

IN THE HIGH COURT OF BOMBAY AT GOA**WRIT PETITION NO. 1133 of 2016**

1. M/s. Shruti Ore Carriers,
A proprietorship concern of
Mrs. Shakuntala Sajjan Kudav,
H.No.146, Near Bharat Gas Godown,
Vaddem, Vasco Da Gama
2. Mrs. Shakuntala Sajjan Kudav,
H.No.146,
Near Bharat Gas Godown,
Vaddem, Vasco Da Gama. .. Petitioners

V/s

M/s. Synergy Trade Exchange,
A proprietorship concern of
Mr. Rohan Lobo,
Having office at, A-005, House
of Lords, Miramar Panjim, Goa. .. Respondent

Mr. Balkrishna Sardessai, Advocate for the petitioners.

Mr. A. Palekar, Advocate for respondent.

CORAM :- C. V. BHADANG, J.

DATE: 30th January, 2017

ORAL JUDGMENT :

Rule, made returnable forthwith. The learned Counsel for the respondent waives service. Heard finally by consent of the parties.

2. The petitioners, who are the plaintiffs in Special Civil Suit No.4/2016/A on the file of the learned Senior Civil Judge at Vasco, are challenging the order dated 12/08/2016, by which, application (Exh.9-D) under Section 8 of the Arbitration and Conciliation Act, 1996 (the Act, for short), filed by the respondent/ defendant, has been allowed and consequently, the suit has been dismissed.

3. The brief facts are that the petitioners have filed the aforesaid suit for mandatory injunction, directing the respondent not to interfere with the barge (M.V. Shruti) and the proprietorship rights of the petitioners and further restraining them or anybody on their behalf, from interfering with the said barge belonging to petitioner no.2. It appears that the respondent filed an application under Section 8 of the Act, seeking referral of the dispute to arbitration, in terms of clause 4 of the agreement dated 07/02/2015. The arbitration clause relied upon by the respondent, reads as under :

“Clause 4- Arbitration dispute of any during the Agreement period shall be settled amicably. In the event both the parties cannot reach any amicable

decision, buyers decision will be binding and final on both the parties. ”

4. The application was opposed on behalf of the petitioners on the ground that the application is misconceived. It was contended that the plaintiffs are not the party to the said agreement and the Power of Attorney given by petitioner no.2 to her husband, does not contain the power to enter into an agreement for sale of the said barge and, therefore, any such agreement, if at all entered by the Power of Attorney Holder is not legally binding on the plaintiffs. It was also contended that there is no legal and valid arbitration agreement between the parties.

5. The learned Trial Court found that the suit was at the initial stage i.e. at the stage of filing of the Written Statement. The learned Trial Court further found that the objection taken on behalf of the petitioners to the application, was not maintainable and in that view of the matter, allowed the application Exh.9-D, which is challenged in this petition.

6. I have heard the learned Counsel for the petitioners and the learned Counsel for the respondent. With the

assistance of the learned Counsel for the parties, I have gone through the Agreement and the impugned order passed.

7. It is submitted by the learned Counsel for the petitioners that there is no agreement to refer the dispute to the Arbitrator, which can be read into clause 4 of the Agreement. It is submitted that all that clause 4 says is that the disputes between the parties, shall be settled amicably. It is contended that the stipulation in the agreement, in the event parties do not reach any amicable settlement, the buyers' decision that is final and binding, would derogate from clause 4 being an arbitration agreement. It is submitted that before the Judicial Authority can be asked to refer the dispute to the arbitration, the existence of an unequivocal arbitration clause, which is binding between the parties, is a *sine qua non* and in the absence thereof, the dispute could not have been referred to arbitration.

