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Arbitration clause in a purchase order prevails over a conflicting arbitration clause contained in an invoice

The Bombay High Court (“**Bombay HC**”) has in *Parekh Plastics Distributors LLP vs. Simplex Infrastructure Limited*¹ considered two conflicting arbitration clauses and held that an arbitration clause contained in a purchase order, which sets out the terms of engagement between the parties, prevails over an arbitration clause contained in an invoice raised by a party.

Brief Facts

Parekh Plastics Distributors LLP (“**Parekh**”) supplied micro silica to Simplex Infrastructure Limited (“**Simplex**”) pursuant to various purchase orders issued by Simplex. These purchase orders contained the terms and conditions governing the relationship between the parties and included an arbitration clause which provided that the venue of arbitration would be Kolkata.

Parekh raised its invoices after successful delivery of the micro silica to Simplex. Simplex made payment of some of these invoices, however, an amount of INR 21,78,910 (Indian Rupees twenty one lakh seventy eight thousand nine hundred ten) remained outstanding. The invoices issued by Parekh also contained an arbitration clause which provided that the venue of arbitration would be Mumbai.

Parekh sent various reminders to Simplex for payment of the outstanding sum, however, Simplex failed to make payment. Given the same, the advocates for Parekh issued a notice dated July 15, 2021 to Simplex invoking the arbitration clause contained in the invoices issued by Parekh (which provided that the venue of arbitration would be Mumbai). Simplex did not issue any response to this notice.

Parekh filed an application under Section 11 of the Arbitration and Conciliation Act, 1996 before the Bombay HC to seek appointment of an arbitrator in terms of the arbitration clause contained in the invoices issued by it to Simplex (“**Application**”).

Simplex *inter alia* contended that the Bombay HC did not have jurisdiction to entertain the Application since the purchase orders issued by it contained an arbitration clause which provided that the venue of the arbitration would be Kolkata. The arbitration clause was unilaterally inserted by the Applicant in the invoices and could not supersede the arbitration clause contained in the purchase orders.

¹ Arbitration Application No. 250 of 2021

Issue

Whether the parties intended to be bound by the arbitration clause in the purchase orders issued by Simplex or the arbitration clause in the invoices raised by Parekh?

Findings and Analysis

The Bombay HC dismissed the Application and *inter alia* observed as follows:

1. The purchase orders issued by Simplex constituted the main agreement between the parties which contained the terms and conditions for supply of goods. It cannot be disputed that the arbitration clause contained in the purchase orders was agreed to by the parties.
2. In order to consider whether there is any arbitration agreement between the parties and also in order to consider what is that arbitration agreement, the intention of the parties is paramount. The parties intended to be bound by the arbitration clause in the purchase orders and not the arbitration clause contained in the invoices.
3. The act of Simplex in accepting the supplies made by Parekh and making payment towards the supply would not have the effect of the arbitration clause in the invoices superseding the arbitration clause in the purchase orders. There was no express agreement between the parties to override or supersede the arbitration clause contained in the purchase orders with the arbitration clause contained in the invoices.
4. The Supreme Court's decision in *Balasore Alloys Limited v. Medima LLC*² considered a similar situation. In that case, the Supreme Court held that there was *consensus ad idem* between the parties to an arbitration clause contained in the comprehensive and all-encompassing agreement to the exclusion of the arbitration clause contained in an ancillary agreement. The ratio of this decision would apply to the facts of the present case since the purchase orders were comprehensive and contained all the terms of engagement between the parties. The arbitration clause in the purchase orders would govern the parties and not the arbitration clause contained in the invoices issued by Parekh.

Conclusion

This judgment may be of significance in cases where parties have standard form purchase orders containing an arbitration clause and subsequent documents which contain a conflicting arbitration clause. In such cases, the court will look at the contents of the documents under reference and the intention of the parties to decide which arbitration clause prevails.

² (2020) 9 SCC 136

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