

\* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

+ **ARB.P. 250/2012**

LETS ENGINEERING & TECHNOLOGY  
SERVICES PVT. LTD. .... Petitioner  
Through: Mr. Sanjay Goswami, Advocate

versus

MANOJ DAS .... Respondent  
Through: Mr. Arunav Patnaik, Advocate

**CORAM:**  
**HON'BLE MS. JUSTICE REVA KHETRAPAL**

### **J U D G M E N T**

**: REVA KHETRAPAL, J.**

1. By way of this petition filed under Section 11(5) of the Arbitration and Conciliation Act, 1996, the Petitioner – LETS Engineering Technology Services Pvt. Ltd. (for short “LETS”) prays for appointment of an independent Sole Arbitrator to decide the claims of LETS as set out in the petition against the Respondent, *viz.*, Digital Analysis and Software Solutions (for short “DASS”) arising out of the disputes which have arisen between LETS and DASS.

2. The facts as narrated in the petition are as follows. LETS is since long been engaged in execution of outsourced Digital Analysis and Software Solutions for its customers in UK, USA and other countries, and has certain indigenously developed proprietary Solutions, Designs, Analysis and Software for Geographical Mapping

services, in which LETS is the pioneer and trend setter in India. Somewhere in the year 2004, LETS started sub-outsourcing some of its overseas assignments and job works to DASS with the clear understanding that the Technical Know How and Digital Analysis including GIS Mapping, etc., and Software Solutions of LETS were all Copyrights and the Proprietary Data and Software of LETS, in which DASS would have no Intellectual Property Rights and would not be authorized to use the same for any purposes other than purposes of job work for LETS, for which it would receive remuneration in Indian Rupees.

3. LETS asserts that over the period DASS's ambition soared and without informing LETS, it set up a new company under the name of Weaver Bird Engineering and Technology Pvt. Ltd. and under the guise of a separate company, without disclosing the setting up of the same to LETS, started competing with LETS by using their Technical Know How, and Copyrighted Digital Analysis Software and Customer Data and started approaching customers of LETS in UK, Europe and USA for soliciting business from them. From January, 2010 onwards, the business turnover of LETS suddenly dropped substantially on account of the diversion of its business by DASS to the newly incorporated company M/s. Weaver Bird Engineering and Technology Pvt. Ltd., which by conservative estimates amounted to an average of ₹ 30 lacs per month (approx) from a single customer, i.e., BLOM AEROFILMS, U.K.

4. LETS alleges that it suffered losses of a minimum of ₹ 2.5 crores in terms of business revenue in the period intervening January,

2010 to October, 2010 alone and in this regard also issued to DASS an e-mail dated 20<sup>th</sup> September, 2010. After discounting what it owed to DASS, LETS claimed from DASS the balance amount of ₹ 2,30,06,080/- as compensation/damages for breach of contract and infringement of their Intellectual Property Rights, including Copyrights, etc. in the Digital Analysis and Software Solutions and Customer Database by its legal notice dated 01.11.2010. DASS did not choose to reply, but instead chose to issue a spate of legal notices to LETS on the same lines, viz., notice dated 01.10.2010, 14.12.2010 and 03.09.2011, which were duly replied by LETS. Thereafter, DASS proceeded to initiate a winding up petition against LETS, which was left with no alternative but to seek settlement of its claims along with the interest due through the process of arbitration, in terms of the Contract Agreement dated 04.11.2009 vide the mail of LETS, which had been ratified and confirmed by DASS through its e-mails dated 16.11.2009 and 19.11.2009 on all clauses including the arbitration clause. The petitioner accordingly got served upon the respondent a legal notice dated 31.01.2012, seeking resolution of the disputes through arbitration. The respondent chose not to reply to the said notice.

