

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION

M/s.D.K. Infrastructure Pvt. Ltd. ..Applicant
Vs.
M/s.Rajdeep Enterprises & Anr. ..Respondents

M/s.D.K. Infrastructure Pvt. Ltd. ..Applicant
Vs.
M/s.Kapoor Trading & Anr. ..Respondents

P.C.:

1. Heard learned Counsel for the applicant and learned Counsel for the respondents.
2. These are two applications filed under Section 11 of the Arbitration and Conciliation Act, 1996 (for short, “the Act”) whereby the applicant has prayed for appointment of an arbitrator to adjudicate the disputes and differences which are stated to have arisen between the parties under the Work Contract Agreement dated 3 March 2014 and the Work Contract Agreement dated 1 July 2013. Learned Counsel for the parties at the

outset have stated that the facts in both these applications are identical. The arbitration clause as relied on behalf of the applicant is also identical. These applications are therefore being disposed of by this common order. For convenience, the facts in arbitration application (l.) No.124 of 2019 are set out.

3. The applicant is a company registered under the Companies Act, 1956 who entered into an agreement with the respondent M/s.Rajdeep Enterprises, a sole proprietary concern of respondent No.2 Mr.Jiten Bhavanji Vora. The agreement is regarding “contract work” dated 3 March 2014 which pertains to horticulture development and maintenance of gardens/ R.G./P.G./Central Maidan, traffic island, etc. in city/Eastern/Western suburbs. The applicant was awarded a contract by Municipal Corporation of Greater Mumbai for maintenance of these gardens/parks and by the agreement in question, the applicant sub-contracted the work to the respondents.

4. The case of the applicant is that under Clause 19 of the agreement entered with the respondent, “other taxes namely service tax, Vat, etc. as applicable at the time of agreement was to be paid by the respondents”. The applicant has contended that the respondents however did not provide any details or documents in regard to the tax paid, nor the respondents have paid any service tax or other taxes as agreed in clause

19 of the said agreement. It is the case of the applicant that the respondents had also not obtained a “no objection certificate” or “no recovery certificate” from the Service Tax Department in respect of non-applicability of service tax on the transaction and without providing NOC and tax exemption certificate, deposited some cheques and got the same cleared without knowledge and intimation to the applicant. The applicant accordingly stopped payment. As the cheques were dishonoured, the respondents filed a complaint under Section 138 of the Negotiable Instruments Act, 1881, against the applicant, although when there was an agreement to refer the disputes to arbitration. It is also the case of the applicant that the respondents did not perform the work under the agreement and it was delayed and was substandard in quality, hence, the Municipal Corporation imposed various penalties on the applicant. This amount has reached upto Rs.14,36,300/- and now the respondents are liable to pay along with tax liability of Rs.55 Lakhs to the applicant.

5. The arbitration agreement is contained in clause 21 which reads thus:-

- “21. a. All disputes or differences between the PARTIES which may arise out of in relation to or in connection with the AGREEMENT shall be settled amicably between the PARTIES hereto. However, in case any dispute or difference is not so settled, each PARTY shall have the right to arbitration for final settlement in conformity with Arbitration and Conciliation Act, 1996.
- b. The Arbitration shall take place in Mumbai and shall be conducted in English Languages.

c. None of the PARTIES shall be entitled to suspend the performance of the Contract merely by reasons of the reference of a dispute to arbitration.”

6. The applicant accordingly by its letter dated 1 November 2018 invoked the arbitration agreement between the parties as contained in clause 21(a) of the agreement dated 3 March 2014 entered between the parties. The applicant informed the respondents that the applicant is appointing an Advocate of this Court as a sole arbitrator to adjudicate the disputes and differences which have arisen between the parties in terms of the arbitration agreement contained in clause 21 of the said contract agreement. The respondent was requested to confirm the appointment failing which the applicant would be required to file an application in this Court seeking appointment of an arbitrator.

