

\$~OS-6

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

%

Date of decision: 18.09.2017

+ ARB.P. 342/2017

JK TECHNOSOFT LIMITED

..... Petitioner

Through Ms. Gayatri Verma, Adv.

versus

RAMESH SAMBAMOORTHY

..... Respondent

CORAM:

HON'BLE MR. JUSTICE JAYANT NATH

JAYANT NATH, J. (ORAL)

1. This petition is filed under Sections 11(4) and 11(5) of the Arbitration and Conciliation Act, 1996 seeking appointment of an arbitrator. Some of the relevant facts are that on 20.01.2004 and 22.01.2004 a letter of employment was issued by the petitioner to the respondent which was followed by detailed terms of the letter of employment dated 22.01.2004. The respondent joined the petitioner as 'Senior Vice President, ERP-Practices'. On 01.04.2015, as the respondent was reaching the age of 60 years the parties executed an agreement whereby the respondent was to continue his association with the business of the petitioner as a full-time consultant. It is the case of the petitioner that the respondent resigned from his service on 17.06.2016.

2. Disputes having arisen between the parties, the petitioner invoked the arbitration clause on 04.04.2017. The respondent on 17.04.2017 refuted the contents of the notice of the petitioner. As there was no consensus on the Arbitrator hence, the present petition.

3. I have heard learned counsel for the parties. The learned counsel for

the respondent has vehemently submitted that though he does not deny the arbitration clause but in terms of the arbitration agreement, the parties had to first follow settled procedure of trying to resolve the matter amicably. Having failed to do the needful it is urged that the present petition is premature. He relies upon judgment of the Rajasthan High Court in *M/s Simpark Infrastructure Pvt. Ltd. V. Jaipur Municipal Corporation 2013(1) WLN 111* to support his contention.

4. The learned counsel for the petitioner has relied upon the judgment of this court in *Shri Ravinder Kumar Verma v. BPDT Ltd. 2015 (147) DRJ 175* to contend that this court held while dealing with a similar clause as that of the present petition that such a clause is not mandatory in nature.

5. I may first look at the arbitration clause in question. Clause 6 of the agreement dated 01.04.2016 reads as follows:

“6. GOVERNING LAW AND DISPUTE RESOLUTION

a) This Agreement shall be governed and interpreted by, and construed in accordance with the substantive laws of India, without giving effect to the principles of conflict of laws thereunder.

b) Any and all disputes or differences between the Parties arising out of or in connection with this Agreement or its performance shall, so far as it is possible, be settled amicably through consultation between the Parties or their designated representatives for this purpose.

c) If after 30 (thirty) days of consultation, the Parties at dispute have failed to reach an amicable settlement, on any or all disputes or differences arising out of or in connection with this Agreement or its performance, such disputes or differences shall be submitted to final and binding arbitration at the request

of either of the party upon written notice to that effect to the other.

d) Such arbitration shall be in accordance with the [Indian] Arbitration and Conciliation Act, 1996 and the rules made thereunder (which rules are deemed to be incorporated in this Agreement by reference herein) and shall be held in New Delhi.

e) Arbitration awards rendered shall be final and binding and shall not be subject to any form of appeal. The losing Party(ies), as determined by arbitrators, shall pay all reasonable out-of-pocket expenses (including, without limitation, reasonable attorneys' fees) incurred by the prevailing Party(ies), as determined by the arbitrators, in connection with any dispute unless the arbitrators direct otherwise.”

6. The issue is as to whether the petitioner had followed the procedure as stated above i.e. to try and settle the matter amicably through consultation between the parties and thereafter approach this court for appointment of an arbitrator. Further if that was not done whether the procedure so stated for first carrying out “amicable consultation” can be said to be a mandatory provision.

7. A perusal of the documents filed shows that on 24.02.2017, the petitioner issued a legal notice to the respondent stating that in case the respondent does not cease and desist from directly dealing with the clients of the petitioner in violation of the service agreement then the petitioner shall avail of all remedies under law. The respondent has replied to the legal notice on 18.03.2017 requesting the petitioner to refrain from making false accusations. It was also pointed in the reply by the respondent that all

disputes and differences under the agreement have to be first settled amicably through consultation between the parties. If only the disputes and differences cannot be settled amicably the disputes are to be referred to arbitration.

