fact that the alleged 2011 agreement was never signed by the Petitioner. The

Agreement annexed with the present petition only has the seal and signatures of the Respondent and not the Petitioner herein, which shows that the

same was only a proposed agreement, which was never finalized.

9. Learned counsel for the respondent further submits that post Octoberâ? 2011, the petitioner Company, in order to conduct business transactions

with the respondent, used to issue individual Requisition Orders (ROs) with

specific terms and conditions mentioned therein, and those did not have an Arbitration Clause. It is further contended that Clause 14 of the ROs and Clause 8 of Tax Invoices clearly provided an exclusive jurisdiction clause which reads as: ""All the disputes are subject to Mumbai Jurisdiction only"".

10. Learned counsel for the respondent relies on ROs placed upon the respondent by the petitioner, dated 03.02.2012, 22.11.2014 and 04.01.2017, and Tax invoices dated 04.10.2011 and 21.07.2015 to submit that the transactions between the parties were never governed by the terms of the alleged 2011 agreement.

11. Learned Counsel for the respondent relies on a judgement of this court, *Young Achievers v. IMS Learning Resources Pvt. Ltd.* ILR (2012) V Delhi 462, wherein it is held that:

If previous agreements mentioning arbitration clause are superseded, novated by a fresh document creating fresh agreement with no arbitration clause then a dispute cannot be referred to Arbitration seeking help of previous agreement"".

12. Learned counsel also relies on a judgement passed by the Supreme Court in the case of *Union of India v. Kishorilal Gupta & Bros*, AIR 1959 SC 1362, in which the Court held that the Arbitration Clause perishes with the original contract. If there is a substitution by the parties of a contract with a new contract then the earlier contract abrogates and the Arbitration Clause therein cannot be invoked for determination of questions under the new agreement. Relevant paras relied on are reproduced as under:

8. Uninfluenced by authorities or case-law, the logical outcome of the earlier discussion would be that the arbitration clause perished with the original contract. Whether the said clause was a substantive term or a collateral one, it was nonetheless an integral part of the contract, which had no existence de hors the contract. It was intended to cover all the disputes arising under the conditions of, or in connection with, the contracts. Though the phraseology was of the widest amplitude, it is inconceivable that the parties intended its survival even after the contract was mutually rescinded and substituted by a new agreement. The fact that the new contract not only did not provide for the survival of the arbitration clause but also the circumstance that it contained both substantive and procedural terms indicates that the parties gave up the terms of the old contracts, including the

arbitration clause ...

9. It is clear, too, that the parties to a contract may agree to bring it to an end to all intents and proposes and to treat it as if it had never existed. In

such a case, if there be an arbitration clause in the contract, it perishes with the contract. If the parties substitute a new contract for the contract

which they have abrogated, the arbitration clause in the abrogated contract cannot be invoked for the determination of questions under the new

agreement. All this is more or less elementary.

13. Learned counsel for the respondent has placed reliance on the judgment in the case of A.N. Traders Pvt. Ltd. vs. Shri Ram Distribution Services

Pvt. Ltd. passed by a Coordinate Bench of this Court on 30.10.2018 in OMP (Comm) 169/2018 wherein the Court has held that while an Arbitration

Agreement is an independent Agreement and would survive the termination of the main Agreement of which it is a part but it cannot be put into

service for adjudicating the disputes that have arisen post such agreement and not under or in relation to the main agreement. Though the post

agreement arrangement may have been between the parties on similar terms and conditions. Reliance is also placed on the judgment of a Coordinate

Bench of this Court in Future Lifestyle Fashions Ltd. vs. Adidas India Marketing Pvt. Ltd. 2015 (147) DRJ 498 where the Court has reiterated the

position of law under Section 7 of the Act which requires that the Arbitration Agreement should either be signed by the parties or contemporaneous

document in the form of correspondence exchange between the parties must show that there was an intent to enter into an Arbitration Agreement.

Respondent has also placed on a judgment of the Supreme Court in the case of MR Engineers & Contractors Pvt. Ltd. vs. Somdutt Builders Ltd.

2009 & SCC 696 where the Supreme Court has held that a general reference to another Contract will not be sufficient to incorporate the Arbitration

Clause. In the contract under dispute, there should be a special reference indicating a mutual intention to incorporate the Arbitration Clause from

another document.

