2025 INSC 1036

Non-reportable

IN THE SUPREME COURT OF INDIA
CIVIL APPELLATE JURISDICTION

CIVIL APPEAL NO. 11067 OF 2025

[@ Special Leave Petition (C) No. 27985 of 2019]

Glencore International AG … Appellant

Versus

M/s. Shree Ganesh Metals and another … Respondents

J U D G M E N T

SANJAY KUMAR, J

1. Leave granted.

2. Is there a binding arbitration agreement between the appellant and respondent No.1?

3. This question was answered in the negative by a learned Judge of the Delhi High Court on 02.11.2017. In appeal, on 14.11.2019, a Division Bench of that Court affirmed that view. Hence, this appeal.

4. Glencore International AG, the appellant, is a Swiss company engaged in the business of mining and commodity trading. Shree

Ganesh Metals, respondent No.1, is an Indian proprietorship concern located at Kala Amb, Himachal Pradesh, and is a producer of zinc alloys. Respondent No. 1 had earlier purchased zinc metal from the appellant under contracts dated 20.04.2011, 01.07.2011, 23.11.2011 and 11.01.2012. All the four contracts contained arbitration clauses which stated that any dispute in connection with that contract would be referred to arbitration to be resolved under the Rules of the London Court of International Arbitration and the seat of the arbitration would be London.

5. The parties then proposed to enter into a fifth contract, whereby respondent No.1 was to buy 6,000 metric tons of zinc metal from the appellant from March, 2016 to February, 2017. The terms and modalities of this contract were sought to be worked out between the parties. In that context, the appellant addressed email dated 10.03.2016 to respondent No.1. Therein, it stated that the provisional price would be the London Metal Exchange (LME) average of 10 market days prior. It stipulated that a Standby Letter of Credit was to be opened in form and substance fully acceptable to the appellant for the entire contractual period. It further stipulated that all other terms and conditions, as per the last contract between the parties, would remain intact. Respondent No.1 replied, *vide* email dated 11.03.2016, wherein it stated as follows:

> "We confirm the same terms as said just one thing that provisional price of both, either LC or Invoice, will be average of last 5 (five) LME days".

6. The appellant, in turn, addressed email dated 11.03.2016 to respondent No.1 thanking it for the business confirmation and promising to revert with the contract and proforma. The appellant then forwarded Contract No. 061-16-12115-S dated 11.03.2016, duly signed by it, to respondent No.1 for its signatures. This contract incorporated the terms and modalities agreed upon through the earlier email correspondence. The quantity of the zinc metal to be purchased was mentioned at clause No.2 as 6,000 (six thousand) metric tons plus/minus 2% (two percent) in the seller's option. Clause 11.2, titled 'Provisional Payment', stated thus:

> "…….The provisional value of the Material per metric ton shall be Official LME Cash Settlement Price, as published in the London Metal Bulletin, averaged over 5 (five) consecutive LME market days prior to the Commercial Invoice date, plus a contractual premium per metric ton."

This clause demonstrates that the modification suggested by respondent No.1 in its email dated 11.03.2016 was duly accepted and acted upon by the appellant.

7. Clause 12.1, titled 'Standby Letter of Credit', stipulated that, within 5 (five) working days after the conclusion of respective business, respondent No.1 would open a Standby Letter of Credit in form and substance fully acceptable to the appellant, valid until 31st March, 2017, for the amount of US$50,000. Significantly, this contract also contained an arbitration agreement in clause 32.2. This clause is of relevance and is extracted hereunder. It reads as follows:

> "32.2 Arbitration:
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> Any dispute arising out of or in connection with this contract, including any question regarding its existence, validity or termination, shall be referred to and finally resolved by arbitration under the Rules of the London Court of International Arbitration, which Rules are deemed to be incorporated by reference into this clause. The seat, or legal place, of arbitration shall be London. The language to be used in the arbitration shall be English. The number of arbitrators shall be three (one arbitrator to be appointed by each party, and the third to be chosen by the two party appointed arbitrators)."

8. Pertinently, the earlier contract dated 11.01.2012 contained an arbitration agreement in clause 29.2 and the same reads as follows:

> "29.2 ARBITRATION
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> Any dispute arising out of or in connection with this contract, including any question regarding its existence, validity or termination, shall be referred to and finally resolved by arbitration under the Rules of the London Court of International Arbitration, which Rules are deemed to be incorporated by reference into this clause. The seat, or legal place, of arbitration shall be London. The language to be used in the arbitration shall be English. The parties waive irrevocably their right to any form of appeal, review or recourse to any state court or other judicial authority."

