

**IN THE HIGH COURT OF PUNJAB AND HARYANA AT
CHANDIGARH**

Arbitration Case No. 77 of 2016

Date of decision:- 17.03.2017

M/s Sachi Geosynthetics Pvt. Ltd.

...Petitioner

Versus

M/s Varha Infra Ltd. through its Managing Director.

...Respondents

CORAM: **HON'BLE MR. JUSTICE S.J. VAZIFDAR, CHIEF JUSTICE**

Present:- Mr. P.S.Rana, Advocate, for the petitioner.
 Mr. Vipul Dharmani, Advocate, for the respondents.

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S.J. VAZIFDAR, CHIEF JUSTICE

This petition is filed under section 11(6) of the Arbitration & Conciliation Act, 1996 (for short 'the Act') for appointment of a sole arbitrator to adjudicate upon the disputes and differences between the parties.

2. The agreement between the parties is admitted. Clauses 13 and 14 thereof read as under:-

"13. ARBITRATION

If any dispute arises between us in respect of execution or interpretation of this order the same shall be referred to arbitration as per the prevailing Arbitration Act.

14. JURISDICTION

If any dispute arise between the "The Main Contractor" and the system supplier in connection with the contract Agreement it shall be subject to the provision of this article, be referred to the arbitration and final decision of a person agreed between the parties or jurisdiction of Jodhpur Courts".

3. If clause 13 is read by itself, there can be no doubt that the disputes and differences between the parties are referable to arbitration. What is contended is that clauses 13 and 14 ought to be read together and so read the same only confer a right upon the parties to go to arbitration if both of them so desire. In other words, it is contended on behalf of the respondent that if one of the parties does not agree to refer the disputes and differences to arbitration it cannot be compelled to do so.

4. The submission is not well founded. I will assume that clauses must be read together. It will make no difference. The respondents seek to establish the above contentions on the basis of the concluding words of clause 14 “.....or jurisdiction of Jodhpur Courts”. The clause may not be well worded. However, the reference to the jurisdiction of Jodhpur Courts only indicates where the parties may adopt legal proceedings in relation to the arbitration proceedings. In other words, the concluding words of clause 14 do not dilute the mandatory reference to arbitration which is referred to in clause 13 and the rest of clause 14. It is important to note that both the clauses use the words “shall be referred to arbitration”. It is equally important to note that there is no reference to a suit or any proceedings other than the arbitration proceedings in the Courts. The suits as well as the arbitration proceedings can form the subject matter of proceedings before the Civil Court. There is no indication of suits or such other proceedings in the Civil Court. Both the clauses, therefore, refer only to arbitration proceedings.

5. The order of the learned Judge of the Supreme Court in *Wellington Associates Ltd. v. Kirit Mehta* 2000(4) SCC 272, passed under section 11 of the Act before it was amended in any event does not

support the respondent's case. The relevant clauses in that case read as follows:-

"4. It is hereby agreed that, if any dispute arises in connection with these presents, only courts in Bombay would have jurisdiction to try and determine the suit and the parties hereto submit themselves to the exclusive jurisdiction of the courts in Bombay.

5. It is also agreed by and between the parties that any dispute or differences arising in connection with these presents may be referred to arbitration in pursuance of the Arbitration Act, 1940 by each party appointing one arbitrator and the arbitrators so appointed selecting an umpire. The venue of arbitration shall be at Bombay."

Firstly, clause 4 expressly referred to the jurisdiction of the Courts in Bombay in respect of suits. It did not refer to the jurisdiction in respect of the arbitration proceedings. Secondly clause 5 used the words 'may be referred to arbitration.....' (emphasis supplied). It is in these circumstances that the learned Judge held:-

"19. Point 2

21. Does clause 5 amount to an arbitration clause as defined in Section 2(b) read with Section 7? I may here state that in most arbitration clauses, the words normally used are that "disputes *shall* be referred to arbitration". But in the case before me, the words used are "may be referred".