14. In the rejoinder, learned senior counsel for the petitioner vehemently denies that the 2011 agreement is not a validly executed agreement. He

submits that not only was the agreement validly executed but also there was a clear meeting of minds and the parties were ad idem that their

commercial relationship from 11.07.2011 till 01.05.2017 would be governed by the terms and conditions contained in the 2011 agreement (including the Arbitration Clause contained therein), subject of course to mutually accepted amendments. Learned Senior Counsel further submits that at no point of time, the respondent objected to the validity and binding nature of the Arbitration Clause as contained in the 2011 Agreement. Furthermore, the said agreement also makes it clear that the parties intended that the agreement would govern the business transactions between the parties beyond three months. This is clear from reading Clause 8 of the Agreement executed by the Respondent which specifies the target sales for the first year, and not just 3 months.

15. Learned Senior Counsel further contends that the Respondent has in numerous letters/ e-mails, including the reply to the notice invoking arbitration, and in reply dated 23.08.2018 to the notice issued under Section 8(2)(a) of IBC, as also the objections filed by it before the NCLT New Delhi, admitted that the agreement dated 11.07.2011 is a validly executed agreement and therefore the execution of the 2011 agreement was never in dispute between the parties. Learned Senior Counsel submits that it is therefore not permissible for the respondent to now contend that the said agreement has not been validly executed, more so, since the respondent has admitted its signatures on the 2011 Agreement.

16. Learned Senior Counsel also submits that as per Section 7(3) of the Act, an Arbitration Agreement need not be signed by both the parties. The requirement is that it only needs to be in writing, which, in the present case, it is. It is further contended that under Section 7(4) of the Act, an Arbitration Agreement is in writing if it is contained in (a) a document signed by the parties; or (b) in letters, telex, telegrams or other means of communication including through electronic means which provides a record of the agreement. Reliance is placed on the judgment of the Supreme Court in Govind Rubber Limited Vs. Louis Dreyfus Commodities Asia Private Limited (2015) 13 SCC 477, more particularly para 15, wherein the Court has analyzed the provisions of Section 7 of the Act. The Supreme Court has held that in order to constitute an Arbitration Agreement, it need not be signed by all the parties. Although Section 7(4) of the Act does state that the Arbitration Agreement shall be in writing if it is a document signed

by all the parties but perusal of clauses (b) and (c) would show that an agreement culled out from other means of communication in writing is also considered as an Arbitration Agreement. Reliance is also placed for the said proposition on the judgment of a Coordinate Bench of this Court in the case of Lt. Col. (Retd.) P.R. Choudhary & Ors. Vs. Narendra Dev Relan & Ors. 2009 (108) DRJ 27 where this Court has held that it is a misconception to say that Section 7 requires a written agreement also to be signed by the parties. This is not the language of Section 7 of the Act. The requirement of law is only that the agreement should be in writing.

17. Learned senior counsel further contends that the business relationships between the parties continued till as late as 2017 and there was correspondence where the 10% commission payable was being discussed and negotiated. Attention is drawn to a letter dated 04.10.2017 written by the respondent to the petitioner in this regard. Attention is also drawn to an email dated 17.04.2017 whereby the respondent had sought to terminate the business transactions and relationship between the parties asking the petitioner to stop marketing their sites w.e.f. 30.04.2017.

18. Learned senior counsel also points out that even as on 30.03.2016, the respondent was continuing business with the petitioner and had requested reduction of the percentage of commission from 10% to 7%. It is thus submitted that the respondent is wrong in its contention that the agreement

between the parties was valid only for an initial period of three months. Reliance is placed by the petitioner on the judgment of this Court in Shine

Travels & Cargo Pvt. Ltd. Vs. Mitisui Prime Advanced Composite India Ltd. 2016 VII AD (Delhi) 515. This was a case where a petition under

Section 11 of the Act had been filed and the respondent had disputed the existence of the Arbitration Agreement. It was contended that the

agreement in question had expired on 31.08.2014 and the Arbitration Clause had perished with it. Any services availed of after the expiry of the

agreement would not extend the validity of the Arbitration Agreement. Learned senior counsel submits that in the said case the Court held that since

the petitioner continued to render the services and the respondent continued to accept them on the terms under the agreement in question, the

contention that there was no Arbitration Agreement cannot be accepted.