9. It is an admitted fact that respondent No.1 did not affix its signatures upon Contract No.061-16-12115-S. However, it is also an admitted fact that 2,000 metric tons of zinc metal were supplied by the appellant and accepted by respondent No.1 under the aforestated contract leading to the raising of 8 invoices by the appellant on various dates during the months of April, May, June, September, October and November, 2016. All these invoices referred to Contract No.061-16-12115-S. Further, at the behest of respondent No.1, HDFC Bank,

respondent No.2 herein, issued two separate Standby Letters of Credit dated 22.04.2016 and 17.11.2016, specifically referring to Contract No. 061-16-12115-S. In fact, owing to a mistake in the Standby Letter of Credit dated 22.04.2016 that recorded the date of the contract erroneously as 12.04.2016, respondent No.1 furnished an amended Standby Letter of Credit on 02.07.2016; wherein Contract No. 061-16-12115-S was correctly shown as dated 11.03.2016.

10. While so, the appellant addressed letter dated 06.09.2016 to respondent No.1 referring to Contract No. 061-16-12115-S dated 11.03.2016 and stating that it had not received Letters of Credit for the contractual monthly quotas of July and August, 2016 and, further, raising certain issues with regard to the pricing. The appellant called upon respondent No.1 to comply with its contractual obligations and reserved its right to claim full compensation for all costs, present or future, financial or otherwise, that it may have to incur as a result of the non-performance by respondent No.1.

11. In reply, respondent No.1 addressed email dated 08.09.2016, wherein it explicitly referred to Contract No. 061-16-12115-S for the sale of 6,000 metric tons of zinc metal, stating that it would not commit any default in the performance of the contract and promised that everything would be in line and it would surely complete its quantity within the contract time. It also promised to furnish the Letters of Credit and

requested that the material should be dispatched from China instead of Russia. It ended the email stating that the appellant had done good business with it in the past; that there was never any default and assured the appellant that it would perform its part of the contract.

12. Thereafter, correspondence ensued between the parties during February, 2017 on the furnishing of a Letter of Credit for the quota of September, 2016 and ended with the letter dated 20.02.2017, whereby the appellant informed respondent No.1 that due to its failure to pay the outstanding payable amount, its Letters of Credit had been encashed. It was further stated that the balance amount under the Letters of Credit along with the cash deposit had been retained towards the postponement fees, calculated at US$301,000. As the balance 4,000 metric tons of zinc metal were yet to be supplied, the appellant informed respondent No.1 that it would like to continue its relationship and resolve the issues quickly in order to resume deliveries under the contract. It again requested respondent No.1 to furnish a Letter of Credit for the September, 2016 quota, enabling it to deliver the material allocated for that quota.

13. At this stage, respondent No.1 filed a civil suit in CS (Comm) No. 154 of 2017 before the Delhi High Court. Its prayer therein was to declare that the invocation of the Standby Letters of Credit dated 22.04.2016 and 17.11.2016 by the appellant was null and void; to pass a

decree for recovery of US$1,200,000 (₹8 crores approximately) in its favour and against the appellant, along with interest thereon @ 18% per annum; to permanently injunct the appellant from invoking the Standby Letters of Credit dated 22.04.2016 and 17.11.2016; and, in turn, injunct the HDFC Bank from releasing any payment in favour of the appellant pursuant to the said Letters of Credit.

14. The appellant, thereupon, filed I.A. No. 4550 of 2017 in the civil suit invoking Section 45 of the Arbitration and Conciliation Act, 1996 (for brevity, 'the Act of 1996'), and requested that the matter be referred to arbitration in terms of clause 32.2 of Contract No. 061-16-12115-S. Respondent No.1 contested this application claiming that the parties had never concluded the said contract and, therefore, the application was liable to be dismissed.