7. The invocation notice of the applicant's Advocate was responded by a letter dated 29 November 2018, of the respondent's Advocate, thereby disputing the claims made by the applicant in regard to the amounts which are due and payable. The respondents made a counter-claim relying on several other facts and refused to appoint an arbitrator. The relevant extract of the reply of the respondent's Advocate is required to be noted which reads thus:-

“ Under the circumstances I do not agree to submit to arbitration and, your clients are hereby called upon by my client to pay outstanding amount of Rs. 65,40,245/- (Rupees Sixty-five Lakh Forty Thousand Two Hundred Forty-five Only) and Rs. 10,00,701/- (Rupees Ten Lakh

Seven Hundred One Only) deposit amount kept with You i.e. total Rs. 75,40,946/- (Rupees Seventy-Five Lakh Forty Thousand Nine Hundred Forty-Six only) with 18% interest till entire payment made to my client and withdraw letter dt. 31.10.2018 and 1.11.2018. Notwithstanding the aforementioned, and without prejudice to the refusal to submit to arbitration, in any event I do not agree to a sole arbitrator.”

8. The Advocate for the applicant thereafter again by his letter dated 15 February 2019 reiterated the applicant's request and called upon the respondents to appoint an arbitrator failing which at the costs of the respondents, an application under Section 11 of the Act would be required to be filed in this Court. There was no reply to this second notice of the applicant's Advocate. Accordingly, the present application is filed under Section 11(6) of the Act praying for appointment of an arbitrator as also in prayer clause (b), there is prayer for costs of Rs.1 Lakh to be awarded under Section 31(A) of the Act.

9. The respondent has filed a reply affidavit. Surprisingly, the respondent has asserted that there is no arbitration agreement between the parties. Although such a position was not taken in the reply to the applicant's notice invoking the arbitration. In paragraph 3 of the reply, the respondent states that the respondent is opposed to any relief granted to the applicant in the present proceedings as there is no agreement in accordance with Section 7 of the Act. It is however stated that in the letter dated 28 December 2018 of the Advocate for the respondent addressed to the applicant's Advocate, the respondent has refused to

submit to arbitration. On merits the claim of the applicant to the amounts is also disputed.

10. It is on the above backdrop, I have heard learned Counsel for the parties. Learned Counsel for the applicant pointing out clause 21(a) of the agreement in question would submit that the said clause is clearly an arbitration agreement, between the parties whereby the parties have agreed that in case any dispute or difference is not settled amicably, then the parties have “right to arbitration”, for final settlement of the disputes in conformity with Arbitration and Conciliation Act, 1996. It is contended that clause 21(b) further clearly records that the arbitration shall take place at Mumbai and shall be conducted in English language. It is her submission that the disputes have arisen between the parties and accordingly, a notice invoking arbitration as per the requirement of under Section 21 of the Act was issued on behalf of the applicant on 1 November 2018 to the respondent. It is submitted that although the contents of the notice on merits of the disputes were disputed in the respondent's Advocate's reply dated 29 November 2018, however the respondent never disputed the arbitration agreement between the parties, much less in any clear terms. It is submitted that now for the first time in this proceedings stand is taken by the respondents that an arbitration agreement between the parties does not exist, which is completely untenable and contrary to the plain reading of clause 21(a) of the

agreement between the parties, as also it is a stand clearly not maintainable considering the provisions of Section 7 of the Act. It is submitted that the whole intention of the respondent is to avoid arbitration and deny the claims as made by the applicant.

11. On the other hand, learned Counsel for the respondents would submit that as contended by the respondent in the reply affidavit, there is no arbitration agreement between the parties. It is submitted that the language of the clause 21(a) supports the contention of the respondent of the absence of any arbitration agreement. This for the reason that the clause only confers a right on the party to arbitration and that a right cannot be an agreement/consent for arbitration, and thus, the arbitration clause in question cannot be held to be an arbitration agreement in the meaning of Section 7 of the Act. To support this contention, learned Counsel for the respondents while referring to the definition of arbitration agreement as contained in Section 7 of the Act, contends that Section 7 recognises only an arbitration agreement and not any right to arbitration. In support of the submissions, reliance is placed on the decision of the Supreme Court in **Ssangyong Engineering & Construction Co. Ltd. v. National Highways Authority of India (NHAI)**¹ and decision of Calcutta High Court in **Jyoti Brothers v. Shree Durga Mining Co.**². It is accordingly submitted that the application be rejected.

