

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY**  
***ORDINARY ORIGINAL CIVIL JURISDICTION***  
**ARBITRATION APPLICATION NO. 197 OF 2014**  
**ALONGWITH**  
**ARBITRATION PETITION NO. 910 OF 2013**

**M/s.Addhar Mercantile Private Limited** ..... Applicant  
**VERSUS**  
**Shree Jagdamba Agrico Exports Pvt.Ltd.** ..... Respondent

Mr.Manoj Khatri for the Applicant/Petitioner.

Mr.Ashwin Shankar a/w.Ms.Ritcha Sahay for the Respondent.

**CORAM : R.D. DHANUKA, J.**

**DATED : 12<sup>th</sup> JUNE, 2015**

**P.C.**

Arbitration Application No.197 of 2014 has been filed under section 11(6) of the Arbitration and Conciliation Act, 1996 inter alia praying for an appointment of an arbitrator by invoking clause 23 of the agreement annexed at Ex.A to the arbitration application. Arbitration Petition No.910 of 2013 has been filed under section 9 of the Arbitration and Conciliation Act, 1996 inter alia praying for interim measures.

2. Both the proceedings filed by the petitioner are opposed by the respondent. Insofar as arbitration application filed under section 11 is concerned, it is opposed on the ground that the parties are governed by English Law and the venue of the arbitration shall be at Singapore.

3. For the purpose of appreciating the arguments advanced by the learned counsel for both the parties, it would be appropriate to refer to the said clause 23 which is extracted as under :-

23 Arbitration in India or Singapore and English law to be apply.

4. It is submitted by Mr.Shankar, learned counsel for the respondent that though both the parties are Indian, parties by agreement can agree to the seat of the arbitration at Singapore and to apply English law. He submits that the clause 23 if interpreted in the manner as canvassed by the learned counsel for the applicant, and if this court exercises its jurisdiction to appoint an arbitrator under section 11 in India, it would be contrary to section 28 of the Arbitration and Conciliation Act, 1996.

5. Learned counsel for the respondent does not dispute that the arbitration agreement exist between the parties. It is however submitted that this court has no jurisdiction to entertain this application on the ground that the seat of the arbitration agreed between the parties would be Singapore and the parties agreed to apply English law.

6. Learned counsel appearing for the applicant in response to this preliminary objection raised by the respondent submits that since both the parties are incorporated in India and are situated in Mumbai and since the said clause 23 provides that the arbitration shall be in India or Singapore and English law to apply, intention of the parties is clear that the parties can have arbitration in India. It is submitted that since both the parties are from India, the parties cannot be allowed to derogate from Indian law. In support of this submission, learned counsel for the applicant placed reliance on the judgment of Supreme Court in case of **TDM Infrastructure Private Limited vs. UE Development India Private Limited** in Arbitration Application No. 2 of 2008 delivered on 14<sup>th</sup> May, 2008 and more particularly paragraphs 14 to 20 which read thus :-

14. Part II of the 1996 Act deals with enforcement of foreign

awards. The 1996 Act keeping in view the scheme of the statute must be read in its entirety. It takes into consideration various situations. Power of this Court to appoint an arbitrator would arise in view of Sub-section (12) of Section 11 of the 1996 Act only if it is to be held that the dispute has arisen in relation to an international commercial arbitration. Whether, thus, an agreement falls within the purview of Section 2 (1)(f) of the 1996 Act is the core question. Section 2(1)(f) speaks of legal relationship whether commercial or otherwise under the law in force in India. The relationship has to be between an individual who is a national of or habitually resident in any country other than India as specified in Clause (i) of Section 2(1)(f). 'Nationality' or being 'habitually resident' in respect of a body corporate in any country other than India should, in my view, receive a similar construction.

15. Determination of nationality of the parties plays a crucial role in the matter of appointment of an arbitrator. A company incorporated in India can only have Indian nationality for the purpose of the Act. It cannot be said that a company incorporated in India does not have an Indian nationality. Hence, where both parties have Indian nationalities, then the arbitration between such parties cannot be said to be an international commercial arbitration.

16. The learned counsel contends that the word "or" being disjunctive, clause (iii) of Section 2(1)(f) of the 1996 Act shall apply in a case where clause (ii) shall not apply. We do not agree. The question of taking recourse to clause (iii) would come into play only in a case where clause (ii) otherwise does not apply in its entirety and not where by reason of an exclusion clause, consideration for construing an agreement to be an international commercial arbitration agreement goes outside the purview of its definition. Once it is held that both the companies are incorporated in India, and, thus, they have been domiciled in India, the arbitration agreement entered into by and between them would not be an international commercial arbitration agreement and, thus, the question of applicability of clause (iii) of Section 2(1)(f) would not arise. The Chief Justice of India or his designate, furthermore,

having regard to Sub-section (9) of Section 11 of the 1996 Act must bear in mind the nationality of an arbitrator. The nationality of the arbitrator may have to be kept in mind having regard to the nationality of the respective parties.