19. Learned senior counsel further contends that it is not even open to the

respondent to contend that Requisition Orders placed on the respondent by the petitioner from time to time were separate agreements, having no connection with the principle 2011 agreement and since these ROs did not have an Arbitration Clause, the present petition is not maintainable. It is submitted that the mother agreement in clause 4 itself contemplated the execution of the ROs/invoices. The ROs/invoices issued pursuant to the mother agreement had been issued in respect of individual clients who were to utilize the advertising space of the respondent. Each of the ROs define what would be the rights that would accrue to the individual client and also provide for bills to be raised by the respondent. In fact, the ROs only represent one of the ways in which the petitioner was to work under the main agreement. The petitioner brought in advertisers to utilize the space available by the respondent, thereby exploiting its rights as an exclusive marketeer under the main agreement. It is argued that each RO pertains to a different advertiser and there is no conflict between any of the terms of the ROs and the main agreement except that the ROs have a standard provision that Courts in Mumbai will have jurisdiction. The argument therefore is that the respondent cannot contend that the ROs/invoices are in supersession or novation of the mother agreement, more particularly when the agreement itself envisages their execution.

20. Responding to the contention of the respondent that under the ROs/invoices, the Courts at Mumbai will have exclusive jurisdiction, learned senior counsel for the petitioner points out that the respondent in its email dated 03.09.2015 has itself written "Disputes are subject to jurisdiction of Delhi." Therefore, clause No. 8 be withdrawn and amended. It is submitted that there is no pleading, let alone a document filed by the respondent that said acceptance was sent by the respondent to the petitioner. Insofar as the main agreement is concerned, it does not have any such clause of exclusive jurisdiction in Mumbai Courts.

21. The next contention is that the ROs/invoices cannot be treated as a separate agreement which novates the main agreement, as six crucial aspects have not been mentioned in the said ROs and which are most fundamental to the relationship of the parties, such as grant of exclusive marketing rights to the petitioner; specification of commission; identification of number or location of the advertisement sites; identification of the party responsible for

marketing the sites; procedure to be followed for sale and specification of expected sale figures to be achieved by the petitioner. It is submitted that

this in itself shows that the ROs were only a part of the main agreement intended basically to execute the main agreement.

22. Learned senior counsel has distinguished the judgments cited by the learned counsel for the respondent. It is argued that in the case of Young

Achievers (supra) an exit paper was executed by both the parties expressly terminating an earlier agreement. The Court held that the disputes arising

after the execution of the exit paper will not be arbitrable under an Arbitration Agreement contained in the earlier agreement.

23. Likewise in Kishorilal Gupta (supra), earlier contracts were concluded by a settlement contract signed by both parties stating therein that no party

will have further or other claims against each other. It was thus held by the Court that the disputes were not arbitrable since the settlement contract

superseded the earlier contract. M.R. Engineers and Contractors Private Limited (supra) is distinguished on the ground that it is inapplicable as the

present case does not fall under Section 7(5) of the Act. Future Lifestyle Fashions Limited (supra) also does not apply according to the petitioner,

because in the said case, neither the Arbitration Agreement was signed by the parties nor was reflected in any correspondences exchanged between

them. A.N. Traders Private Limited (supra) is distinguished on the ground that that was a decision under Section 34 of the Act.

24. Learned senior counsel further submits that contrary to what is argued by the respondent, law has been clearly laid down in Paranjape Schemes

(Construction) Ltd. & Ors. Vs. Avinash Madhukarrao Yekhande & Ors. 2016 SCC OnLine Bom 2527 wherein the Court distinguished the judgment

in the case of Young Achieverâ?? (supra) and rather interpreted the agreements and held that the agreement for sale and deed of apartment were

interconnected and therefore, the execution of the apartment deed did not amount to novation. It was held that the Apartment Deed was a part of the

sale agreement and thus the disputes between the parties were arbitrable.