22. It is contended for the petitioner that the word "may" in clause 5 has to be construed as "shall". According to the petitioner's counsel, that is the true intention of the parties. The question then is as to what is the intention of the parties. The parties, in my view, used the words "may" not without reason. If one looks at the fact that clause 4 precedes clause 5, one can see that under clause 4 parties desired that in case of disputes, the civil courts at Bombay are to be approached by way of a suit. Then follows clause 5 with the words "it is *also* agreed" that the dispute "may" be referred to arbitration implying that parties need not necessarily go to the civil court by way of suit but can also go before an arbitrator. Thus, clause 5 is merely an enabling provision as contended by the respondents. I may also state that in cases where there is a sole arbitration clause couched in mandatory language, it is not preceded by a clause like clause 4 which discloses a general intention of the parties to go before a civil court by way of suit. Thus, reading clause 4 and clause 5 together, I am of the view that it is not

the intention of the parties that arbitration is to be the sole remedy. It appears that the parties agreed that they can "also" go to arbitration in case the aggrieved party does not wish to go to a civil court by way of a suit. But in that event, obviously, fresh consent to go to arbitration is necessary. Further, in the present case, the same clause 5, so far as the venue of arbitration is concerned, uses the word "shall". The parties, in my view, must be deemed to have used the words "may" and "shall" at different places, after due deliberation.

The learned Judge himself noted that the words normally used are that "disputes shall be referred to arbitration" but in the case before him the words used were "may be referred". It is in these circumstances the learned Judge held that the clause is merely an enabling provision and that it was not the intention of the parties that the arbitration was the sole remedy. At the cost of repetition, the words used in clauses 13 and 14 in the case before us are "shall be referred to arbitration". The judgment of the Supreme Court is, therefore, clearly distinguishable.

6. The learned counsel appearing on behalf of the respondents also relied upon the judgment of a learned Single Judge of the Madras High Court in *M/s Sankar Sealing Systems P. Ltd. v. M/s Jain Motor Trading Company and another* 2004 AIR (Madras) 127. The clauses that fell for consideration in that case read as under:-

"25.Whether the Clause 23-A is a mandatory arbitration Clause incumbent to refer disputes to arbitration:

Defendants urge to refer the matter to Arbitration pursuant to Clause 23-A which reads thus:

"23-A Any disputes arising in relation to this Agreement will be settled by the arbitration of a neutral person agreed to by both."

The learned Judge held:-

26. The question arises whether the above Clause is a firm Mandatory Arbitration, Clause. In the Contract Agreement Clause 23-A is not found in isolation but co-exists with 23-B which reads thus:

"Courts in Chennai will have exclusive jurisdiction in the event of any legal/judicial proceedings."

27. Contending that Clause 23-A does not amount to arbitration Clause but only an enabling permission giving option to the parties, learned counsel for the plaintiff laid emphasis upon the co-existence of Clause 23-A and 23-B. In view of simultaneous occurring of Clause 23-A and 23-B, I am of the view that it is not the intention of the parties that Arbitration is to be the sole remedy. It only suggests that they can also resort to arbitration if they wish.

28. While interpreting the expression in the Arbitration Act "may be referred", in (2000) 4 SCC 272 : AIR 2000 SC 1379, Supreme Court held thus: "Thus, Cl. 5 is merit an enabling provision as contended by the respondents. I may also state that in cases where there is a sole arbitration clause couched in mandatory language, it is not preceded by a clause like Cl. 4 which discloses a general intention of the parties to go before a Civil Court by way of suit. Thus, reading Cl. 4 and Cl. 5 together, I am of the view that it is not the intention of the parties that arbitration is to be the sole remedy. It appears that the parties agreed that they can "also" go to arbitration also in case the aggrieved party does not wish to go to a Civil Court by way of a suit. But in that event, obviously, fresh consent to go to arbitration is necessary."

29. In the above decision, Supreme Court has further held that the words "may be referred" is not a firm or Mandatory Arbitration clause but it only postulates that the parties may go in for arbitration. In my view, the above principle laid down by the Supreme Court squarely applies to the case in hand. Thus I find, Clause 23-A in the Contract Agreement is not a firm or Mandatory Arbitration clause compelling the parties to the only recourse of Arbitration.