15. By order dated 02.11.2017, a learned Judge of the Delhi High Court rejected I.A. No.4550 of 2017 filed by the appellant. Therein, the learned Judge recorded that no concluded contract came into existence for the sale-purchase of 6,000 metric tons of zinc metal in 2016 as the contract did not bear signatures of respondent No.1 and was only signed by the appellant. It was observed that the terms and conditions contained therein were apparently not accepted, signed or stamped by respondent No.1. Reference was made to the email of respondent No.1 on 11.03.2016, wherein it had confirmed that it accepted the same terms

but for one thing, that is, the provisional price should be the average of the last 5 (five) LME days but, surprisingly, the learned Judge stated that there was nothing on record to show that this change in the offer was expressly accepted by the appellant. Contract No. 061-16-12115-S, duly signed by the appellant, clearly demonstrated that the appellant had accepted the modification suggested by respondent No.1. Ignoring the same but noting that the appellant never insisted on getting respondent No.1's signatures on Contract No. 061-16-12115-S, the learned Judge observed that it was the appellant that had started acting upon the said unsigned contract. The learned Judge held that the exchange of emails by the parties did not lead to the inference that respondent No.1 had, either expressly or impliedly, agreed to the terms and conditions incorporated in the earlier contract of 2012. This observation was also at variance with respondent No.1's email dated 11.03.2016, wherein it had accepted 'the same terms as said'. The learned Judge further noted that there was a difference between clause 29.2 in the contract of 2012 and clause 32.2 in the contract of 2016 and the same was never accepted by respondent No.1. Comparison of the two arbitration clauses, however, does not show any marked difference. In any event, holding that the intention to refer disputes to arbitration must be clear and specific, the learned Judge opined that the parties were not *ad idem* to do so. The appellant's application was, accordingly, dismissed.

16. Aggrieved thereby, the appellant filed an appeal in FAO (OS) (COMM) No. 195 of 2017. However, by way of the impugned judgment dated 14.11.2019, a Division Bench of the Delhi High Court concurred with the view taken by the learned Judge and dismissed the appeal. The Division Bench noted that the short question which arose for consideration was as to whether or not the arbitration agreement between the parties in terms of clause 29.2 of the contract of 2012 would apply to the disputes which had arisen between the parties with regard to the supplies to be made between March, 2016 and February, 2017. Surprisingly, the Division Bench failed to frame an issue with regard to the arbitration agreement under clause 32.2 of Contract No. 061-16-12115-S, despite a specific argument being advanced on behalf of the appellant in that regard, as noted in paragraph 13 of the judgment. The Division Bench found that there was nothing on record which clearly showed that respondent No.1 gave its acceptance to enter into the contract of 2016 as per the standard terms and conditions of the contract of 2012 and observed that the contract of 2016 was not a standard form contract. Holding so, the Division Bench opined that there was no infirmity in the decision of the learned Judge and dismissed the appeal.

17. We are informed that the appellant filed its written statement in the civil suit on 16.11.2019, without prejudice, but the suit proceedings have not progressed thereafter owing to the pendency of this matter.

18. Having heard Mr. Gourab Banerji, learned senior counsel, appearing for the appellant; and Mr. Vinay Garg, learned senior counsel, appearing for respondent No.1, we are of the view that the Division Bench and the learned Judge of the Delhi High Court lost sight of certain crucial factual aspects which showed that Contract No. 061-16-12115-S was duly accepted and acted upon by respondent No.1. Such actions on its part implied that the arbitration agreement therein also came into effect and bound the parties thereto. Some confusion seems to have arisen due to the contract of 2012, which was referred to in the course of the email correspondence, leading to an alternative plea being raised on behalf of the appellant that, even in the absence of Contract No. 061-16-12115-S, the arbitration agreement in the contract of 2012 would be available to it for invocation.

19. We are of the considered opinion that it was not necessary for the appellant to fall back upon the contract of 2012 in the light of the admitted facts that demonstrated, in no uncertain terms, that the parties duly accepted and acted upon Contract No. 061-16-12115-S dated 11.03.2016. There is no denying the legal proposition that an arbitration agreement can be inferred even from an exchange of letters, including communication through electronic means, which provide a record of the agreement. The mere fact that Contract No. 061-16-12115-S was not signed by respondent No.1 would not obviate from this principle when

the conduct of the parties in furtherance of the said contract, clearly manifested respondent No. 1's acceptance of the terms and conditions contained therein, which would include the arbitration agreement in clause 32.2 thereof.

