

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION
ARBITRATION PETITION NO. 819 OF 2012

Airex Logistics Express Services P. Ltd.)
31, Sona Udyog, Parsi Panchayat Road,)
Andheri (East), Mumbai – 400 069) **Petitioner**

VERSUS

Asit C. Mehta Investment Intermediates)
Limited,)
Nucleus House, Saki Vihar Road,)
Andheri (East), Mumbai – 400 072) **Respondent**

Mr.Rakesh K.Singh for the Petitioner.

Mr.Praveen L.Singh with Mr.Jignesh D.Shah for the Respondent.

CORAM : R.D. DHANUKA, J.

DATED : 23rd JANUARY, 2015

JUDGMENT

By this petition filed under section 34 of the Arbitration and Conciliation Act, 1996, the petitioner has impugned the arbitral award dated 27th December, 2011 allowing the claims made by the respondent and directing the petitioner to pay the sum of Rs.7,18,673/- with interest at the rate of 12% per annum w.e.f. 4th April, 2011 till payment. Some of the relevant facts for the purpose of deciding this petition are as under :-

2. Sometime in the year 2009, the petitioner was desirous of selling their entire shareholding to a prospective buyer/investor for an amount of Rs.25 crores. The petitioner wanted to avail of the services of an intermediary to sell of the company of the petitioner. On 8th September, 2009 the petitioner and the respondent entered into an agreement under which the petitioner appointed the respondent as an intermediary for the sale of the petitioner company on the terms and conditions recorded therein. Under the said agreement, the scope of the services of the

respondent was defined. Under clause III of the said agreement, the fees payable to the respondent was described as under :-

iii. “Our Fees

ACMIIL will charge :

a. If the proposed sale to strategic/Financial Investor(s) is executed, a fee equivalent to 2.25% of the total transaction value.

i. Sign-on fees :

ii. ACMIIL will be paid Rs.0.15 million on signing of the mandate as upfront fees (non refundable incase of no success and adjustable against total fees payable if successful).

The schedule for payment of the balance fees is as follows.

Schedule	Amount
On receipt of the Term Sheet from prospective investors	25% of the total fees payable.
At the time of the signing of the Shareholder/Share Purchase Agreement	Balance 75% of the fees after adjusting the Sign-on fees.

3. It is not in dispute that pursuant to the said agreement, the respondent introduced a party known as Ortus Capital. The said Ortus Capital by their e-mail dated 5th June, 2010 to the petitioner herein forwarded the letter of intent with agreed terms and called upon the petitioner to send executed copy with the signatures of all the shareholders of the petitioner. The said writing was admittedly executed between the petitioner and the said M/s.Ortus Capital.

4. It is not in dispute that on execution of the said agreement between the

petitioner and the respondent, the petitioner has already paid a sum of Rs.0.15 million payable on signing of the said document as front fees to the respondent.

5. It is not in dispute that upon execution of the said agreement dated 5th June, 2010, the said transaction did not materialize between the petitioner and the said M/s.Ortus Capital.

6. The respondent issued an invoice upon the petitioner for making a claim towards 25% of the total fees payable to the respondent from the petitioner under the said agreement on receipt of the term sheet from the prospective investor. The petitioner did not pay the said amount. Dispute arose between the parties and was referred to the arbitration. The arbitrator was nominated by the respondent by invoking clause 3 of the said agreement entered into between the parties.

7. Pursuant to the directions issued by the learned arbitrator both parties filed pleadings. No oral evidence was led by any of the parties before the learned arbitrator.

8. By the impugned award, the learned arbitrator directed the petitioner to pay a sum of Rs.7,18,673/- with interest at the rate of 12% per annum from the date of invoking arbitration i.e. 4th April, 2011 till payment. This award had been impugned by the petitioner in this petition filed under section 34 of the Arbitration and Conciliation Act, 1996.

9. Mr.Singh, learned counsel appearing for the petitioner submits that under the agreement entered into between the petitioner and the respondent the petitioner has already paid a sum of Rs.0.15 million on the signing of the said agreement. It is

submitted that in so far as further sum of 25% of the total fees payable to the respondent is concerned, the said fees was payable only if the sale transaction of the petitioner company would have been completed. It is submitted that the fees equivalent to 2.25% of the total transaction mentioned in the agreement would clearly indicate that unless the sale was complete and the total transaction was concluded and the entire consideration was received by the petitioner, there was no question of payment of even 25% of the total fees on receipt of term sheet from the prospective investor.