25. Reliance is also placed on the judgment of the Supreme Court Groupe Groupe Chimique Tunisien SA Vs. Southern Petrochemicals Industries

Corpn. Ltd. (2006) 5 SCC 275, wherein the invoices issued pursuant to a contract did not contain an Arbitration Clause and the Court held that since

the contract had an Arbitration Clause the absence of the same in the invoices cannot lead to a conclusion that the parties are not governed by an Arbitration Agreement.

26. I have heard the learned counsel for the parties and examined their rival contentions.

27. Section 7 of the Act sets out the requirements and ingredients of an Arbitration Agreement and reads as under:-

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 document signed by the parties;

(b) an exchange of letters, telex, telegrams or other means of telecommunication [including communication through electronic means] which provide

a record of the agreement; or

(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.

28. A plain reading of this Section indicates that an Arbitration Agreement has to be in writing. An agreement is considered to be in writing if it is

contained in a document signed by the parties or in exchange of letters, telegrams or other correspondences which provide a record of the agreement.

Section 7(5) stipulates that reference in a contract to a document containing an Arbitration Clause would constitute an Arbitration Agreement provided

it is in writing and reference is such that the Arbitration Clause is made a part of the contract.

29. Learned counsel for the respondent has contended that the 2011 agreement was neither validly executed nor signed by the petitioner. The

agreement does not even have the seal of the petitioner which shows that this was only a proposed agreement and never acted upon by the parties.

Insofar as this contention is concerned, in my view this should not detain this Court. As a proposition of law, the petitioner is right, an Arbitration

Agreement need not necessarily be signed, Section 7 of the Act itself stipulates that the agreement shall be in writing. It further provides that the

“writing” would envisage both (a) where the document is signed by the parties or (b) the agreement is contained in the correspondence exchange

between the parties. Thus, even where the parties have not signed the agreement but the agreement is reflected in the correspondences, it would be

treated as an Arbitration Agreement as long as it is in writing and provides a record of the agreement. This has been so held by the Apex Court in the

case of Govind Rubber Limited (supra). Relevant paras 15 & 16 of the judgment are as under:-

“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.

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.â??

30. To the same effect is the judgment of a Coordinate Bench of this Court in Lt. Col. (Retd.) P.R. Choudhary (supra), relevant para 9 whereof reads

as under:-

â??The argument of the plaintiffs in the present case proceeded on a misconception that Section 7 requires not only an agreement in writing but also

such agreement to be signed by the parties. The same is not the language of Section 7. To constitute an arbitration agreement, it is not necessary that

the writing should bear the signatures of the parties. Requirement of law is only that it should be in writing.â??

31. The issue that however arises for adjudication in the present case is whether the transactions between the parties post October, 2011 were

separate and independent of 2011 Agreement or were intrinsically linked to it and the ROs/invoices issued for these transactions were only a mode to

execute the 2011 Agreement as per Clause 4. The factual matrix of the case shows that no doubt, that the original 2011 agreement did have clause

No. 4, which envisaged and contemplated future transactions to be executed through purchase orders and invoices being raised by the parties.

However, it is crystal clear that none of these Requisition Orders had any reference whatsoever to the 2011 Agreement. Under Clause 4 of the 2011

agreement, the nature of transaction was purely commission based, whereunder the respondent used to receive the ROs from its clients directly in the

name of the respondent, who in turn used to perform services for the petitionerâ??s clients and then raise invoices upon them directly. Against this, the

petitioner used to raise the invoices for its commission upon the respondent. However, post October, 2011, when the term of the 2011 agreement

came to an end, the nature of the transactions completely changed. Henceforth, the petitioner started issuing separate ROs directly upon the

respondent, whereunder the respondent used to provide services and used to raise its invoices upon the petitioner and not on the petitionerâ??s clients.

Each of these transactions were governed by the terms and conditions of the individual ROs and there was no single agreement pursuant to which the transactions were made. This is clearly evident from a bare perusal of the ROs and the terms and conditions mentioned in the notes in the ROs. For a ready reference, one of the ROs is scanned below:-

32. Note 2 which is significant is particularly extracted hereinunder:-

“Prime Market Reach shall be at liberty to terminate this agreement for whatsoever reason by giving 3 days notice. However notwithstanding anything contained herein Prime Market Reach reserves the right to terminate this agreement at any time without any notice for unsatisfactory services on part of the supplier.”