1 Civil Appeal No.4779 of 2019

2 (1956) Cal. 280 (AIR V. 43 C. 95 June)

12. Having heard learned Counsel for the parties and having perused the record, I am not persuaded to agree to the submissions as urged on behalf of the respondents, that the arbitration clause in question is not an arbitration agreement, and more particularly from a plain reading of Clause 21(a). It is required to be noted that clause 21(a) is a part of written agreement dated 3 March 2014 entered between the parties in the contract work in question. The parties have clearly agreed in clause 21(a), that first an attempt would be made between the parties to amicably resolve the disputes and in case the disputes are not amicably settled, “*each party*” shall have, ‘*a right*’ to arbitration for final settlement of the disputes in conformity with Arbitration and Conciliation Act, 1996. Further as per clause 21(b), the place of arbitration is agreed to be at Mumbai. Thus a cumulative reading of the Clauses 21(a) and 21(b) clearly conforms to all requirements of Section 7 of the Act namely that the intention on the part of the parties to confer a right on the parties, for settlement of the disputes by arbitration, in conformity with the Arbitration and Conciliation Act, 1996. It is not the case of the respondents that the parties in any manner have revoked the said agreement or their rights which are conferred under clause 21(a), and/or that the agreement under clause 21(a) are not in existence, so that a situation is created, that what is agreed in the said clause is not available to the parties. It would be thus required to be held that necessarily there

is an arbitration agreement between the parties.

13. The contention as urged by learned Counsel for the respondents that clause 21(a) merely confers a right and is not an agreement, cannot be accepted. Clause 21(a) forms part of the agreement dated 3 March 2014 entered between the parties, under which the parties have agreed to confer and provide a right to the parties to seek arbitration. Even assuming that the clause 21(a) is to be read as an independent clause distinct from the main agreement, nonetheless the intention of the parties as clearly inferred from the plain wordings of the clause, that a right to arbitration is available to the parties cannot in any manner be displaced by any other interpretation as suggested on behalf of the respondents. In my opinion, the parties have clearly intended that the parties have agreed to refer the disputes and differences which may arise between the parties to arbitration, in the event they are not amicably settled.

14. The arbitration clause would be required to be held as an arbitration agreement between the parties also applying the settled principles of law as laid down by the Supreme Court, in construing such agreements as falling under Section 7 of the Act. It would be appropriate to refer to the decision of the Supreme Court in **Jagdish Chander -vs- Ramesh Chander and others**³ in which the Supreme Court taking a review of the earlier decisions and interpreting section 7 of the Arbitration

3 (2007) 5 SCC 719

and Conciliation Act, 1996, has made following observations to lay down as to what would constitute an arbitration agreement:-

“8. This Court had occasion to refer to the attributes or essential elements of an arbitration agreement in *K K Modi v. K N Modi* [1998 (3) SCC 573], *Bharat Bhushan Bansal vs. U.P. Small Industries Corporation Ltd.* [1999 (2) SCC 166] and *Bihar State Mineral Development Corporation v. Encon Builders (I)(P) Ltd.* [2003 (7) SCC 418]. In *State of Orissa v. Damodar Das* [1996 (2) SCC 216], this Court held that a clause in a contract can be construed as an 'arbitration agreement' only if an agreement to refer disputes or differences to arbitration is expressly or impliedly spelt out from the clause. We may at this juncture set out the well settled principles in regard to what constitutes an arbitration agreement :

(i) The intention of the parties to enter into an arbitration agreement shall have to be gathered from the terms of the agreement. If the terms of the agreement clearly indicate an intention on the part of the parties to the agreement to refer their disputes to a private tribunal for adjudication and a willingness to be bound by the decision of such tribunal on such disputes, it is arbitration agreement. While there is no specific form of an arbitration agreement, the words used should disclose a determination and obligation to go to arbitration and not merely contemplate the possibility of going for arbitration. Where there is merely a possibility of the parties agreeing to arbitration in future, as contrasted from an obligation to refer disputes to arbitration, there is no valid and binding arbitration agreement.

