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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**
Date of Decision: 3rd October, 2018
+ **CS (COMM) 1192/2016 & I.A. 3634/2015**
ASHOO DECOR(INDIA) Plaintiff
Through: Mr. A.K. Verma & Mr. Vibhu Verma,
Advocates (M-98102788022).
versus

AJAY ENTERPRISES PVT LTD & ANR Defendants
Through: Ms. Vidhi Goel & Mr. Vinod Kapoor,
Advocates (M-995860454).

CORAM:
JUSTICE PRATHIBA M. SINGH

Prathiba M. Singh, J. (Oral)

1. The present suit has been filed by the Plaintiff seeking recovery of a sum of Rs.1,42,17,569/- against the Defendants. Defendant No.2 is the Managing Director of Defendant No.1. Defendant No.2 is deleted from the array of parties. Defendant No.1 had floated a tender in response to which the Plaintiff had submitted its bid. Vide letter of intent dated 7th July, 2009, the Plaintiff was awarded the project for Supply, Installation, Testing and Commissioning of Aluminum Structural Glazing (Semi Unitized) and ACP Work for the Defendant's Project: Eros Corporate Park, Block No. K, Sector-2, Manesar, Gurgaon, Haryana. The case of the Plaintiff is that several disputes arose in respect of the said work order, which was issued for a sum of Rs.3,48,65,621/-. The work order was issued after a delay of five months. The Plaintiff submitted the gross final bill for Rs. 5,20,70,080/, against which, it claimed to have received only Rs.4,29,52,667/-. Despite repeated requests and reminders, the outstanding amount was not paid and hence Plaintiff filed the present suit claiming the principal sum of

Rs.88,85,981/-. The suit amount of Rs.1,42,17,569/- includes the interest component of Rs.53,31,588/- on the principal amount.

2. The Defendants have filed an application under Section 8 of the Arbitration and Conciliation Act, 1996. The case of the Defendants is that the work order as also the general terms and conditions contains an arbitration clause, and hence the disputes are liable to be referred to arbitration.

3. The counsel for the Defendants relies upon clause 19 of the work order and clause 2.38 of the general terms and conditions:

“Work Order for Supply, Installation, Testing and Commissioning of Aluminium Structural Glazing (Semi Unitized) & ACP Work for our Project: Eros Corporate Park, Block No. K, Sector-2 Manesar, Gurgaon, Haryana

...

19. Arbitration: In case of any dispute or disagreement between you and our Project team, Managing Director, Mr. Ajay Sood of EROS group will be the sole Arbitrator and his decision will be final binding on you.

“General Conditions of Contract

2.38. DISPUTE

*Any dispute arising out of this contract shall be referred to **Mr. Ajay Sood, Managing Director, Eros group of companies**, whose decision shall be final, binding and conclusive.”*

4. The counsel for the Plaintiff however submits that the above two clauses cannot be construed as arbitration clauses as they do not expressly record that the parties would submit and refer all their disputes to arbitration. Counsel for the Plaintiff specifically relies upon:

- *Discovery Properties & Hotels Pvt. Ltd. v. City and Industrial Development Corporation of Maharashtra Ltd. (CIDCO) 2010 (4) Arb. LR 150 (Bombay)* and
- *Bharat Bhushan Bansal v. U.P. Small Industries Corporation Ltd., Kanpur AIR 1999 SC 899.*

5. In *Discovery Properties (supra)*, the two clauses which were called for interpretation are as under:

“41. Interpretation of general terms and conditions for disposal of plots of land – In case of dispute as regards interpretation of the general terms and conditions of disposal of plots of land and of the invitation of offer or anything therefrom, the final decision rests with Managing Director of CIDCO and will be binding on all parties as the award of arbitrator.

44. Interpretation of general terms and conditions for disposal of plots of land – In case of dispute as regards interpretation of the general terms and conditions of disposal of plots of land and of the invitation of offer or anything therefrom, the final decision rests with Managing Director of CIDCO and will be binding on all parties as the award of arbitrator.”

In the context of these two clauses, the Bombay High Court held as under:

“The Supreme Court held that the mere use of the word "arbitration" or "arbitrator" in a clause will not make it an arbitration agreement. In the present case, a reading of both Clause 44 of the Letter of Allotment and Clause 41 of the bid document shows that parties merely contemplate that the final decision in the event of a dispute as regards the interpretation of the terms and conditions for the disposal of the plot and of the invitation of offer or anything therefrom, would rest with the Managing Director of the Respondent. This decision was to be binding on the parties "as the award of the

Arbitrator". Merely stating that the decision of the Managing Director would be binding on the parties "as the award of Arbitrator" does not constitute an agreement between the parties either to refer their disputes to arbitration nor does it reflect an intention on their part that the Managing Director was to adjudicate upon their disputes as a private tribunal. In these circumstances, in view of the law laid down by the Supreme Court, it is not possible to accede to the contention of the Petitioner."