20. It is an admitted fact that 2,000 metric tons of zinc metal were supplied by the appellant pursuant to Contract No. 061-16-12115-S and not only were 8 invoices raised by the appellant in the context thereof, quoting the said contract number, but respondent No.1 also complied with its obligations under that contract by furnishing two Standby Letters of Credit on 22.04.2016 and 17.11.2016. Thereafter, it also furnished an amended Letter of Credit on 02.07.2016. All these Letters of Credit were issued by HDFC Bank, respondent No.2, at the behest of respondent No.1, quoting Contract No. 061-16-12115-S. The exchange of correspondence by and between the appellant and respondent No.1 also contained references to the very same Contract No. 061-16-12115-S.

21. The feeble plea of respondent No. 1 that this contract number was referred to in the context of the earlier email correspondence does not merit consideration as that contract number came into existence only after the exchange of email correspondence on 10.03.2016 and 11.03.2016. It is also significant to note that even in the course of this email correspondence, respondent No.1 indicated its concurrence with

the terms and conditions proposed by the appellant in its email dated 10.03.2016 by way of its reply email dated 11.03.2016, wherein it suggested only one modification, i.e., with regard to the provisional price being on the basis of the average of the last 5 LME days instead of the last 10 LME days, as proposed by the appellant. It was pursuant to such confirmation by respondent No.1 that the appellant thanked it for the business confirmation and promised to revert with the contract and proforma. Admittedly, Contract No. 061-16-12115-S, signed by the appellant, reflected the modified provisional pricing, as requested by respondent No.1, and stated that the provisional price would be the average of the last 5 LME days. Further, pursuant to the said contract, respondent No.1 furnished two Standby Letters of Credit and thereafter lifted 2,000 Metric Tons of zinc metal. Such actions on its part clearly demonstrated due and complete acceptance of the said contract. Therefore, it cannot blithely bank upon its own failure to sign the said contract to wriggle out of the terms and conditions mentioned therein.

22. We also cannot lose sight of the fact that the suit claim of respondent No.1 pertained to the invocation of the Letters of Credit furnished by it pursuant to Contract No. 061-16-12115-S and in the absence of the said contract, there is no other contract or agreement between the parties, going by respondent No.1’s own claim.

23. Section 44 of the Act of 1996 speaks of a foreign award being an arbitral award in pursuance of an agreement in writing for arbitration. Section 45 thereof provides for reference of the parties to arbitration by a judicial authority. It reads as follows:

> "45. Power of judicial authority to refer parties to arbitration. —Notwithstanding anything contained in Part I or in the Code of Civil Procedure, 1908 (5 of 1908), a judicial authority, when seized of an action in a matter in respect of which the parties have made an agreement referred to in section 44, shall, at the request of one of the parties or any person claiming through or under him, refer the parties to arbitration, unless it *prima facie* finds that the said agreement is null and void, inoperative or incapable of being performed."

24. In ***Interplay between Arbitration Agreements under Arbitration and Conciliation Act, 1996 and Stamp Act, 1899, In Re*** [1], a Constitution Bench noted that the burden of proving the existence of an arbitration agreement generally lies on the party seeking to rely on such an agreement and in jurisdictions, such as India, which accept the doctrine of *Kompetenz-Kompetenz*, only *prima facie* proof of the existence of an arbitration agreement needs to be adduced before the referral Court. It was further observed that the referral Court is not the appropriate forum to conduct a mini-trial by allowing the parties to adduce evidence in regard to the existence or validity of an arbitration agreement, as the same ought to be left to the Arbitral Tribunal. The view expressed earlier in ***Shin-Etsu Chemical Co. Ltd. vs Aksh Optifibre***

[1] (2024) 6 SCC 1

Ltd. and another[2] was reaffirmed and reiterated. In that case, this Court was called upon to determine the nature of the adjudication contemplated by the unamended Section 45 of the Act of 1996, when an objection with regard to the arbitration agreement being null and void was raised before a judicial authority. It was held therein that Section 45 of the Act of 1996 did not require the judicial authority to give a final determination as, even if the Court takes a view that the arbitral agreement was not vitiated based upon purely a *prima facie* view, nothing prevents the Arbitral Tribunal from trying the issue fully and rendering a final decision thereupon.

25. Reliance was sought to be placed by the learned senior counsel for respondent No. 1 on ***M.R. Engineers and Contractors Pvt. Ltd. vs. Som Datt Builders Ltd***[3]. Therein, this Court considered Section 7(5) of the Act of 1996 which deals with arbitration agreements in relation to domestic arbitrations and observed that the wording of the provision made it clear that mere reference to a document would not have the effect of making an arbitration clause in that document a part of the contract. This judgment would have had relevance if the appellant were to claim only under the contract of 2012 but as we have already noted, that alternative plea was unnecessary as it is Contract No. 061-16-12115-S that governed the field and the arbitration agreement in clause

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2 (2005) 7 SCC 234

3 (2009) 7 SCC 696

32.2 thereof was, therefore, available to the appellant and was rightly invoked by it.