17. Only in a case where, however, a body corporate which need not necessarily be a company registered and incorporated under the Companies Act, as for example, an association or a body of individuals, the exercise of central management and control in any country other than India may have to be taken into consideration.

18. Chapter VI of the 1996 Act dealing with making of an arbitral award and termination of proceedings in this behalf plays an important role. In respect of 'international commercial arbitration', clause (b) of Sub-section (1) of Section 28 of the 1996 Act would apply, whereas in respect of any other dispute where the place of arbitration is situated in India, clause (a) of Sub-section (1) thereof shall apply.

19. When, thus, both the companies are incorporated in India, in my opinion, clause (ii) of Section 2(1)(f) will apply and not the clause (iii) thereof.

20. Section 28 of the 1996 Act is imperative in character in view of Section 2(6) thereof, which excludes the same from those provisions which parties derogate from (if so provided by the Act). The intention of the legislature appears to be clear that Indian nationals should not be permitted to derogate from Indian law. This is part of the public policy of the country.

7. The next submission of Mr.Shankar, learned counsel for the respondent is that clause 23 is vague and is not workable and thus cannot be enforced. It is submitted that no part of the arbitration clause can be ignored when the clause is workable. In the alternate it is submitted that the clause 23 is vague and not workable.

8. It is not in dispute that both parties are from India. A perusal of clause 23 clearly indicates that intention of both parties is clear that the arbitration shall be either in India or in Singapore. If the seat of the arbitration would have be at Singapore, certainly English law will have to be applied. Supreme Court in case of ***TDM Infrastructure Private Limited (supra)*** has held that the intention of the legislature would be clear that Indian nationals should not be permitted to derogate from Indian law. This is part of the public policy of the country.

9. Insofar as submission of the learned counsel for the respondent that if such provision is interpreted in the manner in which it is canvassed by the learned counsel for the applicant, it would be in violation of section 28(1) (a) is concerned, since I am of the view that the arbitration has to be conducted in India, under section 28(1) (a), the arbitral tribunal will have to decide the disputes in accordance with the substantive law for the time being in force in India. In my view the said agreement which provides for arbitration in India thus does not violate section 28(1) (a) as canvassed by the learned counsel for the respondent.

10. The applicant had issued notice calling upon the respondent to appoint an arbitrator on 10<sup>th</sup> May, 2013 read with 28<sup>th</sup> May, 2013. There was no response to the said notice. In my view the arbitration agreement exist. Since the respondent failed to appoint any arbitrator, this proceedings filed under section 11(6) of the Arbitration and Conciliation Act is maintainable before this court.

11. Insofar as submission of the learned counsel for the respondent that clause 23 is vague and is not maintainable is concerned, the designate of the Hon'ble Chief Justice has to consider the admitted fact that both parties are Indian and the agreement is executed in India. The intention of the parties is clear that the

disputes between them has to be resolved by arbitration. Learned counsel for the respondent has not disputed the existence of the arbitration agreement. I am thus not inclined to accept this submission of the learned counsel that clause is vague and not workable.

12. Insofar as next submission of the learned counsel for the respondent in the alternative to the earlier submission that the said clause is workable on the ground that the clause referred to the seat of the arbitration at Singapore and applicability of the English law to such proceedings are concerned, in my view since both the parties are Indian and cannot derogate the Indian law, this submission of the learned counsel has no substance and is rejected. In my view the alternate submission of the respondent is self destructive and inconsistent with the argument that clause is vague.

13. Mr.T.V.Shanbhag having his office at 2208, Sky Flama, Dosti Flamingos Complex, T.J.Road, Parel-Sewri, Mumbai – 400 015 is appointed as the sole arbitrator.

14. Insofar as application filed under section 9 is concerned, learned counsel appearing for the petitioner states that the Arbitration Petition No.910 of 2013 be permitted to be converted under section 17 of the Arbitration and Conciliation Act, 1996. The application of the learned counsel for the petitioner to treat the said petition as an application under section 17 of the Arbitration and Conciliation Act is accepted. It is made clear that affidavit in reply filed in the said arbitration petition be treated as reply to the application under section 17 of the Act. Both parties are permitted to file additional pleadings with leave of the learned

arbitrator.

15. It is made clear that insofar as petition under section 9 of the Arbitration and Conciliation Act is concerned, this court has not expressed any views on the merits and the same shall be decided by the learned arbitrator in accordance with law.

16. Both the proceedings are disposed of in the aforesaid terms. No order as to costs.

**[R.D. DHANUKA, J.]**