10. It is submitted that it is not in dispute that there was no term sheet executed by the prospective investor with the petitioner. It is submitted that it is also not in dispute that the sale of the petitioner's company did not materialize. It is lastly submitted that the respondent did not issue any invoice in respect of the said amount of the claim of 25% of the total fees payable.

11. The next submission of the learned counsel is that there was no arbitration agreement entered into between the parties. It is also submitted that since the validity of the agreement was only for a period of six months and since the said agreement was not extended beyond a period of six months, no arbitration agreement could have been invoked by the respondent. It is submitted that the respondent also did not lead any oral evidence to show that the validity of the said agreement entered into between the parties was extended beyond the period of six months.

12. Learned counsel submits that under clause 3 of the said agreement, it was agreed that the disputes could be subject to arbitration before resorting to any other proceedings available in law and therefore it is clear that the parties could invoke

the proceedings under civil law and not only under arbitration.

13. Learned counsel placed reliance on the judgment of the Supreme Court in case of ***Jagdish Chander vs. Ramesh Chander & Ors.*** 2007(5) SCC 719 in support of the submission that since the alleged arbitration agreement is not clear and no ingredients of an arbitration agreement are found under clause 3 of the agreement, it would not be amount to an arbitration agreement. Reliance is placed on paragraph (8) of the said judgment which reads thus:-

8. This Court had occasion to refer to the attributes or essential elements of an arbitration agreement in *K.K. Modi v. K.N. Modi* [1998 (3) SCC 573], *Bharat Bhushan Bansal v. U.P. Small Industries Corporation Ltd.* [1999 (2) SCC 166] and *Bihar State Mineral Development Corporation v. Encon Builders (I) (P) Ltd.* [2003 (7) SCC 418]. In *State of Orissa v. Damodar Das* [1996 (2) SCC 216], this Court held that a clause in a contract can be construed as an arbitration agreement only if an agreement to refer disputes or differences to arbitration is expressly or impliedly spelt out from the clause. We may at this juncture set out the well settled principles in regard to what constitutes an arbitration agreement:

(i) The intention of the parties to enter into an arbitration agreement shall have to be gathered from the terms of the agreement. If the terms of the agreement clearly indicate an intention on the part of the parties to the agreement to refer their disputes to a private tribunal for adjudication and an willingness to be bound by the decision of such tribunal on such disputes, it is arbitration agreement. While there is no specific form of an arbitration agreement, the words used should disclose a determination and obligation to go to arbitration and not merely contemplate the possibility of going for arbitration. Where there is merely a possibility of the parties agreeing to arbitration in future, as contrasted from an obligation to refer disputes to arbitration, there is no valid and binding arbitration agreement.

(ii) Even if the words arbitration and arbitral tribunal (or

arbitrator) are not used with reference to the process of settlement or with reference to the private tribunal which has to adjudicate upon the disputes, in a clause relating to settlement of disputes, it does not detract from the clause being an arbitration agreement if it has the attributes or elements of an arbitration agreement. They are : (a) The agreement should be in writing. (b) The parties should have agreed to refer any disputes (present or future) between them to the decision of a private tribunal. (c) The private tribunal should be empowered to adjudicate upon the disputes in an impartial manner, giving due opportunity to the parties to put forth their case before it. (d) The parties should have agreed that the decision of the Private Tribunal in respect of the disputes will be binding on them.

(iii) Where the clause provides that in the event of disputes arising between the parties, the disputes shall be referred to Arbitration, it is an arbitration agreement. Where there is a specific and direct expression of intent to have the disputes settled by arbitration, it is not necessary to set out the attributes of an arbitration agreement to make it an arbitration agreement. But where the clause relating to settlement of disputes, contains words which specifically excludes any of the attributes of an arbitration agreement or contains anything that detracts from an arbitration agreement, it will not be an arbitration agreement. For example, where an agreement requires or permits an authority to decide a claim or dispute without hearing, or requires the authority to act in the interests of only one of the parties, or provides that the decision of the Authority will not be final and binding on the parties, or that if either party is not satisfied with the decision of the Authority, he may file a civil suit seeking relief, it cannot be termed as an arbitration agreement.

