

THE HON'BLE THE ACTING CHIEF JUSTICE RAMESH RANGANATHAN

Arbitration Application No.4 of 2012

ORDER:

This Arbitration Application is filed, under Section 11(6) of the Arbitration and Conciliation Act, 1996 (for short, "the 1996 Act"), seeking appointment of an arbitrator.

It is the case of the applicant that, on 01.09.2010, the respondent had approached their Tumkur office with a request to transport their consignment situated at Kolkata; the consignment purported to contain 125 packages of chemicals; the applicant took the consignment under the service of "bulk express"; the consignment was despatched through Railways in a leased parcel van; a fire broke out in the said train and all the consignments, being transported by the respondent, were reduced to ashes resulting in the applicant suffering huge monetary loss, besides a criminal case being registered against them. The applicant claims to have issued a notice on 06.01.2011 seeking appointment of an arbitrator; since the respondent chose not to reply, the arbitrator nominated by them had entered appearance and had issued a notice on 13.03.2011; as the respondent had conveyed their refusal to consent to his nomination, the arbitrator had passed orders on 09.07.2011 withdrawing from the arbitration proceedings; and, as a result, the applicant had invoked the jurisdiction of this Court under Section 11(6) of the 1996 Act. Reference is made by the applicant to Clause 18(c) of the consignment note which reads as under:

"Any dispute or difference arising shall be referred to an arbitrator, GATI shall be entitled to nominate a sole arbitrator to adjudicate any dispute, difference or claims. The venue of arbitration shall be at Secunderabad only."

Sri G.Mohan Rao, Learned Counsel for the applicant, would submit that, since the consignment note issued by the applicant, undertaking to transport the respondent's goods from Bangalore to Kolkata, contained an arbitration clause and, despite the applicant's request, the respondent did not agree for an arbitrator to be appointed, they were constrained to invoke the jurisdiction of this Court under Section 11(6) of the 1996 Act; while the consignment note was issued by the applicant to the respondent on 01.09.2010, the respondent had, as stipulated in the consignment note, paid Rs.17,145/- by way of cheque dated 02.09.2010; even in the legal notice dated 27.10.2010, issued on behalf of the respondent, reference is made to the goods having been sent on 01.09.2010, and payment having been made on 02.09.2010; and, since existence of arbitration agreement is evident from the exchange of correspondence, this Court should consider appointing an arbitrator.

On the other hand Sri K.Laxmi Prasad, Learned Counsel appearing on behalf of Smt.A.Satya Sree, Learned Counsel for the respondent, would submit that an indecipherable clause in a consignment note cannot be construed as an arbitration agreement; the consignment note was issued by the applicant, and has neither been accepted nor signed by the respondent; the requirement of a valid arbitration agreement is that it should be signed by the parties; the consignment note, admittedly, does not contain the signature of the respondent; even otherwise, since the goods were transported from Bangalore to Kolkata, this Court lacks territorial jurisdiction to entertain such an application; and the application is, therefore, liable to be dismissed.

Section 7 of the 1996 Act relates to the arbitration agreement. While Section 7(4)(a) stipulates that an arbitration agreement is in writing if it is contained in a document signed by the parties, Section 7(4)(b) provides that an exchange of letters, telex, telegrams or other means of telecommunication, including communication through electronic means, which provide a record of the agreement, would also be an arbitration agreement.

While it is debatable whether or not the consignment note was signed by both the parties and, consequently, clause (a) of Section 7(4) of the 1996 Act may not be attracted, clause (b) of Section 7(4) is far wider in its ambit. The fact that the consignment note dated 01.09.2010 was issued by the applicant to the respondent is evident from the legal notice issued on behalf of the respondent, to the applicant, on 27.10.2010 wherein a reference is made to the fact that the subject goods were transported on 01.09.2010 for which an invoice was issued towards the cost of transportation of the goods; and the amount was paid by the respondent vide cheque bearing No.892764 dated 02.09.2010. The invoice, referred to in the legal notice dated 27.10.2010, is the consignment note issued by the applicant to the respondent which, in Clause 18(c), contains the arbitration clause. While it is not known whether the consignment note was signed by the respondent also, the fact that the consignment note was issued by the applicant, and the respondent received the said note and made payment in terms thereof by way of a cheque on the next date i.e. on 02.09.2010, is admitted in the legal notice dated 27.10.2010. It is evident, therefore, Section 7(4)(b) is attracted and an arbitration agreement in writing must be held to be in existence by exchange of correspondence.

