

FARAD CONTINUATION SHEET No.
IN THE HIGH COURT OF JUDICATURE AT BOMBAY
NAGPUR BENCH AT NAGPUR

MISCELLANEOUS CIVIL APPLICATION (ARBITRATION) NO. 497/2017

(H.R. DHANKAR, PROPRIETOR M/S H.R. BUILDERS **VERSUS** M/S ABHIJEET PROJECTS LIMITED)

Office Notes, Office Memoranda of Coram,
 appearances, Court's orders of directions
 and Registrar's orders

Court's or Judge's orders

Shri Avinash Trivedi with Shri R.V. Gahilot, counsel for the applicant.
 Shri D.V. Chavan, counsel for the NA-1.
 Shri A.K. De, counsel for the NA-1B.

CORAM : A.S. CHANDURKAR, J.

DATE : AUGUST 02, 2018.

This application has been filed under Section 11(6) of the Arbitration and Conciliation Act, 1996 (for short, 'the said Act') seeking appointment of an Arbitrator to adjudicate upon the disputes between the parties.

According to the applicant, it was awarded the work of construction of a four lane road between Meerut to Shamli pursuant to the communication dated 12.05.2012. Along with the letter of award, the scope of the work, the Commercial Terms and Conditions and other details were supplied to the applicant. As per Clauses 19 and 20 of the Commercial Terms and Conditions agreed, any dispute between the parties was to be discussed and finalized through mutual consent and decision of the employer was treated to be final and binding. A reference was also made to the Arbitration Act, 1996. According to the applicants, there arose disputes between the parties and hence on 16.09.2014 as well as on 01.12.2014, the applicant sought appointment of an Arbitrator for resolving the disputes. In reply, it was stated by the non-applicant no.1 that there was no agreement between the parties for resolving their disputes through arbitration. After exchange of further letters,

the present application came to be filed under Section 11(6) of the said Act.

During pendency of proceedings, the non-applicant no.1 was wound up and an Official Liquidator came to be appointed. Thereafter, the Official Liquidator has filed his reply in which various pleas have been raised to urge that the present application was not tenable. One of the grounds urged is that there was no arbitration agreement entered into between the applicant and the non-applicant no.1 and hence, the present application was liable to be dismissed.

Shri Avinash Trivedi, learned counsel for the applicant, submitted that in view of Clauses 19 and 20 of the Commercial Terms and Conditions agreed between the parties, it was clear that in case of any dispute between the parties, the same was to be resolved through mutual consent. He submitted that a specific reference has been made to the said Act in Clause 20 thereof. In proceedings under Section 11(6) of the said Act, what was required to be examined was only the existence of an arbitration clause and such clause was present in the Commercial Terms and Conditions. All necessary requisites contemplated by Section 7 of the said Act were present and therefore, a case was made out for appointing an Arbitrator to resolve the disputes.

Shri Anjan De, learned counsel for the Official Liquidator, opposed the aforesaid application. He submitted that there was no arbitration agreement between the parties inasmuch as, Clauses 19 and 20 relied upon by the applicant did not indicate that if the dispute between them was not resolved through mutual consent, the dispute would be referred to an Arbitrator. It was submitted that the requirements of Section 7 of the said Act were not fulfilled and to buttress his submission, the learned counsel

placed reliance on the decision of the Hon'ble Supreme Court in *Jagdish Chander Versus Ramesh Chander & Others* [(2007) 5 SCC 719]. It was then submitted that since the winding up proceedings were pending before the Calcutta High Court, the leave of the Company Court was necessary before proceeding with the arbitration. The applicant was merely an unsecured creditor and therefore, its claim was liable to be adjudicated by the Company Court. The learned counsel referred to various provisions of the Companies Act, 1956.

In reply, it was submitted on behalf of the applicant that no such leave of the Company Court was required as the applicant was merely seeking appointment of an Arbitrator to resolve the disputes. Reference was made to the judgment of the learned Single Judge in *Saba Chemicals & Others Versus Siddhartha Bhattacharya & Others* [2015(4) BCR 682]. It is submitted that in any event these aspects would not prevent the Court from appointing an Arbitrator under Section 11(6) of the said Act.

I have heard the learned counsel for the parties at length and I have perused the documents placed on record. The present application having been filed under Section 11(6) of the said Act seeking appointment of an Arbitrator, the sole consideration would be to examine if there was an arbitration agreement between the parties. According to the applicant, as per Clauses 19 and 20 of the Commercial Terms and Conditions on the basis of which the work was carried out, such agreement has been arrived at. Clauses 19 and 20 of that agreement read thus:-

19	<i>Dispute Resolution</i>	<i>Any dispute arisen shall be discussed and finalised on mutual consent. Decision of the Employer shall be final and binding on both the parties.</i>
20	<i>Arbitration Act</i>	<i>As per Arbitration Act 1996.</i>

While considering the prayer under Section 11(6) of the said Act, it would be necessary to first refer to the law as laid down in *Jagdish Chander (Supra)*. In the light of the provisions of Sections 7 and 11 of the said Act, it has been held that mere use of the word “Arbitration” or “Arbitrator” in a clause will not make it an arbitration agreement if it requires or contemplates a further or fresh consent of the parties for reference to arbitration. It has been further observed that any clause in the agreement requiring or contemplating a further consent or consensus before a reference to arbitration is sought, is not an arbitration agreement but an agreement to enter into an arbitration agreement in future. When Clauses 19 and 20 of the Commercial Terms and Conditions are examined in the light of the aforesaid law, it becomes clear that there is no arbitration agreement between the parties. Clause 19 stipulates that any dispute between the parties would be discussed and finalized on mutual consent. The decision of the employer, i.e. the non-applicant no.1 is treated to be final and binding on both the parties. Clause 20 merely refers to the Arbitration Act 1996. It is thus clear that the adjudication by the employer has been made final and binding on the parties. There is no agreement amongst them to further refer the dispute to an Arbitrator by taking recourse to the provisions of the Arbitration and Conciliation Act, 1996. As held in the aforesaid decision, mere mention of the Arbitration Act 1996, cannot be treated as an agreement to arbitration and that the intention of the parties must be clear in that regard. I find that the

ratio of the aforesaid decision applies on all fours to the case in hand. On a reading of Clauses 19 and 20 of the said Commercial Terms and Conditions, it is held that there is no arbitration agreement between the parties.

Once it is found that there is no arbitration agreement between the parties, it is not necessary to further adjudicate upon the other contentions raised by the parties. Keeping those contentions open, the miscellaneous civil application stands dismissed with no order as to costs.

JUDGE

APTE

Rohit
Dattatraya
Apte

Digitally signed by
Rohit Dattatraya Apte
Date: 2018.08.03
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