7. I am with respect unable to agree with the judgment. Clause 23-A clearly required the disputes to be referred to arbitration. The judgment, however, turns on the interpretation of clause 23-B read with

clause 23-A. Clause 23-B, however, merely conferred exclusive jurisdiction in the event of any legal/judicial proceedings being adopted by the parties. As I mentioned earlier the legal and judicial proceedings can also be in respect of arbitration proceedings. The words legal/judicial proceedings do not refer to suit(s) alone. There are in fact various proceedings other than suits which are brought to a civil Court. In my view, therefore, in that case also, there was a binding arbitration agreement between the parties and clause 23-B did not have the effect of diluting it in any manner whatsoever. Clause 23-B merely required the parties to approach the Courts in Chennai in respect of legal/judicial proceedings which would include arbitration proceedings.

8. I am also unable to agree with the observation that the judgment of the Supreme Court applies to the case before the Madras High Court. Clause 23-A in that case did not contain the words “may be referred”. The words in clause 23-A were “will be settled by arbitration”. The expression in clause 23-A “will be settled by arbitration” cannot be substituted with the words “may be referred”.

9. Mr. Dharmani, learned counsel appearing for the respondent in the alternative submitted that this Court does not have territorial jurisdiction and only the Courts in Jodhpur have territorial jurisdiction to entertain this petition.

10. In paragraph-11 of the petition it is stated that the entire work was executed within the State of Haryana and that the respondent also got the work executed from the petitioner from its branch office at Panchkula, Haryana. The agreement between the parties indicates that it was entered into in Haryana. The photocopy of the agreement dated

30.01.2013 is faint. The original was produced by Mr. Rana, learned counsel appearing for the petitioner, which bears a stamp on the right side at the foot of each page. The stamp refers to the respondent's office at Rewari, Haryana. Paragraph-11 of the affidavit in reply merely denies what is stated in paragraph-11. It is stated that no work was executed regarding the project by either of the parties. The respondents do not state that any part of the cause of action arose in Jodhpur. No part of the cause of action having arisen in Jodhpur, the dismissal of this petition for want of territorial jurisdiction is not warranted.

11. Lastly it was contended that the arbitration clause contained in the agreement perished on account of the respondent having foreclosed the contract with the petitioner. An agreement was entered into between the National Highway Authority of India and Yamuna Nagar Panchkula Highway Pvt. Ltd. (YPH Pvt. Ltd.) for the construction of a road. YPH P. Ltd. in turn entered into a sub contract with the respondent. The respondent further sub contracted a part of the work to the petitioner. It is this sub-contract that is the subject matter of this petition. Mr. Dharmani relied upon clause 12 of the agreement which reads as under:-

"12. FORECLOSURE

If at any time after this P.O. is accepted by you, if our Client decides to abandon or reduce the scope of work for any reason whatsoever and hence not require the whole or any part of the works to be carried out by you under this P.O., we shall give a notice in writing to that effect to you (M/s Sachi Geosynthetics Pvt. Ltd) and you shall immediately on receipt of such notice stop further execution/erection and further arrangement for procurement of materials and shall also furnish progress status report of the work already executed materials supplied and or under manufacture or ordered for or in transit to be delivered at site by M/s Sachi Geosynthetics Pvt. Ltd. in due discharge of the

contract. M/s Sachi Geosynthetics Pvt. Ltd. shall also submit a report on account of the positioning their technical experts/supervisory staff. In such as case of foreclosure of the contract we shall make payment to M/s Sachi Geosynthetics Pvt. Ltd. on account of following, after adjusting the balance amount of advance, if any.

1. Any expenses incurred on preliminary site, work, expenses incurred in positioning of M/s Sachi Geosynthetics Pvt. Ltd.'s staff, technical experts and the likely expenses of this repatriation.
2. Payment for the work already executed and approved.
3. Payment for the material supplied and ordered for or in transit for delivery or under process of manufacturing at the unit price as per the payment terms and all such materials shall be taken over by us."

The arbitration clause, therefore, does not perish merely on account of the respondent foreclosing the contract. Clause-12 itself contemplates a claim by the petitioner even in the case of foreclosure on account of three items mentioned therein.

12. In the circumstances, the petition is disposed of by appointing Mr. R.S.Virk, retired District & Sessions Judge, Haryana, as the sole arbitrator to adjudicate upon the disputes and differences between the parties. The fees shall be as per the Chandigarh Arbitration Centre (CAC) (Administrative Cost and Arbitrator's Fees) Rules, 2014.

17.03.2017
ravinder

(S.J. VAZIFDAR)
CHIEF JUSTICE

Whether speaking/reasoned	√Yes/No
Whether reportable	√Yes/No