

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION
COMMERCIAL ARBITRATION APPLICATION NO.22 OF 2023

RAC Infra Rental LLP ... Applicant
Vs.
Karvy Digikonnnect Limited and others ... Respondents

Mr. Pritesh Burad a/w. Mrs. Madhuri Gamre and Ms. Samita Vaviya and Mr. Yash Dadriwal i/b. M/s. Pritesh Burad Associates for Applicant.

Mr. Kersi Dastoor for Respondents.

CORAM : MANISH PITALE, J.

DATE : OCTOBER 04, 2023

P.C. :

. Heard learned counsel for the parties.

2. By this application filed under Section 11 of the Arbitration and Conciliation Act, 1996, the applicant is seeking appointment of arbitrator on the basis that there is an arbitration agreement between the parties. It is submitted that in the facts and circumstances of the present case, a dispute has arisen between the parties. According to the applicant, certain amounts are due and payable to it from respondent No.1, in respect of which a notice invoking arbitration was issued to the respondents, which ultimately led to the applicant appointing a sole arbitrator.

2. According to the applicant, since a specific objection was raised on behalf of the respondents, on the basis that the arbitrator was unilaterally appointed, the arbitrator recused, necessitating filing of the present application.

3. The facts in the present case are in a narrow conspectus. According to the applicant, it is engaged in the business of renting

various IT hardware equipments such as computers, laptops etc. Respondent No.1 had approached the applicant for taking such equipments on rent. In pursuance of the negotiations between the parties and the documents exchanged between them, the hardware equipment was made available to respondent No.1. According to the applicant, respondent No.1 failed to pay amounts that were payable for the equipments provided by the applicant and hence, the applicant is entitled to certain amount from respondent No.1.

4. The applicant issued an invocation notice dated 07.10.2021 to the respondents and relied upon clause 'U' of the deliver *challans*, claiming the same to be an arbitration clause / agreement executed between the parties and invoked the said arbitration clause. The applicant proceeded to appoint the sole arbitrator in terms of the said clause in the delivery *challans* and the arbitrator did enter upon reference and initiated the proceedings. Respondent No.1 objected to the said arbitration proceedings, *inter alia*, on the ground that the arbitrator had been unilaterally appointed, which was in the teeth of the provisions of the said Act and the position of law recognized by the Supreme Court. In that light, the sole arbitrator took note of the objections raised on behalf of the respondents and withdrew from the arbitration, pursuant to which the applicant has approached this Court by filing the present application.

5. The applicant has annexed certain documents to the application and in the light of the stand taken on behalf of the respondents, and the documents filed along with their reply affidavit, the applicant has relied upon further documents filed with the rejoinder affidavit. It is contended on behalf of the applicant that there is sufficient material on record to indicate that the parties need to be sent to arbitration by appointing a fit and proper person as a sole arbitrator. The respondents filed their reply to the application and at the outset, took objection to respondent Nos.2

to 4 being added as parties to the present proceedings. It was submitted that respondent Nos.2 to 4 being officers of respondent No.1 company, there was no basis for the applicant to have arrayed them as respondents. It was further the stand of the respondents that in the present case, there is no arbitration agreement between the parties as known to law. It is submitted that the delivery *challan*, containing the purported arbitration clause, is a unilateral document, not signed by any authorized person in accordance with law on behalf of respondent No.1 and that therefore, in the absence of an arbitration agreement, there is no question of the present application being entertained. The reply affidavit has placed on record certain documents to support the contentions raised on behalf of the respondents.

6. The learned counsel appearing for the applicant relied upon the application, additional affidavits, as well as the rejoinder affidavit and the documents filed therewith to contend that in the present case, the applicant has relied upon clause 'U' of the deliver *challan* as the arbitration agreement executed between the parties. It is contended that the said document cannot be said to be a unilateral document issued by the applicant, for the reason that one Girdhar Tiwari has indeed signed the deliver *challan* and the material on record sufficiently indicates that the said person was authorized by respondent No.1 to sign such document to take delivery of the equipments, thereby indicating that clause 'U' contained in the said document has to be treated as an arbitration clause / agreement. It was submitted that the applicant specifically relied upon clause 'U' of the delivery *challan* to invoke arbitration as per notice dated 07.10.2021.

7. It was further submitted that if this Court takes into consideration the documents now available on record including the initial quotation, the purchase order as well as the delivery *challan*, it is clear that parties

had agreed for resolution of their disputes through arbitration. Reliance was placed on Section 7(4)(b) and (5) of the aforesaid Act to contend that the exchange of communications and documents between the parties sufficiently indicated existence of arbitration agreement between them, and that therefore, respondent No.1 could not be heard to say that there was no arbitration agreement executed between the parties. It was further submitted, on instructions, that the applicant was not pressing the present application against respondent Nos.2 to 4, who happen to be officers of respondent No.1, particularly for the reason that the dispute has arisen essentially between the applicant and respondent No.1.

