

M/S AUROHILL GLOBAL COMMODITIES LTD.

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v

M/S M.S.T.C. LTD.

JULY 31, 2007

[S.H. KAPADIA, J.]

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Arbitration and Conciliation Act, 1996:

Applicability of the Act—To international commercial arbitration—Held: The Act is applicable to international commercial arbitration held outside India, unless any or all the provisions of the Act have been excluded by an agreement between the parties expressly or by implication.

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s. 11 (9) r/w s. 11 (5)—Appointment of arbitrator—International commercial transaction—One of the contesting Companies purchasing goods on behalf of a third Company from the other contesting Company—Issuance of Draft Purchase Order by the purchasing Company—Arbitration clause specifying applicability of British law of arbitration—Dispute regarding transaction—Legal notice by selling Company—Proposing therein to be governed by the Act—Acceptance thereof by the purchasing Company—Petition for appointment of arbitrator—Maintainability questioned—On the ground that it was based on non est contract—Held: The petition is maintainable as the Act is applicable also to international commercial arbitration—The questions regarding validity of the contract and non-joinder of the third company to be decided by the arbitrator—However, British law of arbitration would be applicable to the arbitral proceedings as per the terms of the arbitration clause.

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In an international transaction, respondent-Company was to purchase goods on behalf of a third company from the petitioner-company. After negotiations between both the companies, respondent-Company issued a Draft Purchase Order and the same was accepted by the petitioner-company. In the Arbitration clause of the Draft Purchase Order specified settlement of disputes in accordance with rules of arbitration of Great Britain and the jurisdiction of the Court was specified to be of London.

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After a dispute regarding the transaction arose, petitioner sent a legal

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A notice to the respondent for settlement of the dispute through arbitration proposing to be governed by Arbitration and Conciliation Act, 1996 for the purpose of procedural law and Indian Contract Act as substantive law. The respondent by his reply to the notice agreed in principle to be guided by the Arbitration Act.

B Petitioner filed an application for appointment of Arbitrator under the Act. Respondent-Company objected to the maintainability of the petition on the grounds that the petition was based on the contract which was non est as the Draft Purchase Order did not constitute a valid and binding contract between the parties; and that this Court could not appoint an arbitrator of its own choice, as the arbitration clause specified applicability of British law of arbitration.

Petitioner contended that respondent would be deemed to have waived his right to be governed by the British Law in view of its reply to the legal notice agreeing to be guided by the Indian Law.

D Disposing of the petition, the Court

HELD: 1. Provisions of Part I of the Arbitration and Conciliation Act, 1996 are equally applicable to international commercial arbitration (“ICC”) held outside India, unless any or all the provisions have been excluded by an agreement between the parties, expressly or by implication, therefore, where arbitration is to be carried out as per rules of ICC, parties can deviate only to the extent permissible. [Para 12] [695-A]

Bhatia International v. Bulk Trading S.A. and Anr., [2002] 4 SCC 105, relied on.

F 2. In the present case, the petitioner-company has filed this petition under Section 11(9) read with Section 11(5) of Arbitration and Conciliation Act, 1996. Section 11 falls in Part I. The alleged contract is an international transaction, therefore, this Court has the power to appoint an arbitrator in accordance with the terms of the contract. Under the Act, the arbitral tribunal has very wide powers. The powers of the courts have been curtailed. The arbitral tribunal’s authority under Section 16 of the Act is not confined to the width of its jurisdiction but goes to the very root of its jurisdiction. Therefore, it cannot be said that the arbitration petition was misconceived and not maintainable in law. [Para 13] [695-B, C, D]

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Secur Industries Ltd. v. Godrej and Boyce Mfg. Co. Ltd. and Anr., [2004] 3 SCC447, relied on. A

3. The question as to whether the Draft Purchase Order acquired the character of a concluded contract or not and the question as to whether the contract was non est can only be decided by the arbitrator. Therefore, the aforesaid question have got to be decided by arbitration proceedings. The objections raised on behalf of the respondent the arbitration proceedings were not maintainable on account of non-joinder of third Company who was the ultimate buyer also is required to be raised by the respondent before the arbitrator. Therefore, the arbitration petition was maintainable under the Act. B