26. Reliance placed on the decision of this Court in ***NBCC (India) Ltd. vs. Zillion Infraprojects Private Limited***[4] is also of no avail to respondent No.1. Therein, this Court held, in the context of Section 7(5) of the Act of 1996, that unless there is conscious acceptance of the arbitration clause from another document by the parties as a part of their contract, such an arbitration clause could not be read as a part of the contract between the parties. Again, this decision has no relevance on the same grounds as noted hereinbefore.

27. More relevant is the decision of this Court in ***Govind Rubber Limited vs. Louis Dreyfus Commodities Asia Private Limited***[5], wherein this Court observed that a commercial document having an arbitration clause has to be interpreted in such a manner as to give effect to the agreement rather than invalidate it. Reference was made to ***Scrutton on Charter Parties***[6] in the context of principles relating to construction of a commercial agreement and it was observed that it has to be construed according to the sense and meaning as collected in the first place from the terms used and understood in the plain, ordinary and popular sense. It was further observed that the Court should, if the

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4 (2024) 7 SCC 174

5 (2015) 13 SCC 477

6 17th Edition, Sweet & Maxwell, London, 1964

circumstances allow, lean in favour of giving effect to the arbitration clause to which the parties have agreed. As in the case on hand, one of the parties therein had not signed the contract agreement. However, at its request, the other party had changed the terms mentioned in the contract. Further, as is the case presently, the parties acted upon the said contract agreement and, in that factual scenario, this Court observed thus:

> "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.
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> …….
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> 23. It is clear that for construing an arbitration agreement, the intention of the parties must be looked into. The materials on record which have been discussed hereinabove make it very clear that the appellant was prima facie acting pursuant to the sale contract issued by the respondent. So, it is not very material whether it was signed by the second respondent or not."

28. Further, in ***Caravel Shipping Services Private Limited vs. Premier Sea Foods Exim Private Limited***[7], this Court affirmed and reiterated the legal position laid down in ***Jugal Kishore Rameshwardas vs. Goolbai Hormusji*** [8] to the effect that an arbitration agreement needs to be in writing though it need not be signed. Noting the fact that the requirement of the arbitration agreement being in writing has been continued in Section 7(3) of the Act of 1996, it was observed that Section 7(4) only added that an arbitration agreement could be found in the circumstances mentioned in the three sub-clauses that make up Section 7(4) but that did not mean that, in all cases, an arbitration agreement needs to be signed. It was held that the only pre-requisite is that it should be in writing, as pointed out in Section 7(3). This legal principle would hold good equally for an arbitration agreement covered by Sections 44 and 45 of the Act of 1996.

29. In the light of the aforestated settled legal position and given the admitted facts, which unequivocally demonstrate that respondent No.1 signified its consent to the terms spelt out in the appellant's email dated 10.03.2016 that finally found place in Contract No. 061-16-12115-S which, in turn, was accepted and acted upon by respondent No.1, we are of the considered opinion that the arbitration agreement in clause 32.2 thereof was very much available to the appellant and invocation

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7 (2019) 11 SCC 461

8 (1955) 2 SCC 187

thereof under Section 45 of the Act of 1996, by way of I.A. No.4550 of 2017 in CS (Comm) No. 154 of 2017, was fully justified and required to be accepted and acted upon by the referral Court. The refusal by the referral Court of the learned Judge and the confirmation of such refusal by the Division Bench are, therefore, unsustainable on facts and in law.

30. The appeal is accordingly allowed, setting aside the judgment dated 14.11.2019 of the Division Bench and the order dated 02.11.2017 of the learned Judge of the Delhi High Court. In consequence, I.A. No.4550 of 2017 in CS (Comm) No. 154 of 2017 shall stand restored to the file and the disputes between the parties shall be referred to arbitration by the referral Court in accordance with law.

Pending application(s), if any, shall stand disposed of.

....., J
(SANJAY KUMAR)

……....., J
(SATISH CHANDRA SHARMA)

August 25, 2025
New Delhi.