

Neutral Citation No. - 2023:AHC-LKO:76241

Court No. - 19

Case :- CIVIL MISC. ARBITRATION APPLICATION No. - 4 of 2023

Applicant :- Omex Autos Ltd. Thru. Mr. Anand Kumar Tiwari

Opposite Party :- Hi-Tech Competent Builders Pvt. Ltd.

Counsel for Applicant :- Divyanshu Bhatt, Shashwat Singh

Counsel for Opposite Party :- Ashok Kumar Singh

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Hon'ble Jaspreet Singh, J.

1. The instant petition has been preferred under Section 11(6) of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as "the Act of 1996", for short) for seeking appointment of an arbitrator to adjudicate the disputes having arisen between the parties arising out of an agreement dated 01.06.2019.

2. Shri Divyanshu Bhatt, learned counsel for the petitioner submits that the parties had entered into an agreement dated 01.06.2019 and the scope of work was largely relating to shed-large span, all miscellaneous civil/ structural work relating to setup of building, RCC Building and utilities, underground tanks, site plumbing works, road and development works and other enabling works. It is stated that the said agreement contained an arbitration clause in Clause 2.23 which read as under:-

"2.23 SETTLEMENT OF DISPUTE: ARBITRATION

All disputes and differences of any kind whatever arising out of or in connection with the Contract or the carrying out of the works (whether during the progress of the works or after their completion and whether before or after the determination, abandonment or breach of the Contract) shall be referred to and whether before or after the determination, abandonment or breach of the Contract) shall be referred to and settled by the Architects who shall state his decision in writing. Such decision may be in the form of a final Certificate or otherwise. The decision of the Architects with respect to any of the excepted matters shall be final and without appeal as stated in the preceding Clause. But if either the Owner or the Contractor be dissatisfied with the decision of the Architects or any matter, question or dispute of any kind (except any of the excepted matters) or as to the withholding by

the Architects of any Certificate to which the Contractor may claim (the owner of the Contractor) may within twenty-eight days after receiving notice of such decision give a written notice to the other party through the Architects requiring that such matters in dispute be arbitrated upon. Such written notice shall specify the matters which are in dispute and such dispute or difference of which such written notice has been given and no other shall be and is hereby referred to the Arbitration and final decision of a single Arbitration being a Fellow of the Indian Institute of Architects to be agreed upon and appointed both by the parties or in case of disagreement as to the appointment of a single Arbitrator to the Arbitration of two Arbitrators both being fellows of the Indian Institute of Architects, one to be appointed by each party, which Arbitrator shall before taking upon themselves the burden of reference appoint an Umpire.

The Arbitrator, the Arbitrators or the Umpire shall have power to open up, review and revise any Certificate, opinion, decision, requisition or notice, save in regard to the excepted matters in dispute which shall be submitted to him or them and of which notice shall have been given as aforesaid.

Upon every or any such reference in the cost of and incidental to the reference and Award respectively shall be in the direction of the Arbitration, or arbitrators or the Umpire who may determine the amount thereof, or direct the same to be taxed as between attorneys and client or between attorneys and client or as between party and party, and shall direct by whom and to whom and in what manner the same shall be borne and paid. This submissions shall be deemed to be submission to Arbitration within the meaning of the Indian Arbitration Act 1940 or any statutory modification thereof. The award of the Arbitrator, Arbitration Act 1940 or any statutory modification thereof. The award of the Arbitrator or Arbitrators or the Umpire; shall be final and binding on the parties. Such reference except as to the withholding by the Architects of any Certificates under Clause 29 to which the contractor claims to be entitled, shall not be opened or entered upon until after the completion or alleged completion of the works or until after the practical cessation of the works arising from any cause unless with the written consent of the owner and the Contractor. Provided always that the Owner shall not withhold the payment of an Interim Certificate, nor the Contractor, except with the Consent in writing of the Architects, in any way delay the carrying out of the work by reason of any such matter, question or dispute being referred to Arbitration, but shall proceed with the work with all due diligence and hall, until the decision of the Arbitrator or Arbitrators or the Umpire to be given, abide by the decision of the Architects or the Umpire shall relieve the Contractor of his obligations to adhere strictly to the Architects instructions with regard to the actual carrying out of the works. The employer and the Contractor hereby also agree that Arbitration under this Clause shall be a condition precedent to any right of action under the Contract."

3. It is the case of the petitioner that the work done by the respondent was not within the time limit as agreed and there was certain other deviation in the work as a result, the petitioner was confronted with losses.