[Para 13] [695-D, E] C

4. The reply to the legal notice *concurred only in principle* to the offer made by the petitioner to be guided by the 1996 Act so far as the procedural law is concerned. Further, it cannot constitute a waiver because it is a *without prejudice concurrence*. In the circumstances, the parties shall abide by the terms of the alleged contract. Moreover, it is well settled that parties have to stand by the terms of the contract. The present case relates to an international transaction. The parties entered into the alleged contract with open eyes. They agreed to settle their disputes by arbitration in London and *in accordance with the rules of arbitration of Great Britain*. Moreover, vide clause 20 of the alleged contract the parties argued that the competent court in Great Britain alone shall have exclusive jurisdiction to decide all matters including arbitration proceedings to be instituted. Reading clauses 19 and 20 conjointly, it is clear that the procedural law application to the arbitration proceedings had to be the British Rules of Arbitration. In the circumstances, it is not possible for this Court to substitute the British Rules of Arbitration by the procedural law under the 1996 Act. [Para 14] D

CIVIL APPELLATE JURISDICTION : Arbitration Petition No.8 of 2007 E

Under Section 11 (6) of the arbitration and Conciliation Act, 1996. F

Sunil Kumar, Shree Prakash Sinha, Abhishek Singh, Anshuman Kr.& Shekhar Kumar. for the Petitioner. G

Chetan Sharma, Ramini Taneja and Anil Shrivastav for the Respondent.

The Judgment of the Court was delivered by H

A **KAPADIA, J.** 1. M/s Aurohill Global Commodities Ltd. has filed an arbitration application herein under Section 11(9) read with Section 11(5) of the Arbitration and Conciliation Act, 1996 (the "said Act") for the appointment of arbitrators to settle the dispute between the said company and M/s M.S.T.C. Ltd. (PSU). The facts giving rise to this petition briefly are as follows.

B 2. Petitioner company is based in Cyprus having its offices in Russia and India. Petitioner has been exporting steel products for more than a decade.

C 3. Vide letter dated 2.3.2005, M/s Sunvijay Rolling and Engineering Ltd., Nagpur placed an order on the petitioner for supply of 5000 MT of Billets. Accordingly, on 10.3.2005 petitioner forwarded proforma invoice to the said Sunvijay Rolling and Engineering Ltd. for the required quantity of Billets for a total consideration of US \$ 22,25,000. Payment was to be made through irrevocable confirmed letter of credit ("LC") payable 100% at sight. Petitioner's banker was M/s BNP. Subsequently, M/s Sunvijay Rolling and Engineering

D Ltd. informed the petitioner that they prefer to buy the Billets through M/s M.S.T.C. Ltd. (respondent herein).

E 4. On 24.3.2005 a Draft Purchase Order dated 24.3.2005 was issued by M/s M.S.T.C. Ltd. which was accepted by the petitioner. It is the case of the petitioner that the said purchase order was issued as a result of negotiations between the petitioner and M/s M.S.T.C. Ltd.. According to the petitioner, this constituted a contract between the parties at Kolkata. The date of shipment was 15.5.2005 and payment was to be made through irrevocable LC to be opened by First Class Indian Bank. The LC was to be made operative only after receipt of credential report from Dan & Bradstreet. Clauses 19 and 20 of the Purchase Order read as under:

F "19. ARBITRATION:

G Any disputes, controversies and/or claims arising out of or relating to this agreement or any modification thereto, or any alleged breach or cancellation thereof, which cannot be settled amicably between Seller and buyer, shall be settled by arbitration in London, and in accordance with rules of arbitration of the Great Britain arbitration and the award in pursuance thereof shall be binding on the parties.

(emphasis supplied)

H 20. JURISDICTION:

The competent court under the laws applicable in Great Britain alone shall have exclusive jurisdiction to decide all matters, disputes and controversies relating to this contract, including arbitration proceedings instituted or to be instituted. The jurisdiction of court will be London." A

5. On 29.3.2005 M/s M.S.T.C. Ltd. requested M/s Indian Overseas Bank, Kolkata for opening of an irrevocable LC. Accordingly, M/s Indian Overseas Bank informed the petitioner's bankers that LC has been opened on the request of M/s M.S.T.C. Ltd. and that the petitioner was the beneficiary under the LC. The date of expiry of the LC was 5.6.2005. The last date of shipment was 15.5.2005. The LC was to operate only after receiving confirmation from the Opening Bank. B

6. On 20.4.2005 the petitioner's banker confirmed the LC. The LC was payable against presentation of FCR (a receipt of confirmation) of goods at the port of loading. C