8. The learned counsel appearing for the applicant specifically relied upon e-mails exchanged between the parties and the terms and conditions contained in the delivery *challan* to support the prayer made in the present application. It was submitted that even if the terms and conditions annexed to the purchase order issued by respondent No.1 referred to the place of arbitration being Hyderabad, the delivery *challan* being a document issued subsequent in point of time and having been signed by authorized representatives of both the parties, the arbitration clause i.e. clause 'U' contained in the terms and conditions forming part of the delivery *challan* ought to prevail, indicating Mumbai as the place of arbitration. On this basis, it was submitted that the objections raised on behalf of the respondents may be rejected and the present application may be allowed.

9. The learned counsel appearing for the applicant relied upon the following judgements:-

- i. *Mankastu Impex Private Limited Vs. Airvisual Limited, (2020) 5 SCC 399;*
- ii. *Shilpi Constructions Engineers & Contractors Vs. Welspun Group and others, 2019 SCC OnLine Bom 1679;*
- iii. *Sunil Kumar Chandra Vs. Spire Techpark Private Limited,*

2023 SCC OnLine Del 286; and

- iv. *Vidya Drolia Vs. Durga Trading Corporation*, **(2021) 2 SCC 1**.

10. On the other hand, learned counsel appearing for the respondents reiterated the objections specifically taken in the reply affidavit and highlighted the fact that, in an e-mail sent to the sole arbitrator and to the applicant, at the outset, respondent No.1 had stated that it had never agreed to resolution of disputes between the parties through arbitration. Therefore, the specific objection as regards absence of an arbitration agreement was raised at the first available opportunity and the same was being raised before this Court in response to the present application. It was further submitted that in the present case, when the pleadings and documents on record are taken into consideration, it becomes evident that the applicant has been shifting stands and that the applicant itself is not clear as to which clause contained in which document can be said to be an arbitration agreement executed between the parties. It was submitted that when this Court expressed some doubt about the specific reliance placed on behalf of the applicant on a clause forming part of the terms and conditions appended to the delivery *challans*, in the rejoinder affidavit, the applicant came up with new theories, which appear to be contradictory to the stand taken originally in the application filed on behalf of the applicant. On this basis, it was submitted that in the absence of an arbitration agreement executed between the parties, there was no question of the present application being entertained.

11. The learned counsel for the respondents placed reliance on judgement of the Delhi High Court in the case of *Hetampur Tax Fab Vs. Daksh Enterprises*, **2022 SCC OnLine Del 3895**, to contend that in similar circumstances, delivery *challans*, being unilaterally executed documents, were not accepted as documents, which could contain an arbitration agreement between the parties. It was submitted that,

therefore, this Court may also follow the said position of law and hold against the applicant.

12. Heard learned counsel for the rival parties and perused the record. In the present case, it would be appropriate to refer to the documents in chronology to appreciate the rival submissions. All the documents were not before this Court when the application came to be filed and the entire set of documents came on record when the reply affidavit, rejoinder affidavit and additional affidavits were filed on behalf of the rival parties.

13. A perusal of the documents on record shows that in chronological sequence, the applicant had communicated quotation to respondent No.1. The said document also contained general terms and conditions, wherein clause 't' stipulated that the disputes between the parties would have to be resolved by arbitration and that such proceedings would be subject to jurisdiction of Mumbai only.

14. Thereafter, respondent No.1 placed the purchase order, which also appended certain terms and conditions and this document came on record along with the additional affidavit filed on behalf of the applicant. Clause 24 of the terms and conditions also provided for resolution of disputes through arbitration, although the jurisdiction was specified as Hyderabad. It is relevant to note that the purchase order specifically stated that the equipment would have to be shipped to respondent No.1 with the name of Girdhar Tiwari, his email id and mobile number being specified. Thereupon, the delivery *challans* were generated and served upon respondent No.1 along with the equipments. The delivery *challan* was addressed to the said Girdhar Tiwari and the said document along with terms and conditions came to be signed on behalf of the applicant as well as on behalf of respondent No.1. The said Girdhar Tiwari appended his signature on behalf of respondent No.1. It

is undisputed that clause 'u' in the terms and conditions of the said document provided for resolution of disputes through arbitration with such proceedings being subject to jurisdiction of Mumbai only.

15. The applicant issued the invocation notice on 07.10.2021, claiming certain amount from respondent No.1 and specifically relied upon clause 'u' of the delivery *challan* to invoke arbitration. Admittedly, there was no response to the invocation notice despite service of the same upon respondent No.1.