Section 2(1)(e) of the 1996 Act defines “Court” to mean, in the case of an arbitration other than international commercial arbitration, the principal Civil Court of original jurisdiction in a district, and includes the High Court in exercise of its ordinary original civil jurisdiction, having jurisdiction to decide the questions forming the subject-matter of the arbitration if the same had been the subject-matter of a Suit. Section 11(5) of the 1996 Act stipulates that, if the parties fail to agree on the arbitrator within thirty days from receipt of a request by one party from the other party to so agree, the appointment shall be made, upon request of a party, by the High Court. Likewise, under Section 11(6)(a) where, under an appointment procedure agreed upon by the parties, a party fails to act as required under that procedure, a party may request the High Court to take the necessary measure, unless the agreement on the appointment procedure provides other means for securing the appointment.

Clause 18(b) of the consignment note stipulates that all demands and claims arising from the docket shall be paid at Secunderabad, and reads as under:

“All demands claims arising from the docket shall be paid at registered office situated at 1-7-293, MG Road, Secunderabad-500 003, A.P, and all demands by Gati shall be deemed to have been made by Gati, Secunderabad and any dispute, difference and claims arising out of this docket Gati shall intimate action shall be recovery of dues before Secunderabad Court alone and courts at Secunderabad alone shall have exclusive jurisdiction to adjudicate all claims.”

Sri K.Laxmi Prasad, Learned Counsel appearing on behalf of the respondent, would place reliance on **Datawind Innovations Pvt. Ltd v. Indus Mobile Distribution Pvt Ltd**¹, to submit that, as no part of the

¹ 2016(4) ARBLR 208 (Delhi)

cause of action arose at Secunderabad, the applicant is not entitled to invoke the jurisdiction of this Court under Section 11(6) of the 1996 Act seeking appointment of an arbitrator. He would also rely on **Dabur India Ltd v. BSI Ltd**².

In **Datawind Innovations Pvt. Ltd**¹, the petitioner had its registered office at Amritsar and its branch office at New Delhi. They were supplying goods to the respondents from New Delhi to Chennai. The agreement, however, contained in Clause 18 thereof a dispute resolution mechanism which provided that the arbitration shall be conducted in Mumbai in English language. While the petitioner conveyed its no objection for the arbitration to be conducted at Mumbai, they sought appointment of an arbitrator from the Delhi High Court. Clause 19 of the agreement stipulated that all disputes arising out of, or in connection with the agreement, shall be subject to the exclusive jurisdiction of the Courts in Mumbai only. Despite the exclusive jurisdiction clause, the Delhi High Court observed that as the actual cause of action, or a part of cause of action, had not arisen at Mumbai, and as the Courts at New Delhi and Chennai would have jurisdiction an application, seeking appointment of an arbitrator, need not necessarily be filed only at Mumbai.

In **Dabur India Ltd**², the Delhi High Court held that since the contract was to be performed at Bhopal and at Mumbai, the cheque was also received outside Delhi, the mere fact that the payment was only sent from Delhi, and notice was issued from Delhi, would not confer jurisdiction on the Delhi High Court; the Delhi Courts did not have jurisdiction and an application under Section 11 could not be filed before the Delhi High Court.

² 2000(56) DRJ 497

On the other hand Sri G.Mohan Rao, Learned Counsel for the applicant, would place reliance on the judgment of the Supreme Court in **Bharat Aluminium Co. v. Kaiser Aluminium Technical Services Inc**³. A Constitution Bench of the Supreme Court, in **Bharat Aluminium Co**³, held that:-