7. On 10.5.2005 it is alleged that the petitioner received the requisite confirmation on which basis the petitioner prepared the goods for shipment. The goods arrived at the port in Ukraine and a FCR was issued to this effect. The said receipt was presented to the bank along with the documents. However on 13.5.2005 M/s Sunvijay Rolling and Engineering Ltd. addressed a letter to the petitioner to suspend all the dispatches on the LC opened by M/s M.S.T.C. Ltd. On the same day, the petitioner informed M/s Sunvijay Rolling and Engineering Ltd. that it was not possible to suspend the dispatches as the goods were already placed at the port. M/s Sunvijay Rolling and Engineering Ltd. requested the petitioner vide letter dated 23.5.2005 to decrease the price by US \$ 50 PMT. The petitioner was further informed that the LC would remain suspended till the petitioner agrees to decrease in the price. The petitioner refused to reduce the price. On 26.5.2005 the bankers of M/s M.S.T.C. Ltd. stated that the LC was inoperative as certain conditions were not satisfied, namely, non execution of the performance guarantee. According to the petitioner herein, there was no such requirement in the alleged contract dated 24.3.2005. D E F

8. Ultimately, on 31.5.2005 M/s M.S.T.C. Ltd. informed the petitioner that the LC stood cancelled. G

9. On 23.8.2006 a legal Notice was given by the petitioner requesting M/s M.S.T.C. Ltd. to settle the dispute through arbitration before a sole arbitrator. By the said Notice, the petitioner stated that it was agreeable to be governed H

A by Arbitration and Conciliation Act, 1996 for the purposes of procedural law as the substantive law applicable was the Indian Contract Act. In response to the said Notice, M/s M.S.T.C. stated vide reply dated 19.9.2006 that the alleged contract was non est and that the above Purchase Order did not constitute a valid and binding contract between parties. They contended that the Purchase Order was a draft and that it never became a binding contract since the conditions preceding did not materialize. M/s M.S.T.C. Ltd. further contended that there was no concluded contract, much less an agreement to arbitration. However, *without prejudice* to the aforesaid contentions, M/s M.S.T.C. Ltd., in its reply, stated that if the petitioner insisted on arbitration then it had no option but *to concur in principle* to be guided by the said

C Act for the purpose of procedural law as well as the substantive law, namely, the Indian Contract Act. One of the contentions raised on behalf of the petitioner herein is that vide letter dated 19.9.2006 M/s M.S.T.C. Ltd. had waived its option to be governed by the Rules of Arbitration of Great Britain as mentioned in clause 19, quoted above.

D 10. By way of counter, M/s M.S.T.C. Ltd. submitted that the arbitration petition was not maintainable as it was based on an alleged contract, which, in any event, was *non est* as it did not constitute and as it did not acquire the character of a valid and binding contract between the parties. According to M/s M.S.T.C. Ltd. the Draft Purchase Order on which the petitioner has made its claim was a provisional one and never matured in terms of a binding or conclusive contract and since there was no contract there was no arbitration agreement and, therefore, the present petition was misconceived and inappropriate. According to M/s M.S.T.C. Ltd. the Draft Purchase Order cannot be vested with the trapping of a binding or conclusive contract and, therefore, the said Order did not constitute an arbitration agreement. It was

E further submitted by M/s M.S.T.C. Ltd. that, in any event, this Court cannot appoint an arbitrator of its own choice as the arbitration clause itself states that all disputes and/or claims arising out of the agreement for alleged breach shall be settled by arbitration in London and in accordance with the rules of arbitration of Great Britain.

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G 11. Two questions arise for determination. Firstly, whether the question as to whether the Draft Purchase Order constituted a concluded contract and/or whether such contract was non est could be decided by me in this petition in which the petitioner has sought the appointment of an arbitrator.