8. On 04.04.2017, thereafter the petitioner has sent a communication invoking the arbitration clause. Again, the respondent has replied on 17.04.2017 reiterating that prior to appointment of an arbitrator, an attempt should be made to settle the dispute or differences amicably through consultation.

9. Similarly, on 17.04.2017, vide email the respondent has denied his involvement with customers of the petitioner.

10. It is quite clear from the above exchange of legal notices and replies that both parties were not interested in meeting to resolve the issues. Despite exchange of communications dated 24.02.2017 and 18.03.2017 before the invocation of the arbitration clause no meeting took place. It is clear that attempts to settle by consultation was a non-starter. It cannot be said that the terms of the Arbitration Clause was not complied with.

11. In any case, even if it is held that there was no attempt to settle the disputes through consultations, should this petition be dismissed for non compliance of this clause i.e. absence of consultation. The learned counsel for the respondent has relied upon *Simpark Infrastructure Pvt. Ltd. V. Jaipur Municipal Corporation (supra)* to support his contention. In this matter, the Rajasthan High Court was dealing with an arbitration clause which reads as follows:

“16.2 Conciliation

In the event of any Dispute between the parties, either party may require such Dispute to be referred to the Chief Executive Officer and/or Mayor of the Authority and the Director of the Developer for the time being (in case of consortium/JV the director of the Lead Member), for amicable settlement. Upon such reference, the two shall meet at earliest and not later than seven (7) days from the date of reference to discuss and attempt to amicably resolve the dispute. If such meeting does not take place within the period of seven (7) days or Dispute is not amicably settled within fifteen (15) days of the meeting or the Dispute is not resolved as evidenced by signing the written terms of settlement within thirty (30) days of notice in writing referred to in clause 16.1.1 above or such longer period as may be mutually agreed by the parties, either party may refer the Dispute to arbitration in accordance with the provisions of Clause 16.3.”

Interpreting the above clause, the court held as follows:

“28. As regards the submission of Mr. Mahendra Singh that the dispute between the parties was incapable of being resolved by conciliation or reconciliation, or either of the parties may reject the invitation for commencement of the agreed conciliation proceedings within the meaning of Sec. 62(3) of the Act of 1996, I refrain myself from giving the finding on the said issue as the same would touch the merit of the claim which is not permissible for me in view of Para 22.3 of National Insurance Co. (supra), while limiting the scope of Sec. 11(6) which apply with equal force while considering the issue whether the agreed arbitral procedure has been followed or not and further, Sec. 62(3) of the Act of 1996 is not applicable in the present case as the amicable settlement by way of conciliation procedure set forth in Clause 16.1 and 16.2 has been made the condition precedent for invoking clause 16.3 Arbitration with the opening

words "any dispute which is not resolved amicably shall be referred to a panel of three Arbitrators out of the panel of 5 Arbitrators made out by the Authority in terms of Arbitration and Conciliation Act, 1996". In a case where amicable settlement as per the conciliation procedure set forth has been made a condition precedent for invoking the arbitration clause, it is not open to an Applicant to reject the invitation for conciliation.

29. In view of the aforesaid discussion, I am of the view that where (sic) agreed procedure of dispute resolution has been made a condition precedent for invoking the arbitration clause, the same is required to be followed. In the present case, Clause 16.1 for amicable settlement to resolve the dispute in accordance with the procedure set forth in Clause 16.2, is a condition precedent for invoking Clause 16.3 for appointment of Arbitral Tribunal consisting of three Arbitrators out of the panel of five possible Arbitrators made out by the Authority, has not been followed, therefore, the present arbitration application is premature.”

12. It is quite clear that the arbitration clause which was being interpreted by Rajasthan High Court was materially different from the clause which is in issue here. In that case, the clause provided the detailed procedure of how meeting for conciliations/discussions were to take place.