5. In the circumstances, the present petition was instituted by LETS on 6<sup>th</sup> July, 2012, to which DASS filed a reply in which it was contended that the petition was an abuse of the process of law and deserved dismissal as there exists no Arbitration Agreement as contemplated under the Arbitration and Conciliation Act, 1996 (for short “the Act”) governing the relationship between the parties. It

was further submitted that from a perusal of Article 7 of the draft Agreement annexed by LETS to the petition, it is clear that the said draft Agreement would only have come into force from the effective date of signing of the same. That such an eventuality never arose as the said draft Agreement was not signed between the parties due to disagreement on certain terms contained therein. Consequently, the reliance placed by LETS on the arbitration clause in the said draft Agreement in order to maintain an application under Section 11(5) of the Act is without any foundation or basis. It is also submitted that for a document to be considered as a valid Arbitration Agreement under Section 7(4)(b) of the said Act, the same ought to contain a bilateral record of consent of both/all parties to it, but from a perusal of the E-mail dated 04.11.2009 and from various other correspondences between the parties, it is more than clear that DASS had never given its consent to be bound by the said draft Agreement. In fact, from a mere perusal of the e-mails exchanged subsequent to 04.11.2009, annexed by LETS to the petition, being E-mails dated 16.11.2009 and 19.11.2009, two E-mails dated 20.11.2009 and the E-mail dated 05.12.2011, it becomes crystal clear that the said document (Marketing Agreement), being relied upon by LETS was just a draft Agreement which was subject to change since there was disagreement between the parties with regard to the terms of the same. Finally, it is submitted that the present petition has been filed by way of counterblast to the winding up petition filed by DASS against LETS and since there exists no valid and legally binding Arbitration Agreement between the parties, the petition is liable to be dismissed.

6. Rejoinder to the aforesaid reply was filed by LETS denying the averments made in the reply and reiterating the contents of the petition.

7. Mr. Sanjay Goswami, learned counsel for LETS contends that the dealings between LETS and DASS were governed by the Marketing Agreement. The E-mail correspondence between the parties contained the said Marketing Agreement which was exchanged between the parties and the terms of which were accepted by DASS in its response regarding the said Agreement, except minor clarifications being sought on certain issues. The exchange of E-mails and their attachments as well as the response mails by DASS clearly constitute written contract between the parties and the entire dealings and transactions between the parties were governed by the terms of the said contract which was exchanged between the parties. The E-mail of LETS dated 04.11.2009 contained the revised contract as per the modifications and the same was acknowledged by DASS by its mail dated 19.11.2009, which acknowledged the General Agreement between the parties and raised queries about certain clauses of the same. There was, however, no objection of any nature expressed by DASS as regards Arbitration Clause 13.2 of the said Agreement which was impliedly accepted by DASS. The entire basis of the working between LETS and DASS was the said Agreement/Contract and the various clauses of the same. DASS, therefore, cannot dispute the existence of the arbitration clause between the parties, which reads as follows:

*“13.2 In case of any dispute or difference arising out of this Agreement on any issue and cannot be amicably settled between the Parties, the same shall be referred to arbitration under the provisions of Arbitration and Conciliation Act 1996 as then in force. The place of such Arbitration shall be at New Delhi. The parties acknowledge that disputes between them shall be solely settled by arbitration.”*

8. The main stay of the rebuttal arguments of Mr. Arunav Patnaik, learned counsel on behalf of DASS was as follows. The E-mails exchanged between the parties were clearly reflective of the position that the Marketing Agreement/Contract was not a signed Agreement and the signing thereof had been held up with the consensus of the parties. It was this unsigned Marketing Agreement/Contract which contained the arbitration clause. The basis of all the transactions between the parties were the work orders and the work orders did not contain an Arbitration Clause nor it is the case of LETS that the work orders contain an Arbitration Clause.