33. It is also significant to note as pointed out by the respondent that even the terms of the commission and the percentage payable to the petitioner were subsequently modified as is clear from a bare perusal of the invoices/ROs.

34. A perusal of the ROs further shows that neither the Arbitration Clause as mentioned in the 2011 Agreement is incorporated in these ROs nor is

there even a reference to the same, so as to give any indication that the parties intended to incorporate the said Arbitration Clause with respect to the disputes that may arise in connection with these purchase orders. Having gone through the various correspondences exchanged between the parties

during the period when the purchase orders were being issued, it emerges that there was not even a mention of any Arbitration Clause in any of the

letters or the e-mails. In a few e-mails relied upon by the petitioner, no doubt, the petitioner had obliquely referred to the 2011 agreement as the

original agreement, but there was no mention to indicate that the said agreement on the Arbitration Clause was meant to be adhered to for these

purchase orders. The respondent on the other hand had consistently taken a position that the original agreement had expired and the subsequent

purchase orders were not governed by it. Thus, there is neither any Arbitration Agreement in writing between the parties qua the subsequent purchase

orders nor are there any contemporaneous documents exchanged between the parties from which one could infer that the intent was to relegate them

to arbitration proceedings. Thus, in my view the requirements of Section 7 of the Act are not met and it cannot be said that the purchase orders have

Arbitration Agreements between the parties.

35. A Coordinate Bench of this Court in the case Future Lifestyle Fashions Limited (supra) was dealing with an almost identical fact situation and

after examining the provisions of Section 7 of the Act, held that a subsequent agreement which does not incorporate an Arbitration Clause and has no

reference to the previous contract, more specifically the Arbitration Clause contained therein cannot satisfy the ingredients of Section 7 of the Act.

The Supreme Court in the case of M.R. Engineers (supra) summarized the principles of Section 7(5) of the Act and held that even a mere reference

to a document would not have the effect making an Arbitration Clause from that document a part of the contract. The reference should be such that

shows the intention to incorporate the Arbitration Clause contained in the said document into the present contract. In case the Legislators intended to

import an Arbitration Clause from another document merely on a reference, Sub-Section 5 of the Act would not have read as “and the reference is

such as to make that Arbitration Clause part of the contract” and would have stopped only at the earlier part of the provision. Supreme Court further

held that Section 7(5) requires a conscious acceptance of the Arbitration Clause from another document. The law was summarized in para 24 of the

judgment which reads as under:-

“24. The scope and intent of Section 7(5) of the Act may therefore be summarised thus:

(i) An arbitration clause in another document, would get incorporated into a contract by reference, if the following conditions are fulfilled:

(1) the contract should contain a clear reference to the documents containing arbitration clause,

(2) the reference to the other document should clearly indicate an intention to incorporate the arbitration clause into the contract,

(3) the arbitration clause should be appropriate, that is capable of application in respect of disputes under the contract and should not be repugnant to

any term of the contract.

(ii) When the parties enter into a contract, making a general reference to another contract, such general reference would not have the effect of

incorporating the arbitration clause from the referred document into the contract between the parties. The arbitration clause from another contract can

be incorporated into the contract (where such reference is made), only by a

specific reference to arbitration clause.

(iii) Where a contract between the parties provides that the execution or performance of that contract shall be in terms of another contract (which contains the terms and conditions relating to performance and a provision for settlement of disputes by arbitration), then, the terms of the referred contract in regard to execution/performance alone will apply, and not the arbitration agreement in the referred contract, unless there is special reference to the arbitration clause also.

(iv) Where the contract provides that the standard form of terms and conditions of an independent trade or professional institution (as for example the standard terms and conditions of a trade association or architects association) will bind them or apply to the contract, such standard form of terms and conditions including any provision for arbitration in such standard terms and conditions, shall be deemed to be incorporated by reference. Sometimes the contract may also say that the parties are familiar with those terms and conditions or that the parties have read and understood the said terms and conditions.

(v) Where the contract between the parties stipulates that the conditions of contract of one of the parties to the contract shall form a part of their contract (as for example the general conditions of contract of the Government where the Government is a party), the arbitration clause forming part of such general conditions of contract will apply to the contract between the parties.â??