“....We are of the opinion, the term “subject matter of the arbitration” cannot be confused with “subject matter of the suit”. The term “subject matter” in Section 2(1)(e) is confined to Part I. It has a reference and connection with the process of dispute resolution. Its purpose is to identify the courts having supervisory control over the arbitration proceedings. Hence, it refers to a court which would essentially be a court of the seat of the arbitration process. In our opinion, the provision in Section 2(1)(e) has to be construed keeping in view the provisions in Section 20 which give recognition to party autonomy. Accepting the narrow construction as projected by the learned counsel for the appellants would, in fact, render Section 20 nugatory. **In our view, the legislature has intentionally given jurisdiction to two courts i.e. the court which would have jurisdiction where the cause of action is located and the courts where the arbitration takes place. This was necessary as on many occasions the agreement may provide for a seat of arbitration at a place which would be neutral to both the parties. Therefore, the courts where the arbitration takes place would be required to exercise supervisory control over the arbitral process.** For example, if the arbitration is held in Delhi, where neither of the parties are from Delhi, (Delhi having been chosen as a neutral place as between a party from Mumbai and the other from Kolkata) and the tribunal sitting in Delhi passes an interim order under Section 17 of the Arbitration Act, 1996, the appeal against such an interim order under Section 37 must lie to the Courts of Delhi being the Courts having supervisory jurisdiction over the arbitration proceedings and the tribunal. This would be irrespective of the fact that the obligations to be performed under the contract were to be performed either at Mumbai or at Kolkata, and only arbitration is to take place in Delhi. **In such circumstances, both the Courts would have jurisdiction, i.e., the Court within whose jurisdiction the subject matter of the suit is situated and the courts within the jurisdiction of which the dispute resolution, i.e., arbitration is located.**

.....**The definition of Section 2(1)(e) includes “subject matter of the arbitration” to give jurisdiction to the courts where the arbitration takes place, which otherwise would not exist.** On the other hand, Section 47 which is in Part II of the Arbitration Act, 1996 dealing with enforcement of certain foreign awards has defined the term “court” as a court having jurisdiction over the subject-matter of the award. This has a clear reference to a court within whose jurisdiction the asset/person is located, against which/whom the enforcement of the international arbitral award is sought.....” (emphasis supplied)

³ (2012) 9 SCC 552

The law declared by the Supreme Court, in **Bharat Aluminium Co.**³, is that both the Courts within whose jurisdiction the subject matter of the Suit is situated and the Courts within the jurisdiction of which the dispute resolution mechanism, i.e arbitration, is located, would have jurisdiction. The definition of “Court” in Section 2(1)(e) of the 1996 Act, includes the subject matter of the arbitration, and would give jurisdiction to the Courts where the arbitration takes place, which otherwise would not exist. As clause 18(c) of the consignment note stipulates that the venue of arbitration shall be at Secunderabad, the jurisdiction of this Court can be invoked under Section 11(6) of the 1996 Act for appointment of an arbitrator.

Sri K.Laxmi Prasad, Learned Counsel for the respondent, would submit that the respondent did not sign the consignment note; the contents on the back of the said note (which includes the arbitration clause) were not known to the respondent; they cannot be held bound thereby; and an arbitration agreement cannot be said to be in existence. He would rely on **The Special Secretary to Government of Rajasthan v. Vedakantara Venkataramana Seshaiyer**⁴; **C.W.C. Industrial Estate v. Mandal Gokulchand Bhoot**⁵; and **M/s.East India Transport Agency v. National Insurance Co. Ltd.**⁶. On the other hand Sri G.Mohan Rao, Learned Counsel for the applicant, would contend that the consignment note must have been signed by the respondent and the original copy of the consignment note would be available with them.

In **Vedakantara Venkataramana Seshaiyer**⁴, a Division Bench of this Court observed that, unless the terms of the contract are arrived at

⁴ AIR 1984 AP 5

⁵ 2016(6) ALT 683

⁶ AIR 1991 AP 53

after due negotiation, they cannot be held to be binding merely because a lottery ticket is later issued containing the said terms; there must also be proof that the terms were meant to be contractual; the said terms must have been brought to the notice of the contracting party at or before the time when the contract was entered into; and, as the printed terms on the lottery ticket do not become part of the contract, they cannot be enforced unilaterally.

A Learned Single Judge of this Court in **C.W.C. Industrial Estate**⁵, following **Vedakantara Venkataramana Seshaiyer**⁴, observed that the conditions for storage printed on the back of the warehouse receipts were not brought to the notice of the plaintiff before the deposit of the goods by him; the signature of the plaintiff was not taken on the conditions of storage; and, therefore, they do not form part of the contract.