9. Learned counsel for LETS placed reliance on the decisions of the Hon’ble Supreme Court rendered in:-

- (i) *Shakti Bhog Foods Limited vs. Kola Shipping Limited, (2009) 2 SCC 134.*
- (ii) *Smita Conductors Ltd. vs. Euro Alloys Ltd., (2001) 7 SCC 728.*
- (iii) *Great Offshore Limited vs. Iranian Offshore Engineering and Construction Company, (2008) 14 SCC 240.*

- (iv) *Visa International Limited vs. Continental Resources (USA) Limited, (2009) 2 SCC 55.*
- (v) *Trimex International FZE Limited ,Dubai vs. Vedanta Aluminium Limited, India, (2010) 3 SCC 1.*
- (vi) *Unissi (India) Private Limited vs. Post Graduate Institute of Medical Education and Research, (2009) 1 SCC 107.*

10. Learned counsel for DASS, on the other hand, relied upon the judgments rendered in:-

- (i) *Indowind Energy Ltd. vs. Wescare (I) Ltd. and Anr., AIR 2010 SC 1793.*
- (ii) *M.M. Aqua Technologies Ltd. vs. Wig Brothers Builders and Anr., 95 (2002) DLT 818 (DB).*
- (iii) *P.T. Tirtamas Comexindo vs. Delta International Limited and Anr., 2001 (2) ARB LR 630 (Cal).*
- (iv) *Bharat Sanchar Nigam Limited vs. Telephone Cables Limited, (2010) 5 SCC 213.*
- (v) *M.R. Engineers and Contractors Private Limited vs. Som Datt Builders Limited, (2009) 7 SCC 696.*
- (vi) *U.P. Rajkiya Nirman Nigam Ltd. vs. Indure Pvt. Ltd. and Others, (1996) 2 SCC 667.*

11. In view of the controversy raised between the parties and in order to resolve the same, it would be useful at this juncture to reproduce the e-mails relied upon by the parties to buttress their respective contentions, which have been enclosed as annexures to the petition, those relevant being collectively enclosed as Annexure A7:-

**Harish Sharma**

**From:** Kishore das [kishore.das@sar-group.com]  
**Sent:** Monday, December 05, 2011 2:22 PM  
**To:** harish@luminousets.com  
**Subject:** **FW: Contract Agreement**  
**Attachments:** **Vendor Agreement\_DASS.doc**

**Importance:** High

Fyi...

**From:** pawan sachdeva [mailto:pawans@luminousets.com]  
**Sent:** Wednesday, November 04, 2009 3:30 PM  
**To:** Manoj Das  
**Cc:** kishored@luminousets.com  
**Subject:** Contract Agreement  
**Importance:** High

Dear Manoj Ji,

As per your discussions with Kishore sir, the contract agreement has been modified, please find attached the same document and make arrangement to sent us a signed copy of the same asap.

Regards  
Pawan

MARKETING AGREEMENT

.....

---Original Message---

**From:** pawan sachdeva  
**To:** Manoj Das  
**Cc:** kishored@luminousets.com

**Sent:** Monday, November 16, 2009 7:23 PM  
**Subject:** Contract Agreement & Work Order Format

Dear Manoj Ji,

As directed please find attached the final contract agreement and work order format. Based on our today's discussions I have further refined both the documents to be on a mutual acceptable level.

Please provide a signed copy of the agreement asap.

Regards

Pawan..

**From:** Manoj Kumar Das  
**To:** pawan sachdeva  
**Cc:** kishored@luminousets.com  
**Sent:** Thursday, November 19, 2009 7:58 PM  
**Subject:** Re: Contract Agreement & Work Order Format

**Dear Pawanji, please look into the following few lines from Work Order & General Agreement...**

**Regarding Work Order:** 01. The Expected date of Delivery should be on mutually agreed basis, not imposed categorically (as we have informed a fixed no of resource involved in your project)...

**LETS Comments:** The expected delivery date will be stated by LETS, after discussing with DASS and would be inline with the fixed number of resources involved in our project.