6. Learned counsel for the Plaintiff has also relied on ***Bharat Bhushan Bansal (supra)*** in which the following clauses were interpreted by the Supreme Court:

"Decision of the Executive Engineer of the UPSIC to be final on certain matters

23. Except where otherwise specified in the contract, the decision of the Executive Engineer shall be final, conclusive and binding on both the parties to the contract on all questions relating to the meaning, the specification, design, drawings and instructions hereinbefore mentioned, and as to the quality of workmanship or materials used on the work or as to any other question whatsoever in any way arising out of or relating to the designs, drawings, specifications, estimates, instructions, orders or otherwise concerning the works or the execution or failure to execute the same whether arising during the progress of the work, or after the completion thereof or abandonment of the contract by the contractor shall be final and conclusive and binding on the contractor.

Decision of the MD of the UPSIC on all other matters shall be final

24. Except as provided in clause 23 hereof, the decision of the Managing Director of the UPSIC shall be final, conclusive and binding on both the parties to the contract upon all questions relating to any claim, right, matter or thing in any way arising out of or relating to

the contract or these conditions or concerning abandonment of the contract by the contractor and in respect of all other matters arising out of this contract and not specifically mentioned herein.”

The Court, interpreting the above clauses, went on to observe:

9. In the present case the Managing Director is more in the category of an expert who will decide claims, rights, on matters in any way pertaining to the contract. The intention appears to be more to avoid disputes than to decide formulated disputes in a quasi-judicial manner. In paragraph 18.067 of Volume 2 of Hudson on Building and Engineering Contracts, Illustration (8) deals with the case where, by the terms of a contract it was provided that the engineer "shall be the exclusive judge upon all matters relating to the construction, incidents and the consequences of these presents, and of the tender, specifications, schedule and drawings of the contract, and in regard to the execution of the works or otherwise arising out of or in connection with the contract, and also as regards all matters of account, including the final balance payable to the contractor, and the certificate of the engineer for the time being, given under his hand, shall be binding and conclusive on both parties". It was held that this clause was not an arbitration clause and that the duties of the engineer were administrative and not judicial.”

The Court further held as under:

“10. Since Clause 24 does not contemplate any arbitration, the application of the appellant under Section 8 of the Arbitration Act, 1940 was misconceived. The appeal is, therefore, dismissed though for reasons somewhat different from the reasons given by the High Court. There will, however, be no order as to costs.”

7. On the other hand, learned counsel for the Defendants relies upon two judgments of the Supreme Court, including, ***Punjab State And Others v. Dina Nath (2007) 5 SCC 28*** wherein the Supreme Court, in the context of the clause set out hereinbelow, observed as under:

"Any dispute arising between the department and the contractor/society shall be referred to the Superintending Engineer, Anandpur Sahib, Hydel Circle No. 1 Chandigarh for orders and his decision will be final and acceptable/binding on both the parties

....

10. We have already noted Clause 4 of the Work Order as discussed hereinabove. It is true that in the aforesaid Clause 4 of the Work Order, the words "arbitration" and "arbitrator" are not indicated; but in our view, omission to mention the words "arbitration" and "arbitrator" as noted herein earlier cannot be a ground to hold that the said clause was not an arbitration agreement within the meaning of Section 2(a) of the Act. The essential requirements as pointed out herein earlier are that the parties have intended to make a reference to an arbitration and treat the decision of the arbitrator as final. As the conditions to constitute an 'arbitration agreement' have been satisfied, we hold that clause 4 of the Work Order must be construed to be an arbitration agreement and dispute raised by the parties must be referred to the arbitrator. In the case of *K.K. Modi v. K.N. Modi* this Court had laid down the test as to when a clause can be construed to be an arbitration agreement when it appears from the same that there was an agreement between the parties that any dispute shall be referred to the arbitrator. This would be clear when we read para 17 of the said judgment and Points 5 and 6 of the same which read as under: (SCC p. 584)

"(5) that the agreement of the parties to refer their disputes to the decision of the tribunal must be intended to be enforceable in law; and

(6) the agreement must contemplate that the tribunal will make a decision upon a dispute, which is already

formulated at the time when a reference is made to tribunal.