In **East India Transport Agency**⁶, a Full Bench of this Court referred with approval to the Division Bench Judgment in **Vedakantara Venkataramana Seshaiyer**⁴, and held that where a form printed by one party is signed only by that party and delivered to the other party, without anything more, it would be difficult for the Court to hold that there has been consensus ad-idem in regard to the particular clause; and if there is some other material to indicate the acceptance or consent of the party, who received the printed form, then the Court is free to infer that the clause formed part of the agreement.

Even if we were to proceed on the premise that the consignment note was not signed by the respondent, the legal notice dated 27.10.2010 issued on behalf of the respondent, specifically refers to the consignment having been entrusted by the respondent to the applicant; the applicant having issued an invoice for Rs.17,145/- towards the cost

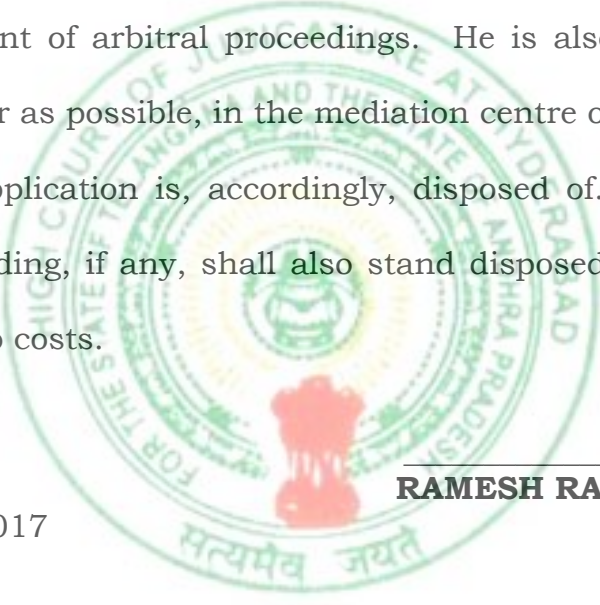
of transporting the goods which was paid by the respondent vide cheque bearing No.892764 dated 02.09.2010; and, on the basis of these and other facts, the respondent had claimed damages of Rs.1,68,315/- for the loss suffered by them. As held by the Full Bench of this Court in **East India Transport Agency**⁶, the fact that the respondent had acted on the basis of the very same consignment note, had issued a cheque pursuant thereto on the next day, and had also claimed damages for the loss suffered by them on account of the goods being destroyed, would suffice to infer that the respondent had received the consignment note, and was aware of its contents. This Court would, therefore, be justified in holding that the arbitration clause in the consignment note is, in view of Section 7(4)(b) of the 1996 Act, an arbitration agreement. Even otherwise none of the aforesaid judgments, relied upon on behalf of the respondent, arose under the 1996 Act which, under Section 7(4)(b), stipulates that an arbitration agreement would be in writing if it is contained in an exchange of correspondence.

Sri K.Laxmi Prasad, Learned Counsel appearing on behalf of the respondent, would submit that, in any event, the respondent is not liable to pay the said amounts since the applicant had transported the goods by rail, instead of transporting the consigned goods by road. The validity or otherwise of the applicant's claim are all matters for the arbitrator to consider, and this Court would not be justified in examining these contentions in an application filed under Section 11(6) of the 1996 Act seeking appointment of an arbitrator, since Section 11(6A) of the 1996 Act (as inserted by Act 3 of 2016 with retrospective effect from 23.10.2015) requires the High Court, while considering an application under Section 11(6), to confine its examination to the

existence of an arbitration agreement alone. As this Court is satisfied that there exists an arbitration agreement, suffice it to make it clear that it is open to either parties to agitate their respective claims on merits before the Learned Arbitrator.

I consider it appropriate, therefore, to appoint Sri Justice A.Gopal Rao, Retired Judge of this Court, as the sole arbitrator. The Learned Arbitrator shall fix his remuneration, and incidental charges for the arbitration proceedings, in consultation with the parties. He is requested to complete arbitration proceedings, and pass an award at the earliest, preferably within a period of six months from the date of commencement of arbitral proceedings. He is also requested to hold sittings, as far as possible, in the mediation centre of the High Court.

The Application is, accordingly, disposed of. The miscellaneous petitions pending, if any, shall also stand disposed of. There shall be no order as to costs.



RAMESH RANGANATHAN, ACJ

Date:03.11.2017
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