2. See the clause 4(b)...Inspection means inhouse data checking or inspection in DASS premises..?please clarify..

**LETS Comments:** It has always been inhouse and will continue to be that, the same has been specified in the WO.

03. Clause 3(c) Lets is entitled to claim liquidated damage to the

*extent of total project cost from the vendor-Not Agreed..*

*LETS Comments: As the expected delivery date is mutually agreed/discussed it is expected that DASS completes the delivery in atleast 10 days delay. If this needs to be scrapped then point one will not be mutually agreed.*

*04) Clause 5(b), what is quality and effort detail..as it is assessed internally for our internal purpose.*

*LETS Comments: We have scrapped this clause, we are only concerned with the quality of the data delivered to LETS.*

*05) If there is deviation in quality and time both what is the penalty clause(as..I think once quality is a issue than definitely it needs time to check it once again which may lead to delay), as per me there should be one..*

*LETS Comments: Incase DASS delivers low quality output as the first delivery which delayed from the executed delivery date then both penalties would be levied.*

*Incuse the first delivery timeline is fine and quality is rejected the re-delivery date again shall be mutually agreed.*

*6) Doubt: Rejection are based on what %ge basis, (otherwise a single error may lead to rejection), so that it is declared as 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup> rejection.*

*LETS Comments: As was discussed on your visit to Naraina our Q&P is working on setting the acceptance/rejection benchmarks, which would be realistic and acceptable to all. The first analysis report received by you from Charu says there were ~33 errors per sqkm for a ~28 sqkm city and the city has been accepted at LETS, clearly proves the point that single error would not lead to rejection.*

*Regarding Agreement: AS per clause 2.6 includes time to time..., so extra cost is there to implement time to time modification..so what abt this.. or define the quality from the beginning based on which dass will raise the quotation..*

*2) clause 3.2 only ..no other sum ..other sum may be service*

*tax..please note..*

*3) clause 4.4 ..look for the second sentence, may be a problem..*

*NB: To implement the quality it needs some revision of the previous pricing..Please look into it.*

*Regards,*

*Manoj*

*-----Original Message-----*

***From:** pawan sachdeva*

***To:** Manoj Kumar Das*

***Cc:** kishored@luminousets.com*

***Sent:** Friday, November 20, 2009 1:04 PM*

***Subject:** Re: Contract Agreement & Work Order Format*

*Dear Manoj Ji,*

*I have added my comments in the work order observation below, also attached the updated WO. Regarding the Contract agreement your comments have been forwarded to our legal/commercial authorities who would comment on the same.*

*You may hold onto the agreement as of now BUT as per our legal/commercial dept. having the WO in place is mandatory to process the invoices going forward.*

*I would look forward to your acceptance on the WO latest by tomorrow so that I can pass on all the related WOs to DASS by Monday and confirm the same with a copy of it to our concerned dept. Monday is the strict deadline I have.*

*Do let me know if you still have any issues.*

*Thanx*

*Pawan..*

**From:** Manoj Kumar Das [mailto:manoj@digitalinfosoft.com]  
**Sent:** Friday, November 20, 2009 4:55 PM  
**To:** pawan sachdeva  
**Cc:** kishored@luminousets.com  
**Subject:** Re: Contract Agreement & Work Order Format

Dear Pawanji, Regarding agreement it is ok..we will make it later..Please look into the Sl. Nos. of previous mail of work order heading..May be these things are not considered....

**Regarding Work Order:**01. The Expected date of Delivery should be on mutually agreed basis, not imposed categorically (as we have informed a fixed no of resource involved in your project).

03. Clause 3(c) Lets is entitled to claim liquidated damage to the extent of total project cost from the vendor-Not Agreed..

05) If there is deviation in quality and time both what is the penalty clause (as..I think once quality is a issue than definitely it needs time to check it once again which may lead to delay), as per me there should be one..

6) Doubt: Rejections are based on what %ge bases, (otherwise a single error may lead to rejection), so that it is declared as 1<sup>st</sup>, 2<sup>nd</sup> 3<sup>rd</sup> rejection.

Best Regards,

Manoj..