H 12. In the case of *Bhatia International v. Bulk Trading S.A. and Anr.*,

reported in [2002] 4 SCC 105 this Court held that provisions of Part I of the Arbitration and Conciliation Act, 1996 are equally applicable to international commercial arbitration ("ICC") held outside India, unless any or all the provisions have been excluded by an agreement between the parties, expressly or by implication, therefore, where arbitration is to be carried out as per rules of ICC, parties can deviate only to the extent permissible. A

13. In the present case, M/s Aurohill Global Commodities Ltd. has filed this petition under Section 11(9) read with Section 11(5) of the said Act. Section 11 falls in Part I. The alleged contract is an international transaction, therefore, this Court has the power to appoint an arbitrator in accordance with the terms of the contract. Under the said Act, the arbitral tribunal has very wide powers. The powers of the courts have been curtailed. The arbitral tribunal's authority under Section 16 of the said Act is not confined to the width of its jurisdiction but goes to the very root of its jurisdiction [see: *Secur Industries Ltd. v. Godrej & Boyce Mfg. Co. Ltd. and Anr.*, [2004] 3 SCC 447]. In the present case, therefore, the question as to whether the Draft Purchase Order acquired the character of a concluded contract or not and the question as to whether the contract was non est can only be decided by the arbitrator. Therefore, the aforesaid question have got to be decided by arbitration proceedings. In my view, therefore, there is no merit in the contention advanced on behalf of M/s M.S.T.C. Ltd. that the arbitration petition was misconceived and not maintainable in law. Before concluding on this point, one of the objections raised on behalf of M/s M.S.T.C. Ltd. was that, in any event, the arbitration proceedings were not maintainable on account of non-joinder of M/s Sunvijay Rolling and Engineering Ltd., who was the ultimate buyer. In my view, the objection was also required to be raised by M/s M.S.T.C. Ltd. before the arbitrator. Therefore, on the first issue, I am of the view that the arbitration petition was maintainable under the said Act. B C D E F

14. The second question which arises for determination in the present case is whether by virtue of reply dated 19.9.1996 to the legal notice given by the petitioner, M/s M.S.T.C. Ltd. could be said to have waived its right to claim holding of arbitration proceedings in accordance with the British Rules of Arbitration as mentioned in clause 19, quoted above. To recapitulate, on 23.8.2006 a legal notice was given by the Advocate for the petitioner to M.S.T.C. Ltd.. After stating of the facts and submission, petitioner requested M/s M.S.T.C. Ltd. to give its consent for settlement of disputes through arbitration before a sole arbitrator. By the said legal notice, petitioner proposed the place of arbitration at New Delhi instead of London. By the said Notice, G H

- A the petitioner stated that it was agreeable to be governed by the said Act so far as the procedural law is concerned. According to the petitioner, vide letter dated 19.9.2006 addressed by the Advocate for M/s M.S.T.C. Ltd., the respondent agreed in principle to be guided by the said Act so far as the procedural law was governed and this letter, therefore, constituted waiver on the part of M/s M.S.T.C. Ltd. to be governed by the British Rules of Arbitration as mentioned in clause 19, quoted above. There is no merit in the contention advanced on behalf of the petitioner. The letter dated 19.9.2006 addressed by the Advocate for M/s M.S.T.C. Ltd. *concurred only in principle* to the offer made by the petitioner to be guided by the said 1996 Act so far as the procedural law is concerned. Further, it cannot constitute a waiver because
- B it is a *without prejudice concurrence*. In the circumstances, the parties shall abide by the terms of the alleged contract. Moreover, it is well settled that parties have to stand by the terms of the contract. We have before us an international transaction. Petitioner is a company registered in Cyprus. The parties entered into the alleged contract with open eyes. They agreed to settle their disputes by arbitration in London and *in accordance with the rules of arbitration of Great Britain*. (emphasis supplied by me). Moreover, *vide* clause 20 of the alleged contract the parties argued that the competent court in Great Britain alone shall have exclusive jurisdiction to decide all matters including arbitration proceedings to be instituted. Reading clauses 19 and 20 conjointly, it is clear that the procedural law application to the arbitration proceedings had to be the British Rules of Arbitration. In the circumstances, it is not possible for this Court to substitute the British Rules of Arbitration by the procedural law under the said 1996 Act.
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15. Accordingly, I hold that the question as to whether there existed a concluded contract, the question as to whether the alleged contract was *non est* and the question as to whether M/s Sunvijay Rolling and Engineering Ltd. was necessary and proper party are all questions to be decided in the arbitration proceedings and, to that extent, this petition is maintainable under the Arbitration and Conciliation Act, 1996. However, as stated above, there is no waiver of the British Rules of Arbitration and, therefore, the parties are bound by the terms of the arbitration clause no. 19 quoted hereinabove.

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16. Accordingly, the arbitration petition stands disposed of with no order as to costs.