

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION
(COMMERCIAL DIVISION)**

COMM. ARBITRATION APPLICATION NO.66 OF 2017

Hatim Glazing & Cladding Pvt. Ltd.)....Applicant
V/s.

DIL Limited)....Respondent

Ms.Vidhya N.Shet I/by Vaid Associates for the applicant.
Mr.Kunal Mehta a/w Mr.Ashish Kamat and Mr.Arun Unnikrishnan I/by
AAT Legal and Co. for respondent.

CORAM : K.R.SHRIRAM,J

DATE : 24.9.2018

P.C.:-

1. This application is filed under Section 11 of the Arbitration & Conciliation Act 1996 (the said Act).

2. The applicant is appointed as a contractor for supply, installment, testing and handing over of facade works (DW04) for proposed project "Thane-One" for DIL Limited Thane (West)-400 610. It is the case of the applicant that they carried out the work as required under the contract but certain payments have not been made and disputes have arisen between the parties. By a letter dated 9.1.2017 the applicant through its Advocate informed respondent that there are various amounts payable under the contract which the respondent, despite oral assurances, has failed and neglected to honour. The applicant called upon respondent to pay sum of

Rs.1,77,36,210/- being total sum of outstanding amount. It has also been noted that all the invoices have been received by respondent. To this letter, respondent replied through its Advocate's letter dated 18.1.2017 which was a holding letter. On 28.2.2017, as no further reply came from respondents' advocate, applicant through its advocate gave a notice of referring the dispute to arbitration. To this, there was very elaborate reply dated 9.3.2017 followed by another letter dated 7.4.2017. The only point that was raised by Shri Mehta for respondent is that the arbitration clause provides for certain pre-conditions to be met before the dispute could be referred to arbitration and as those pre-conditions have not been met, this reference to arbitration is pre-mature. Mr.Mehta relied upon the judgment of the Apex Court in *Iron & Steel Co. Ltd. Vs. Tiwari Road Lines*¹ to submit that when there is an agreed procedure for resolution of dispute by arbitration, unless the applicant strictly follows the agreed procedure, the question of referring parties to arbitration does not arise.

3. The arbitration clause 1.29 reads as under :-

“DISPUTE RESOLUTION

All disputes, claims and differences of any kind whatsoever arising out of or in connection with this Contract whether during the progress of the work or after their completion shall be referred in writing by the

1 (2007) 5 Supreme Court Cases 703

Contractor to the Client's Representative, and the client shall within ten (10) days from receipt make and notify its decisions thereon in writing to the Contractor.

Decisions, directions, clarifications, measurements, drawings and certificates with respect to any matter the decision for which is specially provided for by these or other special conditions to be given and made by the client's Representative or by the Project Manager are matters which are referred to hereinafter as exempted matters and shall be final and binding upon the Contractor and shall not be set aside on account of non-observance of any formality, any omission, delay or error in proceeding in or about the same or on any other ground or for any reason and shall be without appeal. They shall be specifically excluded from the scope of arbitration proceedings hereinafter referred to.

Subject to the aforesaid in the event of any dispute, claim or difference between the parties hereto as to the construction or operation of this Contract, or the respective rights and liabilities of the parties on any matter in question, dispute or difference on any account or as to the withholding by the Client of any certificate to which the Contractor may claim to be and entitled to or if the Client fails to make a decision within the aforesaid time, then and in any such case, but except in any of the exempted matters referred to in the above clause, shall be resolved by binding arbitration by a sole arbitrator mutually acceptable to the client and the Contractor. In the event the parties fail to appoint a mutually acceptable arbitrator, the sole arbitrator shall be appointed under the provisions of the Indian Arbitration and Conciliation Act, 1996. The award of the Arbitrator shall be final and binding on both the parties. The provision as per the Arbitration and Conciliation Act 1996 shall apply to such arbitration. The arbitration venue shall be at Mumbai. The procedure of the arbitration shall be determined by the arbitrator. The arbitral decision and award shall determine the manner in which the costs of such arbitration shall be shared and borne.

The Contractor shall not, except with the consent in writing of the Client, in any way delay or suspend the carrying out of the Work by reason of such matter, question or dispute being referred to arbitration but shall proceed with the work with all due diligence and shall, until the decision of the arbitrator is given and no award of the arbitrator shall relieve the Contractor of its obligations to adhere strictly to the Client, the Client's Representative's or the Project Manager's instructions with regard to the actual carrying out of the Work except as specifically affected by such award."

4. According to Mr.Mehta sub paragraph-2 of this clause 1.29 provides the issues which are specifically excluded from the scope of arbitration proceeding and unless the client gives details of what the dispute is regarding so that parties can come to a conclusion whether the claims fall under the exempted items, question of referring the disputes to arbitration does not arise. Mr.Mehta also submitted that the applicant straightaway issued a demand notice dated 9.1.2017 through its advocate and did not therefore, follow the procedure prescribed. Mr.Mehta also relied upon recent judgment of the Apex Court in *United India Insurance Co. Ltd. & Anr. Vs. Hyundai Engineering & Construction Co. Ltd. & Ors*²

5. I have considered the arbitration clause. It does not prescribe any procedure as suggested by Mr.Mehta. It only says that

² Civil Appeal No.8146 of 2018 decided on 21.8.2018 (arising out of SLP(C) No.4260 of 2018)

when there are disputes, claims and differences of any kind whatsoever arising out of or in connection with the contract, shall be referred in writing by the contractor to the client's representative and the clients shall within 10 days of receipt to make a decision thereon in writing to the contractor. It also says that if any decision, directions, clarifications, measurements, drawings and certificates with respect to any matter is given, that decision which has been made by the Client's representative or by the Project Managers are matters which are exempted and shall be final and binding upon the Contractor and those shall be excluded from the scope of arbitration proceedings. Rest all can be referred to arbitration. The claim notice dated 9.1.2017 was not replied to within 10 days period. The claim is only for unpaid bills. The claim made is not with respect to any measurement or drawing or certificates issued by respondent. Therefore, the submission of Mr.Mehta that there is a procedure prescribed which has not been followed, is baseless. Even assuming there is a procedure prescribed, the only procedure is claimant should refer in writing to the client all disputes, claim and differences and within 10 days, the client viz. Respondent has to reply. This has been followed by claimant vide its letter dated 9.1.2017. Therefore, this procedure has been complied with. Under Section 11(6A) of the Arbitration & Conciliation Act 1996, the court has to confine itself to

the examination of existence of an arbitration agreement.

6. In the circumstances, since the claim is only for unpaid invoices, I see no reason why I should hold that there is no arbitration agreement.

7. Application therefore allowed.

8. Mr.Sarosh Bharucha an advocate practicing in this court, having his office at 201, Savla Chambers, 40, Cauuasji Patel Street, Fort, Mumbai-400 001, Mobile No.9821034806, is appointed as an arbitrator to arbitrate on Work Order dated 5.2.2014 Ref. No.DIL/THANE ONE/PW 04.

9. The parties shall share the Arbitrator's fees, expenses, administration charges and typing charges if any, equally and the same shall be cost in the arbitral proceeding.

10. Arbitrator to make disclosure in writing directly to the parties as required under Section 11(8) read with section 12(1) of the said Act within two weeks of receiving communication from either of the parties forwarding a copy of this order.

11. Application accordingly disposed.

Jahagirdar
Kiran
Ganesh

Digitally signed
by Jahagirdar
Kiran Ganesh
Date:
2018.09.27
14:36:20 +0530

(K.R.SHRIRAM,J)