**Harish Sharma**

**From:** Kishore das [kishore.das@sar-group.com]  
**Sent:** Monday, December 05, 2011 2:23 PM  
**To:** harish@luminousets.com  
**Subject:** FW: Contract Agreement & Work Order Format

**From:** pawan sachdeva [mailto:pawans@luminousets.com]  
**Sent:** Friday, November 20, 2009 5:03 PM

**To:** Manoj Kumar Das  
**Cc:** kishored@luminousets.com  
**Subject:** Re: Contract Agreement & Work Order Format

*Manoj Ji I had added my comments in your original mail in a different color against each point.*

**12.** From the aforesaid, the following question arises for consideration:-

- (i) Whether the arbitration clause between the two parties, viz., LETS and DASS could be considered as a binding Arbitration Agreement on DASS, which is not a signatory to the said Agreement?

**13.** Section 7 defines an “arbitration agreement” and the various legally recognized modes of entering into the same. For the facility of reference the said Section is extracted below:-

*“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 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.”*

**14.** The term “arbitration agreement” is defined under Section 2(b) of the Act as an agreement referred to in Section 7. Section 7(3) specifically stipulates that an “arbitration agreement” shall be in writing. Sub-sections (4) and (5) of Section 7 stipulate that an “arbitration agreement” will be considered to be in writing if it is contained in:

- (a) a document signed by the parties [sub-section 4(a) of Section 7]; or
- (b) an exchange of letters, telex, telegrams or other means of telecommunication which provide a record of the agreement [sub-section 4(b) of Section 7]; 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 [sub-section 4(c) of Section 7].
- (d) a contract between the parties making a reference to another document containing an arbitration clause indicating a mutual intention to incorporate the said

arbitration clause from such other document into the contract [sub-section (5) of Section 7];

**15.** From the above conspectus of what would constitute an “arbitration agreement” in writing, it is clear that in the present case it is the provisions of Section 7(4)(b) that are sought to be relied upon by LETS. It is the case of LETS that it was by an exchange of E-mails, which is a mode of telecommunication, that an Arbitration Agreement was entered into between LETS and DASS and it is these E-mails which provide a record of the Agreement between the parties. Indubitably, DASS is not a signatory to the Marketing Agreement sent by E-mail dated 04.11.2009 and thus the only aspect which is to be considered is whether DASS had affirmed and approved of the said Agreement and/or acted in terms of the said Agreement and whether an Arbitration Agreement can be spelt out to have come into existence from the exchange of E-mails between the parties. If DASS had acknowledged or confirmed in any correspondence between the parties the Arbitration Agreement contained in the Marketing Agreement or indicated that it is bound by the Arbitration Agreement, the inevitable corollary would be that the contention of DASS that it was not bound by the Arbitration Agreement would deserve outright rejection. On the other hand, if LETS is unable to substantiate its contention that by an exchange of E-mails DASS had provided a record of the Arbitration Agreement between the parties, the prayer of LETS for appointment of an Arbitrator would be liable to be rejected.

**16.** The E-mails between the parties when viewed through the aforesaid lens, in the opinion of this Court, clearly indicate the

existence of an Arbitration Agreement between the parties. It is not in dispute that there existed a draft Marketing Agreement containing an arbitration clause between the parties, being Clause 13.2, that this Agreement was e-mailed as an attachment to the E-mail dated November 04, 2009 by LETS to DASS with the request by LETS to DASS to make arrangement to send a signed copy of the same as soon as possible, and that a few days later, i.e., on November 16, 2009, LETS again e-mailed to DASS “*The final contract agreement and work order format*” stating:

*“Based on our today’s discussions I have further refined both the documents to be on a mutual acceptable level. Please provide a signed copy of the agreement asap.”*

**17.** Three days’ later, i.e., on November 19, 2009, DASS sent an E-mail to LETS to look into certain lines of the Work Order and General Agreement, but the said E-mail nowhere refers to the Arbitration Clause. Regarding the General Agreement, DASS sought modification of clauses 2.6, 3.2 and 4.4 to a limited extent and requested LETS to look into the matter. The necessary inference is that no dispute was raised by DASS with regard to the Arbitration Clause contained in the Agreement.