(iv) But mere use of the word arbitration or arbitrator in a clause will not make it an arbitration agreement, if it requires or contemplates a further or fresh consent of the parties for reference to arbitration. For example, use of words such as "parties can, if they so *desire*, refer their disputes to arbitration" or "in the event of any dispute, the parties *may*

also agree to refer the same to arbitration" or "if any disputes arise between the parties, they should consider settlement by arbitration" in a clause relating to settlement of disputes, indicate that the clause is not intended to be an arbitration agreement. Similarly, a clause which states that "if the parties so decide, the disputes shall be referred to arbitration" or "any disputes between parties, if they so agree, shall be referred to arbitration" is not an arbitration agreement. Such clauses merely indicate a desire or hope to have the disputes settled by arbitration, or a tentative arrangement to explore arbitration as a mode of settlement if and when a dispute arises. Such clauses require the parties to arrive at a further agreement to go to arbitration, as and when the disputes arise. Any agreement or clause in an agreement requiring or contemplating a further consent or consensus before a reference to arbitration, is not an arbitration agreement, but an agreement to enter into an arbitration agreement in future.

14. Learned counsel also placed reliance on the judgment of Supreme Court in case of *M/s.Groupe Chimique Tunisien SA vs. M/s.Southern Petrochemicals Industries Corpn.Ltd. 2006 (5) SCC 275* and submits that even if the petitioner who had appeared through a director in person before the learned arbitrator had taken a particular stand about the arbitration agreement which stand was taken based on a wrong understanding of law and facts can be allowed to take a different stand in this court under section 34 of the Arbitration and Conciliation Act, 1996. The following paragraph is relied upon :-

If on account of mistake or wrong understanding of law, a party takes a particular stand i.e. there is no arbitration agreement, he is not debarred from changing his stand subsequently or estopped from seeking arbitration.

15. Learned counsel appearing for the respondent on the other hand submits that one of the obligation of the respondent under the said agreement was to facilitate

the petitioner signing on the MOU/term sheet with the financial/strategic investment. It is submitted that once such documents of the MOU/term sheet is signed between the petitioner and the said prospective investor, the petitioner became liable to pay 25% of total fees payable to the respondent. It is submitted that the respondent has not claimed the balance 75% of the fees which was payable at the time of signing of the shareholders/share purchase agreement. Learned counsel submits that thus if for any reasons, the petitioner and the said prospective investor have not entered into the shareholders/share purchase agreement, the petitioner is still liable to pay 25% of the fees payable which became payable on receipt of the MOU/term sheet from the prospective investor.

16. It is submitted that the petitioner neither raised any issue of there being no arbitration agreement between the parties before learned arbitrator under section 16 of the Arbitration and Conciliation Act, 1996 nor the petitioner raised an issue before the learned arbitrator that his appointment was made unilaterally by the respondent and thus he did not have jurisdiction to entertain the claims made by the respondent. It is submitted that thus this issue cannot be raised for the first time in this proceedings under section 34 of the Act.

17. In so far as issue of invoice alleged to have been not issued by the respondent is concerned, my attention is invited to the letter addressed by the petitioner itself acknowledging the receipt of the invoice. It is submitted by the learned counsel for the respondent that the learned arbitrator has interpreted the terms of the agreement which interpretation is a possible interpretation which cannot be substituted by this court under section 34 of the Arbitration and Conciliation Act, 1996.

18. A perusal of the agreement entered into between the parties dated 8th September, 2009 clearly indicates that one of the scope of service of the respondent to be provided to the petitioner was facilitating the petitioner's signing of the MOU/term sheet with the financial/strategic investor. A perusal of the provision for payment of fees clearly indicates that the fees was payable in three parts. Rs.0.15 million was payable on signing of the mandate as front fees which is already paid by the petitioner and is not in dispute. In so far as other two parts of the fee structure is concerned, 25% of the total fee is payable on receipt of the MOU/term sheet from the prospective investor and the balance 75% is payable at the time of the signing of shareholders/share purchase agreement.