It is further stated that communication was exchanged between the parties, however, an attempt was made to resolve the disputes, however, despite the petitioner having paid some amount to the respondent yet the respondent instead of invoking the arbitration clause invoked the jurisdiction of National Company Law Tribunal (for short, "NCLT") after issuing a demand notice under Section 8 of the Insolvency and Bankruptcy Code, 2016 which needless to say was not only illegal but was a sharp tactic adopted by the respondent to arm-twist the petitioner into succumbing to the illegal demands of the respondent.

4. It is in the aforesaid backdrop that since the dispute had occurred between the parties and the respondent escalated the matter by taking recourse to filing a petition before the NCLT. Accordingly, the petitioner though contesting the proceedings before the NCLT invoked the arbitration clause by means of the notice dated 13.09.2022 intimating the respondent that the petitioner had nominated Mr. Rajan Sood (Architect) and now it is for the respondent to appoint their arbitrator but they did not respond to the said letter and since more than 30 days had elapsed, consequently, the petitioner has invoked the jurisdiction of this Court for appointing an arbitrator on behalf of the respondent since needless to say the respondent had forfeited their rights to appoint their own party nominated arbitrator.

5. Learned counsel for the petitioner has also pointed out that since the factory of the petitioner is situated in Raebareli where the works were required to be done and completed under the contract, consequently, this Court has ample jurisdiction to entertain the instant petition and pass appropriate orders appointing an arbitrator.

6. Per contra, Shri Prashant Chandra, learned Senior Counsel assisted by Ms. Mahima Pahwa and Ms. Geetika Yadav learned counsel for the respondent have refuted the aforesaid contentions and have primarily raised a two pronged preliminary objections (i) this Court does not have the territorial jurisdiction to entertain the petition and (ii) petition is not maintainable as the petitioner has not invoked the arbitration clause appropriately.

7. Elaborating his submission, the learned Senior Counsel has pointed out that the agreement between the parties was executed at Alwar in the State of Rajasthan, the petitioner has its registered office at Gurugram at Haryana and in terms of the agreement between the parties there is a specific clause regarding disputes and jurisdiction (at Page 181 of the paper-book) stating that the parties agreed that any suit to enforce the rights of either or any under this purchase order shall only be instituted in and tried by Courts of Ordinary Civil Jurisdiction in REWARI in the State of Haryana. It is thus submitted that the petitioner should be well advised to file a petition before the appropriate Court having territorial jurisdiction to deal with the subject matter of arbitration.

8. Shri Chandra, learned Senior Counsel has further submitted that the petitioner has not invoked the arbitration clause appropriately. Since, from a perusal of the their notice dated 13.09.2022 where the petitioner has quoted the dispute resolution mechanism. At the first instance on account of the disputes arising between the parties, the matter was required to be referred to an Architect whose decision would be final in between the parties. However, if any person was dissatisfied with the decision of the

Architect then the matter could be escalated and within 28 days after receiving the notice of decision to the other party through Architect, a request for referring the matter for arbitration can be made. Such written notice was required to specify that matters which are in dispute and the decision of a single arbitrator who would be a fellow of Indian Institute of Architect duly appointed by both the parties would arbitrate. In case of any disagreement as to the appointment of a single arbitrator then each party would be entitled to nominate its own party arbitrator and the two arbitrators being fellows of Indian Institute of Architect would by mutual consultation appoint an Umpire.

9. It is submitted by the learned Senior Counsel that the instant procedure as mentioned in the agreement and is part of the dispute settlement mechanism but this recourse has not been adopted by the petitioner and as such the instant petition without appropriately invoking the arbitration clause is not maintainable and deserves to be dismissed.

10. Shri Chandra has also attempted to argue that actually there is no dispute between the parties and as such the instant petition on this count also is not maintainable. In order to buttress his submission, it has been pointed out that the parties were negotiating and entered into an agreement whereby the petitioner had agreed to pay a certain sum to the respondent and in terms of the aforesaid arrangement payments were also made but they were erratic. In the aforesaid backdrop where the amount had been crystallized and the petitioner had also made some payments in respect thereto thereby admitting the amount but did not pay according to the terms, hence, in the aforesaid circumstances the respondent only

endeavoured to recover the admitted sum from the petitioner by invoking the jurisdiction of the NCLT, hence, there apparently being no dispute, the petition is liable to be fail.