**18.** The next E-mail is dated November 20, 2009 sent by LETS to DASS emphasizing the urgency of having the Work Order in place so as to enable processing of invoices and stating that DASS “*may hold onto the agreement as of now*”. DASS’s reply to this E-mail is

contained in E-mail dated November 20, 2009, which begins by stating:

*“Regarding agreement it is ok...we will make it later...Please look into the Sl. nos. of previous mail of work order heading....”*

**19.** From the aforesaid, it is clear that the parties were *ad idem* with regard to all the clauses including the arbitration clause contained in the Marketing Agreement attached with E-mail dated 04.11.2009 except Clauses 2.6, 3.2 and 4.4 referred to in E-mail dated 19.11.2009 and thus the existence of a valid Arbitration Agreement in writing cannot be refuted. The provisions of Section 7 of the Act envisage that the existence of an Arbitration Agreement can be inferred from a document signed by the parties, or an exchange of letters, telex, telegrams, or other means of telecommunication which provide a record of the Agreement. In the present case, the exchange of E-mails, the contents of which have been reproduced hereinabove is not denied by DASS. In the circumstances, the contention of DASS that there was no Arbitration Agreement between the parties is therefore wholly unacceptable. DASS had clearly refuted certain Clauses in the subject Agreement, but as regards the Arbitration Clause there was no controversy between the parties at any stage. At this stage, for DASS to turn around and dispute the existence of the Arbitration Agreement between the parties would be both unwarranted and unjustified.

**20.** It is also not in dispute that various work orders were placed by LETS upon DASS and that DASS had catered to the aforesaid work orders until disputes arose between the parties. The transactions

between the parties were clearly premised on the Marketing Agreement and for this reason also it would not be open to DASS at this juncture to contend that there was no consensus between the parties with regard to the Arbitration Agreement.

**21.** In the case of *Visa International Limited (supra)*, relied upon by the counsel for the petitioner, the Hon'ble Supreme Court opined:-

*“18. That an arbitration agreement is not required to be in any particular form has been reiterated in more than one decision. [See Bihar State Mineral Development Corpn. v. Encon Builders (I) (P) Ltd. (2003) 7 SCC 418] What is required is to gather the intention of the parties as to whether they have agreed for resolution of the disputes through arbitration. What is required to be decided in an application under Section 11 of the Act is whether there is any arbitration agreement as defined in the Act? It needs no reiteration that Section 7 of the Act does not prescribe any particular form and it is immaterial whether or not expression “arbitration” or “arbitrator” or “arbitrators” has been used in the agreement.”*

**22.** In *Unissi (India) Private Limited (supra)*, also relied upon by the counsel for the petitioner, while interpreting the provisions of Section 7 of the Act, the Hon'ble Supreme Court relying upon its earlier decisions held that although no formal Agreement was executed, the tender documents indicating certain conditions of contract contained an arbitration clause. The appellant had given his tender offer, which was accepted and the appellant acted upon it. Thus, in view of Section 7 of the Act, the Arbitration Agreement did exist and therefore the matter was required to be referred to an

Arbitrator for decision and the Respondent could not be allowed to wriggle out from the Arbitration Agreement.

23. In a well considered and erudite judgment rendered in *Trimex International FZE Limited, Dubai (supra)*, the Hon'ble Supreme Court after gleaning the various E-mails exchanged between the parties including an E-mail attaching the draft contract, which remained unsigned, opined as follows:-

*“44. From the materials placed, it has to be ascertained whether there exists a valid contract with the arbitration clause. It is relevant to note that on 15-10-2007 at 4.26 p.m. the petitioner submitted a commercial offer wherein Clause 6 contains the arbitration clause i.e. “this contract is governed by Indian law and arbitration in Mumbai courts”. At 5.34 p.m. though the respondents offered their comments, as rightly pointed out by Mr K.K. Venugopal, no comments were made in respect of the “arbitration clause”. It is further seen that at 6.04 p.m., the petitioner sent a reply to the comments made by the respondent. Again, on 16-10-2007 at 11.28 a.m., though the respondents suggested certain additional information on the offer note, here again no suggestion was made with regard to the arbitration clause.*