19. A perusal of the arbitral award clearly indicates that the learned arbitrator has interpreted the terms of the contract and has held that on execution of the letter of intent recording the terms and conditions of the deal between the petitioner and the prospective purchaser, the petitioner became liable to pay 25% of the total fees payable. In my view, the interpretation of the learned arbitrator is not only a possible interpretation but is a correct interpretation. In my view even if the final shareholders/ share purchase agreement would not have been entered into between the petitioner and the prospective investor for reasons attributable to the petitioner or to such third party, the fees of 25% which was payable and contemplated on receipt of the term sheet was liable to be paid by the petitioner to the respondent. That part of the services rendered by the respondent to the petitioner was completed and therefore 25% of the total fees became payable on receipt of such LOI/MOU/term sheet from prospective investor. I am thus not inclined to accept the submission of the learned counsel for the petitioner that even 25% was not payable until the entire transaction between the petitioner and prospective investor would have been concluded in sale of the company of the petitioner to such third

party.

20. In so far as submission of the learned counsel that no invoice was issued is concerned, the same is factually incorrect as is clear from the correspondence exchanged between the parties.

21. In so far as learned counsel for the respondent that there was no arbitration agreement entered into between the parties is concerned or that since the respondent could have also invoked proceedings before a civil court is concerned, a perusal of clause 3 of the agreement clearly contemplates that in case of dispute the parties had subjected themselves to the arbitration before resorting to any other proceedings. It is thus mandatory for the parties to invoke arbitration agreement before invoking any civil proceedings. Since the respondent has chosen to invoke arbitration agreement, there was no question of referring that dispute to civil proceedings. There is thus no merit in the submission of the learned counsel for the petitioner.

22. In so far as submission of the learned counsel that since the said agreement had not been extended beyond a period of six months and thus no arbitration agreement could be invoked is concerned, the same is totally frivolous for the reason that the dispute between the parties had arisen under the said agreement. Even if the validity of the agreement had come to end or if it would have been terminated, arbitration agreement being a separate agreement entered into between the parties could still be invoked by the parties to the arbitration agreement.

23. In so far as judgment of the Supreme Court in case of *Jagdish Chander (supra)* relied upon by the learned counsel is concerned, in my view the reliance

placed on the said judgment is totally misplaced for the reason that in the said case before the Supreme Court there was no arbitration agreement. A perusal of the arbitration agreement in this case makes it clear that the party has agreed to refer the disputes to arbitration. The judgment of the Supreme Court in case of **Jagdish Chander (supra)** thus does not assist the petitioner.

24. In so far as judgment of Supreme Court in case of **M/s.Groupe Chimique Tunisien SA (supra)** is concerned, the said judgment was rendered by the Supreme Court under section 11(6) of the Arbitration and Conciliation Act. The applicant had taken different stand about existence of arbitration agreement before filing of the said application. On perusal of the arbitration agreement, the learned designate of the Hon'ble Chief Justice took a view that ultimately court has to see whether the arbitration agreement exist or not. If there was any misunderstanding about existence of arbitration agreement, such misunderstanding could be corrected by him while filing application under section 11(6) of the Act. In this case there is no such misunderstanding of law or about existence of arbitration agreement.

25. In so far as appointment of the learned arbitrator by the respondent is concerned, it is admitted position that the petitioner appeared before the learned arbitrator and did not raise any such issue under section 16 of the Arbitration and Conciliation Act and thus in my view the petitioner can not be allowed to raise this issue for the first time under section 34 of the Arbitration and Conciliation Act, 1996.

26. The next submission of the learned counsel for the petitioner is that the respondent did not lead any oral evidence before the learned arbitrator to prove the claim. In my view since the claim of the respondent was based on the provision of

the contract and the amount payable was quantified, there was no need to lead any oral evidence. The learned arbitrator has awarded the claims in favour of the respondent based on the percentage fixed under the said agreement and has computed the amount considering the consideration mentioned in the said LOI/MOU/term sheet. I am thus not inclined to accept this submission for the petitioner.

27. At this stage, Mr.Singh, learned counsel for the petitioner submits that the rate of interest at the rate of 12% awarded by the learned arbitrator is exorbitant and should be reduced. In my view the interest awarded at the rate of 12% per annum is a reasonable rate of interest and thus no interference with that part of the award is warranted.

28. Arbitration petition is devoid of merits and is accordingly dismissed. No order as to costs.

[R.D. DHANUKA, J.]