36. In *Inox Wind Limited vs. Thermocables Limited* (2018) 2 SCC 519, the Supreme Court has while examining the existence of an Arbitration

Agreement, held that the Arbitration Clause in an earlier contract cannot be incorporated by a general reference. The Court has in para 18 reiterated

the position of law in *M.R. Engineers* (supra) and observed that the Court was in agreement with the judgment in *M.R. Engineers* (supra).

37. The matter can be looked at from another angle. The 2011 Agreement contained an Arbitration Clause which is an admitted position between the parties. The subsequent purchase orders, as held above by me are, separate agreements with different terms and conditions. Therefore, assuming that there were transactions between the parties as contended by the petitioner till 2017, these were only through these subsequent ROs/invoices. Thus,

there was novation of the initial agreement and by operation of law, the 2011 Agreement stood superseded and the Arbitration Clause perished. It has been held in various judgments that if the parties substitute a new contract for the contract they have abrogated, the Arbitration Clause in the abrogated contract cannot be invoked for determination of disputes under the new contract. The Arbitration Clause being an intrinsic component of the original agreement would fall and cannot be invoked by the parties for adjudication of disputes relating to any subsequent contract. This has been so held by the Supreme Court in *KishoriLal Gupta* (supra).

38. In *ITC Ltd. v. George Joseph Fernandes and Anr.*, (1989) 2 SCC 1, the Supreme Court has held that where the dispute between the parties is that the contract itself does not subsist either as a result of its being substituted by a new contract or by recession, that dispute cannot be referred to arbitration as the Arbitration Clause would itself perish if the averment was found to be valid, as the very jurisdiction of the arbitrator is dependent on the existence of the Arbitration Clause. The parties thus cannot invoke a clause which has perished with the contract. In the present case the respondent has clearly disputed the extension of the 2011 Agreement and has consistently maintained that the subsequent purchase orders were individual transactions with different terms and with no reference to any Arbitration Agreement.

39. It is thus no longer *res integra* that an Arbitration Clause has to be either clearly stipulated between the parties and signed or must be contained in correspondence as a record of it. A general reference to an Arbitration Agreement in any other contract is not enough to show the intent of the parties that they agree to be governed by the mechanism of arbitration. The contract in question must contain a clear reference to the documents containing the Arbitration Clause if at all a reference has to be made and the clause should be capable of application in respect of the disputes under the present contract. Thus, unless there is a special reference to the Arbitration Clause of the earlier contract, even reference to the other terms of the contract is not enough to incorporate that there is an Arbitration Agreement between the parties.

40. In my view, from the facts of the present case it is evident that various Purchase Orders do not even have a reference of the 2011 agreement

much less the Arbitration Clause. Thus, in the opinion of this Court, there is no Arbitration Agreement between the parties with respect to the ROs in

question in relation to which the disputes are sought to be referred to arbitration by the petitioner. Another factor that weighs with this Court to come

to the above conclusion is that the ROs contain an exclusive jurisdiction clause.

41. Once it is found that the ROs are with respect to transactions independent of 2011 Agreement, it is not necessary to decide whether 2011

Agreement satisfies the requirement of Section 7 of the Act or not. Thus, this Court is not delving into the issue of 2011 Agreement being an

Arbitration Agreement or not.

42. In so far as the petitioner has relied on the judgment of Shine Travels (supra) in the opinion of this Court the same is distinguishable on facts. In

para 7 of the judgment it is clearly recorded that after the initial contract had expired, the respondent continued to avail all the services under the

agreement, even beyond its term. In fact, the respondent had expressly stated in its letter that till such time, a fresh agreement was entered into with

mutually agreed rates, the respondent would continue to avail the services as an interim measure. The Court, therefore, noted that it was an admitted

case that the contractual relationship between the parties continued even after the term of the agreement ended. In fact, the Court itself drew a

distinction in a situation where the parties disputed that the contractual agreement was extended. In that background, the judgment in the case of

Bharat Petroleum Corporation Ltd. Vs. The Great Eastern Shipping Co. Ltd., 2008 1 SCC 503 was distinguished as the Court found that in the said

case, one of the parties had clearly disputed the extension of the contractual agreement. A perusal of Para 18 of the judgment also shows that what

weighed with the Court was the material fact that there was no dispute between the parties that the agreement continued between them and services

were being availed and rendered.