11. Shri Bhatt, learned counsel for the petitioner, refuting the aforesaid preliminary objections has urged that in the entire agreement, there is no clause which defines the jurisdiction or the seat of arbitration or the venue. In absence of any clear indicia and noticing the fact that the petitioner's factory is at Raebareli where work was executed, consequently, this Court has ample jurisdiction to entertain the aforesaid petition.

12. Shri Bhatt, learned counsel for the petitioner further submits that the very fact that the respondent has already approached the NCLT camouflaging the amount as stated by the respondent to recoverable from the petitioner which is not admitted rather is disputed by the petitioner cannot be construed to mean that there is no dispute between the parties. Since, the disputes subsists, accordingly, the petitioner in consonance with the terms of the agreement invoked the arbitration clause. Insofar as the existence of the arbitration clause and the notice sent by the petitioner invoking the said clause is concerned, it is not denied by the respondent.

13. Under the aforesaid circumstances where this Court exercises limited powers under Section 11(6) of the Act of 1996 the issue which needs to be seen at a prima-facie level is whether an arbitration clause exists and whether there are live disputes and that one party has put to the other to notice who has not cooperated in formation of the Arbitral Tribunal then it give powers to the Court in terms of Section 11(6) of the Act of 1996 to appoint an arbitrator and this situation is clearly evident in the instant case,

hence, the petition deserves to be allowed.

14. Shri Bhatt in support of his submissions has relied upon a decision of Delhi High Court in **Ravindra Kumar Verma v. M/s. BPTP Ltd., and another, 2014 SCC OnLine Del 6602** and it is submitted that a similar arbitration clause as is governing the instant parties was the subject matter before the Delhi High Court. Noticing that the pre-referral procedure is merely directory in nature and not mandatory. It is submitted that even in the instant case, the same analogy is applicable inasmuch as the dispute had arisen which is evident from the fact that the respondent has approached the NCLT even though a forum not desirable as the parties were bound by the arbitration clause and the respondent ought to have invoked the same and could get the matter referred for arbitration. Nevertheless, the dispute do subsist between the parties and since the respondent has already invoked the jurisdiction of the NCLT and the respondent did not invoke the arbitration. Now, at this stage where the parties are at daggers drawn, no fruitful purpose would be served in cajoling the parties to invoke the pre-referral arbitration measures and seeking good offices of Architect as in all probability any such attempt would fail then if the matter is referred for arbitration it would be a long drawn process that too without any fruitful result.

15. It is also urged by Shri Bhatt by relying upon the decision of the Apex Court in **Demerara Distilleries Private Limited and another v. Demerara Distilleries Limited, (2015) 13 SCC 610** that even in the said case since the parties had already burned their bridges, consequently, at this stage, the parties may not be relegated to get the matter referred through the

conciliation and thus the Apex Court took upon itself and appointed arbitrator in terms of Section 11(6) of the Act of 1996 and the course should be adopted in the instant case as well.

16. The Court has heard learned counsel for the parties and also perused the material on record.

17. At the outset it may be stated that insofar as the first objections of Shri Chandra regarding the territorial jurisdiction is concerned, this Court is not quite inclined to accept the submission for the reason that there is no exclusionary clause in the entire agreement which ousts the jurisdiction of this Court in respect of arbitration matters. On the contrary, the clause referred to by Shri Chandra was a term and condition which was part of work order and moreover it is limited to jurisdiction regarding suits and moreover it cannot override the clauses of the agreement dated 01.06.2019.

18. In the instant case, it is not disputed that the works under the agreement were to be done at Raebareli which is within the territorial jurisdiction of this Court. Another significant feature is that the agreement in between the parties does not vest the seat, venue or jurisdiction to any particular Court, hence, this Court is of the clear opinion that this Court does have the jurisdiction to entertain the petition, hence to that extent the objection raised by the learned Senior Counsel stands overruled.

19. Insofar as the second submission of the learned Senior Counsel that there is no dispute between the parties is concerned, also does not impress the Court inasmuch as any contention put forward by one party which is disputed by the other, give rise to a dispute. It is not disputed by the

learned counsel for both the parties that the parties had crystallized their rights, duties and obligations in terms of mother-agreement dated 01.06.2019. It is also not disputed that the work which is said to be completed by the respondent was beyond time as contemplated in the agreement initially.

20. It may be a different thing to say that some settlement was initiated by the parties but this is subject to the concurrence of both the parties. In case it is raised by one but disputed by the other then it gives rise to disputes which requires necessary evidence to adjudicate, hence, this Court without delving further into the issue, lest it may affect the rights of either of the parties refrains to give a categorical finding as to whether the disputes arise and are live between the parties. Accordingly, the second objection also raised by the learned Senior Counsel is turned down.