13. In view of the aforesaid conditions being satisfied, which were based on the principles laid down by this Court in K.K. Modi's case there cannot be any doubt in our mind that the arbitration agreement does exist. Clause 4 of the Work Order is an Arbitration Agreement. The learned Counsel appearing on behalf of the appellants contended that the ingredients laid down in K.K. Modi are not satisfied in the present case and therefore following the principles laid down in that case, this Court must hold that clause 4 of the Work order cannot be construed as an arbitration agreement. We are unable to accept this contention of the learned counsel for the appellants for two reasons. First, in view of our discussions herein earlier, to the effect that all the ingredients to hold a particular agreement as an arbitration agreement have been satisfied in the preset case. Secondly, the factual situations in the case of K.K. Modi and in the case before us are very different. That case dealt with the evaluation and distribution of assets, which required expert decision rather than arbitration. The clause in the K.K Modi case had a very restricted operation as it dealt with only disputes regarding implementation of contract whereas, in the case before us, clause 4 is much wider in its ambit as it deals with any dispute between the contractor and the department.”

8. Ld. Counsel for the Defendants also relies upon ***Powertech World Wide Limited v. Delvin International General Trading LLC (2012) 1 SCC 361***. The Supreme Court considered the following clause:

“Any disputes arising out of this purchase contract shall be settled amicably between both the parties or through an arbitrator in India/UAE.”

In the context of the above clause, the Supreme Court held as under:

“26. It is in light of these provisions, one has to construe whether the clause in the present case,

reproduced above, in Para 3, constitutes a valid and binding agreement. It is clear from a reading of the said clause that the parties were ad idem to amicably settle their disputes or settle the disputes through an arbitrator in India/UAE. There was apparently some ambiguity caused by the language of the arbitration clause. If the clause is read by itself without reference to the correspondence between the parties and the attendant circumstances, may be the case would clearly fall within the judgment of this Court in Jagdish Chander. But once the correspondence between the parties and attendant circumstances are read conjointly with the petition of the petitioner and with particular reference to the purchase contract, it becomes evident that the parties had an agreement in writing and were ad idem in their intention to refer these matters to an arbitrator in accordance with the provisions of the Act.”

9. A perusal of the clauses in the present case shows that the intention to refer the disputes to arbitration exists not just in the work order but also in the General Conditions of Contract. When one sees the clauses appearing in the work order, it is clear that though the person being appointed as the Arbitrator is the Managing Director, it uses the words “*in case of any dispute or disagreement*”. In clause 2.38 of the General Conditions of Contract, the terms used are “*any dispute arising out of this contract*”. The intention of the parties is to be deciphered not from the use of the words “Arbitrator”, “award”, etc. but from the letter and spirit of the two clauses. A perusal of the clauses reveals that there is no doubt that parties wish to resolve their disputes through a dispute resolution mechanism. The resolution would be of any dispute or disagreement. The clauses in the present case are similar to the clause in ***Punjab State & Ors. v. Dina Nath (supra)***. The agreement itself is not doubted, as both the work order and the

terms and conditions are admitted as having been executed between the parties. The fact that the name of the Managing Director appears in the dispute resolution clause does not by itself take away the intention of the parties to refer the disputes to arbitration.

10. Counsel for the Plaintiff submits that in clause 19, the decision of the Sole Arbitrator is held to be binding only on the Plaintiff and hence this is not an arbitration clause. While the wording of the clauses could have been better, it is clear from a perusal of clause 19 and clause 2.38 that there is a dispute resolution clause between the parties. Parties have agreed to resolve their disputes not through court proceedings but through arbitration.

11. Learned counsel for the Defendants submits that she has no objection if an independent Arbitrator is appointed. The Defendant is also willing for arbitration under the aegis of the Delhi International Arbitration Centre. On both these issues, learned counsel for the Plaintiff submits that he does not have instructions and hence cannot give consent.

12. Under these circumstances, this Court has no option but to refer the matter for arbitration to the named Arbitrator in the contract i.e. Mr. Ajay Sood, who is the Managing Director of the Defendants.

13. The suit is dismissed as not being maintainable. The Section 8 application is allowed. The claims raised by the Plaintiff shall be referred to the named Arbitrator. All claims and counter claims are left open to be adjudicated by the Arbitrator. All pending I.As are disposed of.

PRATHIBA M. SINGH
JUDGE

OCTOBER 03, 2018

Rahul