43. The judgment in the case of Govind Rubber (supra) cannot be of any avail to the petitioner as in the said case the Supreme Court was examining

the effect of an Arbitration Agreement which though in writing was not signed by the parties and the question was if the record of agreement was

provided by exchange of correspondence between the parties in terms of Section 7(4)(b) of the Act. The Court found as a matter of fact that the

appellant was acting pursuant to the sale contract. A few e-mails were looked into by the Court and it came to a conclusion that the intention of the parties appearing from the correspondence led to a clear inference that there had been a meeting of mind and they were ad-idem to the terms of sales contract which contained the Forum of Dispute Resolution. In fact, after the dispute was referred to the Arbitral Tribunal, the appellant had made a counter claim and had submitted to the jurisdiction of the Arbitrator. In the present case as noted above, the respondent had always disputed the extension of the initial agreement and in each correspondence had taken a categorical stand that the 2011 agreement had expired.

44. In the case of Lt. Col. (Retd.) P.R.Chowdhary (supra), the plaintiff had filed a suit for declaration and recovery of money and the defendants had filed an application under Section 8 of the Act. A Co-Ordinate Bench of this Court had allowed the application under Section 8 of the Act, on the ground that it was not disputed by the plaintiffs that there was an agreement between the parties forming the basis of the claims of the plaintiffs and which was evidenced by the contract notes. In fact, the plaintiffs had themselves before the Consumer Court filed the said contract notes and had acted on the same.

The entire claim of the plaintiffs for money and delivery of shares was on the basis of the said notes. The Court found that the intention of the parties to refer to arbitration was clearly spelt out even though the agreement did not have signature of both the parties. The said judgment would not, therefore, enure to the advantage of the petitioner as the facts in the present case are contrary.

45. Reliance was placed by learned senior counsel on paras 75 and 76 of the judgment in the case of Paranjape Schemes (supra), in order to argue that the Supreme Court had distinguished the case of Young Achievers (supra) wherein a proposition had been laid down that the Arbitration Clause in an agreement cannot survive if the agreement is superseded or novated by a subsequent agreement. In my view the said judgment would have no application to the present set of facts. As evident from para 76 of this judgment, the parties had entered into a Deed of Apartment and the Court found that there was no provision in the said Deed that after execution of the said Deed, the Agreement of Sale entered into between the parties

ceased to exist or was superseded by the Deed of Apartment. On the contrary, Clause 46 of the Agreement for Sale categorically provided that the

said agreement shall always be subject to provisions of the Maharashtra Ownership Flats Act, 1963.

46. The judgment in the case of *Groupe Chemique* (supra) is clearly distinguishable on the facts of the case. In the said case, the purchase orders

placed by the respondent on the petitioner had specifically provided that they would be governed by all terms and conditions as per the FAI Terms. It

was not disputed between the parties that clause 15 of the FAI Terms, provided for settlement of disputes by Arbitration. In the facts of that case, the

Supreme Court held that when the Purchase Order incorporates an Arbitration Agreement by reference the invoice need not contain a provision for

arbitration. In the present case, the invoices/ROs are individual purchase orders which is indicated from the notes mentioned on the invoices and none

of the ROs even obliquely referred to the Arbitration Clause in the 2011 agreement, much less the agreement itself.

47. In terms of Section 11 (6)(a) of the Act, this Court while deciding a petition under Section 7 of the Act is only required to examine the existence of

a valid Arbitration Agreement between the parties. Recently, the Supreme Court in the case of *Mayavti Trading Pvt.Ltd. Vs. Pradyut Deb Burman*,

2019 SCC OnLine SC 1164 has held 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 as Section 11(6A) 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 *Duro Felguera, S.A. (Supra)* see paras 48 & 59.

11) We, therefore, overrule the judgment in *United India Insurance Company Limited* (supra) as not having laid down the correct law but dismiss this

appeal for the reason given in para 3 above.

48. Having examined the contentions of the parties as well as the documents, in my opinion, there is no valid Arbitration Agreement existing between

the parties. The present petition is, thus, not maintainable and deserves to be

dismissed.

49. The petition is accordingly dismissed.

50. However, it is open to the petitioner to avail any other remedy that may be available to the petitioner in accordance with law.