16. It appears that in these circumstances, the applicant proceeded to unilaterally appoint the sole arbitrator. Initial proceedings took place and minutes of the meeting were recorded. Respondent No.1 specifically relies upon an e-mail sent on behalf of the respondents to the arbitrator, wherein the respondents took a specific stand, *inter alia*, raising objection about the contents of the minutes of the meeting, claiming that they were not correctly recorded. It was emphasized that the respondents had not agreed for resolution of disputes through arbitration and a specific objection was raised recording the unilateral appointment of the said arbitrator.

17. In fact, an application was moved on behalf of the respondents raising objection to the unilateral appointment of the sole arbitrator at the behest of the applicant.

18. In this application, the respondents specifically invoked the position of law clarified by the Supreme Court in the case of *Perkins Eastman Architects DPC & Another v HSCC (India) Limited*, **2019 SCC OnLine SC 1517**. In the face of the stand taken on behalf of the respondents, the sole arbitrator thought it fit to withdraw from the arbitration and to recuse herself. Such a specific order was indeed passed by the sole arbitrator on 28.05.2022.

19. The specific objection raised on behalf of the respondents to the effect that there is no arbitration agreement executed between the parties and that therefore, this Court cannot assume jurisdiction to entertain the present application, much less allow the same, needs to be dealt with.

20. The respondents also contend that during the course of filing of affidavits and documents, the applicant has shifted its stands and that there is absolutely no clarity as to which clause contained in which document can constitute a valid arbitration agreement between the parties.

21. This Court has perused the documents on record, including the exchange of communications between the parties. The chronology of the said documents is noted hereinabove. It is clear that arbitration clauses are found in the quotation, the purchase order as well as the delivery *challans*. This Court is of the opinion that the quotation and the purchase order can be said to be unilateral documents, as evidently, both parties have not signed on the said documents. The only documents that bear signatures on behalf of both the parties are the delivery *challans*. It is specifically contended on behalf of the respondents that the signature appended on the delivery *challans* on behalf of respondent No.1 only signifies delivery of the equipment and receipt of the same on behalf of respondent No.1 and nothing more. It is contended that the said Girdhar Tiwari cannot be said to be a person authorized in accordance with law to sign any document, much less an arbitration agreement with the applicant before this Court.

22. In this context, this Court has minutely perused the quotation, the purchase order and the delivery *challans*. It is significant that in the purchase order, respondent No.1 has specifically referred to the quotation issued by the applicant and in the purchase order itself, respondent No.1 has specified the name of the said Girdhar Tiwari as the

person to whom the equipment is to be shipped, giving details of the place of delivery, as also the email id and mobile number of the said Girdhar Tiwari. It is significant that the email id of Girdhar Tiwari is girdhar.tiwari@karvy.com. This Court is of the opinion that hairsplitting arguments, at this stage, are unwarranted and the respondents are not justified in contending that the said Girdhar Tiwari is not an authorized person and that his signatures on delivery *challans* ought to be ignored by this Court.

23. If the signature of the said person is to be taken into consideration, a perusal of the delivery *challans* would show that the said Girdhar Tiwari has indeed signed on the said documents on behalf of respondent No.1, the said documents bear the signature of the authorized person of the applicant as well and this is the only document on which signatures have been appended on behalf of both the parties. There is no denial about the fact that these documents indeed contain clause 'u', which reads as follows:-

“u) Dispute/s arising out of the present arrangement shall be subject to the arbitration proceedings as provided under the Arbitration and Conciliation Act, 1996 and the said Arbitration and the proceedings arising therefrom shall always be subject to Mumbai Jurisdiction only.”

24. Perusal of the same shows that the said clause is clearly an arbitration agreement and it specifies that such arbitration proceedings shall always be subject to jurisdiction of Mumbai only, thereby indicating that the place of arbitration would be at Mumbai.

25. As regards the place of arbitration being Hyderabad specified in clause 24 of the terms and conditions appended to the purchase order, suffice it to say that the same does indicate that respondent No.1, all through the proceedings, was also of the opinion that the disputes between the parties would be resolved through arbitration and that it

cannot be said that respondent No.1 had shown its aversion to such a process of resolution of disputes. Since this Court has opined that the purchase order is a unilateral document, the arbitration clause contained therein cannot prevail over the above-quoted clause 'u' contained in delivery *challans*.

26. As regards the allegations of shifting stands taken by the applicant before this Court in various affidavits, including the additional affidavits and rejoinder affidavit, this Court is of the opinion that during the course of arguments, certain issues arose, which the applicant chose to address by placing further documents on record. It cannot be ignored that in the notice invoking arbitration, the applicant specifically relied on clause 'u', quoted hereinabove, and therefore, this Court is proceeding on the basis that the applicant is seeking relief on the basis of the said clause, which is already found hereinabove to be a valid arbitration agreement between the parties. Therefore, the objection raised on behalf of the respondents cannot be accepted.