*Paras 45 to 48 .....*

*49. In the light of the details which have been extracted in the earlier paragraphs, I am unable to accept the stand of the respondent. It is clear that if the intention of the parties was to arbitrate any dispute which arose in relation to the offer of 15-10-2007 and the acceptance of 16-10-2007, the dispute is to be settled through arbitration. Once the contract is concluded orally or in writing, the mere fact that a formal contract has to be prepared and initialled by the parties would not affect either the acceptance of the contract so entered*

*into or implementation thereof, even if the formal contract has never been initialled.*

*Paras 50 to 56 .....*

*57. .... It is essential that the intention of the parties be considered in order to conclude whether the parties were ad idem as far as adopting arbitration as a method of dispute resolution was concerned. In those circumstances, the stand of the respondent that in the absence of signed contract, the arbitration clause cannot be relied upon is liable to be rejected.*

*Paras 58 and 59 .....*

*60. **It is clear that in the absence of signed agreement between the parties, it would be possible to infer from various documents duly approved and signed by the parties in the form of exchange of e-mails, letter, telex, telegrams and other means of telecommunication.***

**23.** Adverting to the precedents relied upon by Mr. Arunav Patnaik, the learned counsel for the respondent, the same are clearly distinguishable. In *Indowind Energy Ltd. (supra)*, the facts leading to controversy were totally different in as much as the agreement was executed between Wes Care (I) Ltd. (respondent therein) and Subuthi Finance Ltd., but disputes in respect of which reference was sought had arisen between Wes Care and Indowind. The respondent (Wes Care) had filed the petition under Section 11 *inter alia* on the ground that the agreement was entered into by Subuthi as promoter of Indowind and also described Indowind as its nominee. Referring to Clause 11 of the agreement which required the Board of

Directors/shareholders of Wes Care, Subuthi and Indowind to expressly approve the agreement, the Hon'ble Supreme Court held that in the absence of a ratification, approval, adoption or confirmation of the agreement by Indowind, it could not be said that Indowind was a party or signatory to the agreement. In the circumstances, the order appointing an arbitrator with regard to claims of Wes Care against Indowind was set aside. Pertinently, the Court noted that it was not the case of Wes Care that any exchange of letters, telex, telegrams or other means of telecommunication referred to and provided a record of any Arbitration Agreement between the parties, and held that it was not sufficient for the petitioner in an application under Section 11 to show that there existed an oral contract between the parties.

**24.** In *M.M. Aqua Technologies Ltd. (supra)*, relied upon by the learned counsel for the Respondent, also a similar controversy had arisen, that is, the disputes had arisen between the petitioner and two respondents, while the arbitration agreement was only between the petitioner and the first respondent. The learned Single Judge accordingly appointed arbitrator referring the disputes between the petitioner and the first respondent only to arbitration on the ground that there did not exist any arbitration agreement between the petitioner and the second respondent. The petitioner preferred a Writ Petition against the order of the learned Single Judge, which was dismissed holding that:-

“.....  
there cannot be any doubt whatsoever that before the Chief Justice or any other body designated by him take recourse to exercise the said power (power under Section 11 of the Act) the existence of an arbitration agreement is imperative.”

25. In *P.T. Tirtamas Comexindo (supra)*, the High Court of Calcutta after noting that there was an oral Agreement followed by a fax message sent by the Respondent to the Appellant, which contained the Arbitration Clause and it was not the case of the Respondent before the Trial Court that the fax message was the Agreement, opined as follows:-

*“37. The underlying requirement under Section 7(4) is that (i) there must be an agreement, and (ii) it must be in writing. The simplest form is covered by Section 7(4)(a) - namely a signed document signed by both parties. This would satisfy both requirement of consensuality and a bilateral record of such consensus. For the same reason an exchange of statements of claim and defence where one party alleges the existence of the arbitration clause and the other does not deny it in writing, would also be an arbitration agreement under Section 7(4)(c). Read in this context, it is clear that the “record” required in Section 7(4)(b) is a bilateral record of consent. This would exclude a situation where the consent of either one of the parties is not recorded. Thus a mere response in writing to a telephonic message would not do. It would be a unilateral record of the act of one of the parties. On this interpretation it would follow that there was in fact no arbitration agreement is envisaged under Section 7 of the Act.”*

The facts of the aforesaid case are, therefore, clearly distinguishable from the facts of the present case, as in the present

case there exists a written agreement between the Petitioner and the Respondent which is evident from the E-mails exchanged between the parties.