21. Coming to the last objection regarding invocation of the arbitration clause inappropriately, this Court finds that there is substance in the submission made by the learned Senior Counsel on behalf of the respondent. This Court finds that the agreement between the parties did contain an elaborate dispute resolution mechanism. The parties agreed that in the first instance on account of any dispute or disagreement, the matter was to be referred to the Architect. Significantly, the agreement entered between the parties also defines the term Architect in Clause 1.1(b) *"Architects/Design Consultants : shall mean M/s. Aashray Design Consultants, K-8, 1st Floor, South Ext.-1, New Delhi - 110 049 and shall include their legal representative/s, assign/s or successor/s."*

22. A pinpointed query was put to the learned counsel for the petitioner

as to whether in terms of the arbitration clause whether the good offices of the Architect was invoked to which learned counsel for the petitioner has eloquently submitted that the timeline and the chronology of events which occurred post 19.04.2022 it was clear that there was no scope for any conciliatory measure and rather the respondent escalated the matter by invoking the jurisdiction of NCLT with a purpose to armtwist the petitioner into succumbing to their demands. May be the arbitration clause did contain a measure to invoke the good offices but where it was plain and clear that the said exercise would be in futility, consequently, the petitioner by means of its notice dated 13.09.2022 had summarizely stated its disputes and also invoked the Clause 2.23 of the agreement and informed the respondent that they had nominated Mr. Rajan Sood, Architect as an arbitrator and the respondent was required to nominate its own arbitrator.

23. It is further submitted that despite the service of the said notice, the respondent did not appoint their own party arbitrator. Under such situation the petitioner has invoked the jurisdiction of this Court.

24. Be that as it may, the fact remains that the petitioner did not invoke the arbitration clause in the manner as envisaged and incorporated in the agreement. At this stage, it will be relevant to notice the decision of the Delhi High Court in **Ravindra Kumar Verma** (supra) which was heavily relied upon by the learned counsel for the petitioner, however, with utmost respect and humility, this Court is unable to subscribe to the view of the Delhi High Court in case of **Ravindra Kumar Verma** (supra) for the reason that even though the arbitration clause is similar to the one in the instant case but the reasoning given in Para-8 of the said report does not

take note of the provisions of Section 21 of the Act of 1996. The sole reasoning of the Delhi High Court in waiving of pre-referral process relating it to the issue of limitation but in the humble opinion of this Court, the issue of limitation has no role to play inasmuch as the moment an aggrieved party invokes the arbitration clause which is a two tier mechanism which kick starts by invoking the good office of the Architect and in case of its failure by getting the matter referred to a panel of three arbitrators unless both the parties agree to appoint a sole arbitrator and that too as per the qualification that the said arbitrators would be a fellow of the Indian Institute of Architect. Thus, this Court is not inclined to follow the decision of the Delhi High Court also for the reason that the matter before the Delhi High Court was being examined in context with the exercise of powers under Article 227 of the Constitution of India vis-a-vis under Section 8 of the Act of 1996 which is not the case at hand.

25. Even the decision relied upon by the learned counsel for the petitioner in **Demerara Distilleries Limited** (supra) is also on different point altogether where the issue before the Apex Court was regarding the validity of invocation of jurisdiction by a non-signatory to the arbitration agreement. Thus, the facts of the case before the Apex Court are in a different context and any observations made in the aforesaid light is not applicable to the present case. Accordingly, it does not come to the aid of the petitioner.

26. Be that as it may, the fact remains and admitted to the petitioner that they have not invoked the arbitration clause by first invoking the good offices of the Architect as defined in the agreement and straightway have

appointed their arbitrator calling upon the respondent to participate in formation of the arbitral Tribunal in accordance with the terms of the agreement.

27. This Court in light of the aforesaid is of the clear opinion that in the instant petition at the behest of the petitioner is not maintainable at this stage without invoking the arbitration clause appropriately as envisaged and incorporated in the agreement.

28. For the aforesaid reasons, this Court is not inclined to entertain the petition which is accordingly dismissed leaving it open for the petitioner to invoke the arbitration clause appropriately and in case if at any future point of time any cause of action arises, it shall be at liberty of approaching the Court for appointment of an arbitrator. Accordingly, the petition is **dismissed**.

29. Costs are made easy.

Order Date :- 20th November, 2023

Rakesh/-