(ii) Even if the words 'arbitration' and 'arbitral tribunal (or arbitrator)' are not used with reference to the process of settlement or with reference to the private tribunal which has to adjudicate upon the disputes, in a clause relating to settlement of disputes, it does not detract from the clause being an arbitration agreement if it has the attributes or elements of an arbitration agreement. They are : (a) The agreement should be in writing. (b) The parties should have agreed to refer any disputes (present or future) between them to the decision of a private tribunal. (c) The private tribunal should be empowered to adjudicate upon the disputes in an impartial manner, giving due opportunity to the parties to put forth their case before it. (d) The parties should have agreed that the decision of the Private Tribunal in respect of the disputes will be binding on them.

(iii) Where the clause provides that in the event of disputes arising between the parties, the disputes shall be referred to Arbitration, it is an arbitration agreement. Where there is a specific and direct expression of intent to have the disputes settled by arbitration, it is not necessary to set out the attributes of an arbitration agreement to make it an arbitration agreement. But where the clause relating to settlement of disputes, contains words which specifically excludes any of the attributes of an arbitration agreement or contains anything that detracts from an arbitration agreement, it will not be an arbitration agreement. For example, where an agreement requires or permits an authority to decide a claim or dispute without hearing, or requires the authority to act in the interests of only one of the parties, or provides that the decision of the Authority will not be final and binding on the parties, or

that if either party is not satisfied with the decision of the Authority, he may file a civil suit seeking relief, it cannot be termed as an arbitration agreement.

(iv) But 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. For example, use of words such as "parties can, if they so desire, refer their disputes to arbitration" or "in the event of any dispute, the parties may also agree to refer the same to arbitration" or "if any disputes arise between the parties, they should consider settlement by arbitration" in a clause relating to settlement of disputes, indicate that the clause is not intended to be an arbitration agreement. Similarly, a clause which states that "if the parties so decide, the disputes shall be referred to arbitration" or "any disputes between parties, if they so agree, shall be referred to arbitration" is not an arbitration agreement. Such clauses merely indicate a desire or hope to have the disputes settled by arbitration, or a tentative arrangement to explore arbitration as a mode of settlement if and when a dispute arises. Such clauses require the parties to arrive at a further agreement to go to arbitration, as and when the disputes arise. Any agreement or clause in an agreement requiring or contemplating a further consent or consensus before a reference to arbitration, is not an arbitration agreement, but an agreement to enter into an arbitration agreement in future.

15. In so far as the decisions as relied on behalf of the respondents, there can be no dispute on the proposition the judgments lay down, however considering the facts of the present case, these decisions are certainly not applicable. More so in the decision of the Calcutta High Court, the Court was considering a clause which was completely different from the clause in the present proceedings. Having come to the conclusion that there is a binding arbitration agreement, the applications need to succeed. They are accordingly allowed by following order:-

ORDER

(i) Mr. Akshay Patil, Advocate of this Court, is appointed as a sole Arbitrator to arbitrate the disputes and differences between the parties under the Works Contract Agreement dated 3 March 2014 and Works Contract Agreement dated 1 July 2013;

- (ii) The learned prospective sole arbitrator, fifteen days before entering the reference, shall forward a statement of disclosure as per the requirement of Section 11(8) read with Section 12(1) of the Arbitration and Conciliation Act, 1996, to the Prothonotary & Senior Master of this Court, to be placed on record of these applications with a copy to be forwarded to both the parties;
- (iii) The fees payable to the arbitral tribunal shall be as prescribed under the Bombay High Court (Fees Payable to Arbitrators) Rules, 2018.
- (iv) At the first instance, the parties shall appear before the prospective arbitrator within three weeks from today on a date which may be mutually fixed by the prospective sole arbitrator;
- (v) All contentions of the parties are expressly kept open;
- (vi) The applications are disposed of in the above terms. No costs.
- (vii) Office to forward a copy of this order to the learned Arbitrator on the following address:

“6A, Sindhu House,
3/5 Nanabhai Lane,
Fort, Mumbai-40001
Mobile: 9892252175
E-Mail: ap.akshay@gmail.com”

[G.S. KULKARNI, J.]