**26.** The facts in the case of *Bharat Sanchar Nigam Limited (supra)* are also altogether distinguishable. The Arbitration Agreement was available only in regard to the “contract”, but only when a purchase order was placed a “contract” would be entered; and only when a “contract” was entered into, the general conditions of contract including the arbitration clause would become a part of the contract. If a purchase order was not placed, the general conditions of contract did not become a part of the contract. In other words, as held by the Hon’ble Supreme Court in the said case, the arbitration clause contained in the general conditions of contract “was not an Arbitration Agreement in praesenti, during the bidding process, but a provision that was to come into existence in future, if a purchase order was placed”. The dispute raised was with regard to a claim for damages for non-placement of a purchase order. In such circumstances, the Supreme Court held that in the absence of a purchase order the Arbitration Agreement was non-existent.

**27.** Likewise, the decision of the Hon’ble Supreme Court in *M.R. Engineers and Contractors Private Limited (supra)* was on altogether different facts. The Supreme Court in the said case was dealing with sub-section (5) of Section 7 of the Act, which is an enabling provision and which sets out the legislative intent to import an arbitration clause from another document, merely on reference to such document in the contract by *conscious* acceptance of the

arbitration clause from another document by the parties as a part of their contract. The decision, in fact, highlights the difference between reference to another document in a contract and incorporation of another document in a contract, by reference, and the fact that when there is a reference to a document in a contract, the Court has to consider whether the reference to the document is with the intention of incorporating the contents of that document in entirety into the contract including the arbitration clause contained therein, or with the intention of adopting or borrowing specific portions of the said document for application to the contract. It concluded as follows:- (SCC, Page 706)

“22. A general reference to another contract will not be sufficient to incorporate the arbitration clause from the referred contract into the contract under consideration. There should be a special reference indicating a mutual intention to incorporate the arbitration clause from another document into the contract. The exception to the requirement of special reference is where the referred document is not another contract, but a standard form of terms and conditions of trade associations or regulatory institutions which publish or circulate such standard terms and conditions for the benefit of the members or others who want to adopt the same.”

**28.** In *U.P. Rajkiya Nirman Nigam Ltd. (supra)* also, on facts the Hon'ble Supreme Court came to the conclusion that there was no written Agreement for submitting the existing or future differences to arbitration, which is a pre-condition and further that the original contract itself was not a concluded contract and there existed no Arbitration Agreement for reference of disputes to the Arbitrators.

The Court noted that apart from the draft Agreement and counter proposal, there was no other document and in the absence of consensus *ad idem* it could not be held that an Arbitration Agreement existed between the parties.

**29.** In view of the aforesaid discussion and on an overall conspectus of the facts and the law as discussed above, I have no hesitation in concluding that the present case falls within the scope and ambit of Section 7(4)(b) of the Act as that there exists between the parties an Arbitration Agreement in writing, which is borne out from the record of correspondence and E-mails exchanged between the parties. This being so, the inevitable corollary is that the disputes between the parties must be referred to arbitration. In view of the fact that the arbitration clause does not provide for any named Arbitrator, I appoint Justice Y.K. Sabharwal, Retired Chief Justice of India to adjudicate upon the disputes between the parties. The learned Arbitrator shall fix his own fees. Parties shall appear before the learned Arbitrator on 4<sup>th</sup> February, 2013 in order to enable the learned Arbitrator to proceed with the matter.

**30.** Petition stands disposed of in the above terms.

**REVA KHETRAPAL  
(JUDGE)**

**January 04, 2013**  
*km*