27. There is substance in the contentions raised on behalf of the applicant by placing reliance on the aforementioned judgements. In the case of **Mankastu Impex Private Limited Vs. Airvisual Limited** (*supra*), the Supreme Court has laid down that the intention of the parties as to the seat of the arbitration is to be determined on the basis of the clauses of the agreement and conduct of the parties. Applying the same, this Court is of the opinion that the basis of the present application being clause 'u' quoted hereinabove, the place of arbitration is indeed 'Mumbai' and that therefore, this Court clearly has jurisdiction to entertain the present application.

28. In the case of **Shilpi Constructions Engineers & Contractors Vs. Welspun Group and others** (*supra*), a learned Single Judge of this Court discussed various aspects of the matter, including the question as

to whether an arbitration agreement exists when the parties specifically refer to documents exchanged during the course of their business including quotations and other such documents. It is laid down in the said judgement that the court is entitled to look into the true nature of such documents to come to a conclusion in the facts of each case, as to whether the arbitration agreement indeed exists. This Court has applied the said principle to reach the findings rendered hereinabove.

29. In the case of **Sunil Kumar Chandra Vs. Spire Techpark Private Limited** (*supra*), the Delhi High Court has held that when there are more than one clauses pertaining to mode of dispute of resolution in documents available before the court, it would be appropriate for the Court to decide as to which clause would prevail over the other. This Court has applied the said principle to reach the finding that in the facts of the present case, clause ‘u’ contained in the delivery *challans* shall prevail over clause 24 contained in the purchase order.

30. This Court is also of the opinion that the applicant is justified in relying upon the general principles recognized by the Supreme Court in the case of **Vidya Drolia Vs. Durga Trading Corporation** (*supra*), wherein it is emphatically laid down as follows:-

“238. At the cost of repetition, we note that Section 8 of the Act mandates that a matter should not (*sic*) be referred to an arbitration by a court of law unless it finds that *prima facie* there is no valid arbitration agreement. The negative language used in the Section is required to be taken into consideration, while analyzing the Section. The Court should refer a matter if the validity of the arbitration agreement cannot be determined on a *prima facie* basis, as laid down above. Therefore, the rule for the Court is ‘when in doubt, do refer’.

* * * *

244. Before we part, the conclusions reached, with respect to question 1, are:

* * * *

244.4 The Court should refer a matter if the validity of the arbitration agreement cannot be determined on a prima facie basis, as laid down above, i.e., ‘when in doubt, do refer’.”

31. Applying the said principles, this Court is of the opinion that the parties in the present case deserve to be referred to arbitration.

32. As regards the judgement of the Delhi High Court in the case of **Hetampuria Tax Fab Vs. Daksh Enterprises** (*supra*), wherein it was found that the delivery *challan* was a unilateral document and it was concluded that an arbitration agreement did not exist, the decision was rendered in the facts of the said case. In the present case, this Court has specifically concluded that the delivery *challans* cannot be said to be unilateral documents, being documents signed on behalf of both the parties, thereby giving rise to an arbitration agreement.

33. In view of the above, this Court is of the opinion that the present application deserves to be allowed. Accordingly, it is allowed.

34. Considering the extent of claims raised on behalf of the applicant, it would be appropriate that a counsel practising in this Court is appointed as the sole arbitrator. Accordingly, Mr. Kunal Dwarkadas, Advocate, is appointed as the sole arbitrator for resolution of disputes between the parties. The details of the learned arbitrator are as follows:

Advocate Kunal Dwarkadas

Chambers of Mr. Kunal Dwarkadas,
A6, 1st Floor, Tamarind House, 36 Tamarind,
Tamarind Lane, Mumbai - 400 001.

Mobile : 98215 81853

Email : Kdwarkadas@gmail.com

35. The parties shall inform the said learned arbitrator at the earliest about the order passed today.

36. Learned Arbitrator is requested to communicate his consent and disclosure statement in terms of Section 11(8) and 12(1) of the aforesaid Act to the Prothonotary and Senior Master of this Court, within three weeks from today.

37. The fees of the learned Arbitrator shall be fixed in terms of the Fourth Schedule to the aforesaid Act.

38. All questions are kept open for decision by the learned arbitrator.

39. It is clarified, particularly in the light of the specific stand taken on behalf of the applicant itself, that the arbitral proceedings shall be undertaken only between the applicant and respondent No.1.

40. The application stands allowed in above terms.

(MANISH PITALE, J.)

Minal Parab