13. The learned counsel for the petitioner has relied upon the judgment of the learned Single Judge of this court in ***Ravinder Kumar Verma v. BPTP Ltd. (supra)***. The arbitration clause which was the subject of the said judgment is materially similar to the present arbitration clause. The said arbitration clause which was in dispute in that case reads as follows:

“All and any disputes arising out of or touching upon or in relation to the terms of this application and/or Standard Floor

Buyer's Agreement including the interpretation and validity of the terms thereof and the respective rights and obligations of the parties shall be settled amicably by mutual discussion failing which the same shall be settled through arbitration. The arbitration proceedings shall be governed by the Arbitration & Conciliation Act, 1996, or any statutory amendments/modifications thereof for the time being in force. The arbitration proceedings shall be held at an appropriate location in New Delhi by a sole arbitrator appointed by the Company. The applicant(s) hereby confirms that he/she shall have or raise no objection to this appointment. The Courts at New Delhi alone shall have the jurisdiction in all matter arising out of/touching and/or concerning this application and/or Floor Buyers agreement regardless of the place of execution of this application which is deemed to be at New Delhi.”

While interpreting the above clause, this court held as follows:

“8(i). In my opinion, there are two other reasons, and which are in addition to the reasoning given in the case of Saraswati Construction Co. (supra) for holding that a prior requirement to be complied with before seeking reference of disputes to the arbitration is only directory and not mandatory

(ii) The first reason is that if the arbitration clause is read in a mandatory manner with respect to prior requirement to be complied with before invoking arbitration, the same can result in serious and grave prejudice to a party who is seeking to invoke arbitration because the time consumed in conciliation proceedings before seeking invocation of arbitration is not exempted from limitation under any of the provisions of the Limitation Act, 1963 including its Section 14. Once there is no provision to exclude the period spent in conciliation proceedings, it is perfectly possible that if conciliation proceedings continue when the limitation period expires the

same will result in nullifying the arbitration clause on account of the same not capable of being invoked on account of bar of limitation i.e when proceedings for reference to arbitration are filed in court, the right to seek arbitration may end up being beyond three years of arising of the disputes and hence the petition for reference may be barred by limitation. Another example would make this position clear that suppose on the last date of limitation period of three years a party wants to invoke an arbitration clause but the arbitration clause contains the requirement of invoking the precondition of 'mutual discussion'. Surely, on the last date if a notice has to be given for invoking mutual discussion, no mutual discussion or conciliation can take place on the same date of the notice itself i.e., no mutual discussion can take place before expiry of the period of limitation which expires on that very day on which the notice for mutual discussion is given. Therefore, if the pre-condition of mutual discussion is treated as mandatory, valuable rights of getting disputes decided by arbitration will get extinguished and which is not a position which should be acceptable in law.

9 (i). Any doubt on this aspect as to whether conciliation proceedings as required by an arbitration clause are directory or mandatory is removed when we refer to Section 77 of the Act, and which is the second reason that the pre-condition of mutual discussion is only a directory requirement and not a mandatory one. Section 77 of the Act states that in spite of conciliation proceedings going on, the existence of the same will not prevent any of the parties to exercise its rights in accordance with law. Section 77 of the Act reads as under:-

“Section 77. Resort to arbitral or judicial proceedings.- The parties shall not initiate, during the conciliation proceedings, any arbitral or judicial proceedings in respect of a dispute that is the subject-matter of the conciliation proceedings except that a

party may initiate arbitral or judicial proceedings where, in his opinion, such proceedings are necessary for preserving his rights." (underlining added)

(ii) Section 77 of the Act specifically uses the expression proceedings which are necessary for preserving rights and therefore if rights are to be preserved on account of limitation expiring, because after expiry of the period of limitation arbitration clause cannot be invoked either by filing of a petition under Section 8 of the Act or under Section 11 of the Act, therefore, existence of conciliation proceedings or mutual discussion should not be a bar for enforcing rights to arbitration either by filing a petition under Section 11 of the Act or by seeking to get the suit dismissed by filing an application under Section 8 of the Act because such proceedings are necessary to preserve rights of getting the disputes decided by arbitration."

I am bound by the above decision of the Co-ordinate Bench of this court as above while interpreting an almost identical arbitration clause which required that first the dispute should be settled amicably by mutual discussion as directed. Hence, there is no merit in the plea of the respondent.

14. Accordingly, I allow the present petition and appoint a sole arbitrator to adjudicate the dispute between the parties. The arbitration proceedings shall be held under the aegis of the Delhi International Arbitration Centre. The Centre may appoint an appropriate person as an arbitrator to adjudicate the dispute between the parties. Copy of the order be sent to DIAC. Petition stands disposed of.

JAYANT NATH, J.

SEPTEMBER 18, 2017/rk