8. On the contrary, it is submitted by the learned Counsel for the respondent that clause 4 spells out an arbitration agreement. The learned Counsel has pointed out that the petitioners in their reply to the notice issued by the

respondent as well as the reply filed to the application Exh.9-D, do not dispute the existence of an arbitration agreement. It is submitted that the application was opposed only on the ground of the authority of the Power of Attorney Holder to enter into an agreement dated 07/02/2015. It is submitted that thus, now the petitioners cannot claim that there is no arbitration agreement, as such, between the parties. The learned Counsel has then referred to Section 16 of the Act, in order to submit that the Arbitral Tribunal is competent to decide on its own jurisdiction and even after the matter is referred to Arbitrator, it would be open to the Arbitrator to decide on the existence and validity of the arbitration clause. He submits that the impugned order does not suffer from any infirmity, so as to require interference. On behalf of the petitioners, reliance is placed on the decision of the Hon'ble Supreme Court in the case of **Jagdish Chander Vs. Ramesh Chander**; [(2007)5 SCC 719] and the decision of this Court in the case of **M/s. Seema Constructions Engineers and Contractors Vs. Vidarbha Irrigation Development Corporation and Another**; [(2013)5 MhLJ 130].

9. I have carefully considered the rival circumstances and the submissions made.

10. Section 8 of the Act provides for the power of the Judicial Authority, to refer the parties to arbitration, where there is an arbitration agreement. A bare reading of Section 8 would show that the existence of an arbitration agreement, which is valid and binding between the parties, is the *sine qua non* for exercise of power under Section 8 of the Act. Section 2(b) of the Act defines Arbitration Agreement, being an agreement referred to under Section 7 of the Act. Section 7 of the Act provides that an 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. Subsection (2) of Section (7) provides that the Arbitration Agreement may be in the form of an arbitration clause in a contract or in the form of a separate agreement and subsection (3) thereof provides that it has to be in writing. It is trite that while deciding the question whether there exists an arbitration agreement, the intention of the parties has to be gathered from the terms of the agreement as a whole and if the

terms of the agreement clearly indicate an intention on the part of the parties to agree to refer their disputes to a private Tribunal for adjudication and willingness to be bound by the decision of the said Tribunal, on such dispute, would be an arbitration agreement. Although there cannot be any specific form in which an arbitration agreement or a clause can be couched, the words should clearly disclose the intention of the parties to go to arbitration and an intention to be bound by the decision of the arbitrator.

11. In the case of ***Dharma Pratishtanam Vs. Madhok Construction (P) Ltd***; [(2005)9 SCC 686], the Hon'ble Supreme Court has envisaged two contingencies; namely (i) arbitration agreement, using clear and unambiguous language expressing parties' intention to have their disputes settled by arbitration; (ii) the arbitration agreement suffering from such vagueness or uncertainty as is incapable of being construed even by reference to Arbitration Act. It has been held that in the first case, the Court has no other choice but to treat the contract as binding and enforce it. However, in the later case, it would have to be held that there was no agreement in the eyes of law and as such, the question of

appointing arbitrator or making reference under Section 8, would not arise.

12. Coming back to the present case, except that clause 4 is entitled as 'Arbitration' Clause, there is nothing in the clause, which would show that the parties had intended to refer the disputes to arbitration. It is trite that the arbitration clause /agreement has to be read as a whole and the mere heading, cannot govern the substantive portion of the clause. If we read clause 4 as a whole, all that it says is that the disputes between the parties, during the period of agreement, shall be settled amicably and in the event both the parties do not reach any amicable decision, the buyers' decision would be binding and final on both the parties. It can, thus clearly, be seen that on one hand, there is no agreement that the dispute and differences shall be resolved through the process of arbitration. Secondly, in the event the parties do not reach any amicable settlement, the decision of one of the parties (Buyers' decision) is made final and binding. In my considered view, clause 4 cannot be read as an arbitration clause and in the absence of there being an arbitration agreement, the application under Section 8 of the Act, could not have been granted. As noticed

earlier, the existence of a clear, unequivocal and binding arbitration agreement is *sine qua non* for Judicial Authority, to refer the parties to arbitration under Section 8 of the Act, which is not forthcoming in this case.

13. In the result, the petition is allowed. The impugned order is hereby set aside. The application Exh.9-D stands dismissed. The Civil Suit is restored back to file at its original number. Parties to appear before the Trial Court on 10/02/2017.

14. Rule is made absolute in the aforesaid terms, with no order as to costs.

C. V. BHADANG, J.

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