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IN THE HIGH COURT OF JUDICATURE AT BOMBAY**ORDINARY ORIGINAL CIVIL JURISDICTION****COMMERCIAL ARBITRATION APPLICATION NO. 18 OF 2019**

B.E.Billimoria and Co.Ltd.

..Applicant

Vs.

1.Lotus Enterprises & Ors.

..Respondents

Mr.Maulik Tanna, for the Applicant.

Mr.Karl Tamboly with Mahek Kamdar i/b. Kanga & Co., for the Respondents.

CORAM : G.S. KULKARNI, J.**DATE : 18 September, 2019****P.C.:**

1. Heard the learned Counsel for the applicant and the learned Counsel for the respondents.

2. This is an application filed under Section 11 of the Arbitration and Conciliation Act,1996 (for short 'the Act') whereby the applicant has prayed for appointment of an arbitral tribunal, contending that the disputes and differences have arisen between the parties under the Work Order dated 28 April 2014. It is contended that there is an arbitration agreement between the parties referring to Clause 10 of Part B of the work order which reads thus:-

“10. In the absence of any Contract Documents, the contract shall be governed by FIDIC (Indian version).”

3. The case of the petitioner is that the parties have agreed to be governed by FIDIC (Indian Version). My attention is drawn to the

correspondence which has ensued between the parties which shows that the arbitration agreement was invoked and as the respondent was not agreeable for the disputes being referred to the arbitral tribunal, the present petition was required to be filed.

4. On the other hand, learned Counsel for the respondents at the outset would submit that there is no arbitration agreement between the parties. It is his submission that clause 10 can in no manner be treated as an arbitration agreement. My attention is also drawn to the respondents disputing the notices issued on behalf of the petitioner referring to the arbitration agreement. Learned Counsel for the respondents has drawn my attention to a letter dated 11 March 2017 of the respondents addressed to the petitioner wherein the petitioner was clearly informed that the respondents are not agreeing to any arbitration. The respondents in paragraph (3) has stated thus:-

“3. Further we have also informed you that we have not agreed for any person to intervene in the matter but you are continuously providing the information and there is no Question to appoint any Arbitrators as it was not agreed at any point of time by us and you have commenced the work after executing the contract.”

5. My attention is drawn to a further letter dated 17 March 2017 of the respondents where the respondents denied the existence of the arbitration agreement, as set out in paragraph 11 of the said letter which reads thus:-

“11. With respect to the purported initiation of arbitration proceedings against us, you may note that the Contract does not provide for the reference of any dispute, which may subsist between the parties, to arbitration. Your interpretation of Part B Clause 10 of the Contract, whereby you have sought to trigger clause 20.6 of the FIDIC Conditions of Contract, is misconceived and erroneous. As you may be aware, the applicable law expressly states that, to be valid, an arbitration agreement must clearly express the will of the parties to waive the jurisdiction of the courts in India, in favour of a private arbitral tribunal. It is only when that intent is clearly established that the rest of the interpretation of the arbitration agreement – or that of a

compulsive arbitration clause – can be done with a view to ensuring that the arbitration takes place. Therefore, your reference of the present dispute to arbitration is baseless and untenable. In fact, clause 10 of the Contract clearly provides that where there is no contract between the parties, the FIDIC Rules shall apply and not to this Contract. Thus, any work that may be assigned to you outside the scope of the Contract would be said to be covered under Clause 10. Despite the aforesaid, if you yet choose pursue the arbitration proceedings as stated in the Arbitration Notice, we shall be constrained to initiate legal proceedings to quash the same, before the appropriate authority/forum having jurisdiction to do so entirely at your costs and consequences, which please note”

6. Learned Counsel for the respondents has also placed reliance on “*M.R.Engineers and Contractors Pvt.Ltd. Vs. Som Datt Builders Ltd.*”¹ and more particularly paragraphs 14, 15 and 19 to contend that in what circumstances it can be said that there is an arbitration agreement between the parties. Paragraphs 14, 15 and 19 read thus:-

“14. The wording of Section 7(5) of the Act makes it clear that a mere reference to a document would not have the effect of making an arbitration clause from that document, a part of the contract. The reference to the document in the contract should be such that shows the intention to incorporate the arbitration clause contained in the document, into the contract. If the legislative intent was to import an arbitration clause from another document, merely on reference to such document in the contract, sub-section (5) would not contain the significant later part which reads: “and the reference is such as to make that arbitration clause part of the contract”, but would have stopped with the first part which reads”:

“7. (5) The reference in a contract to a document containing an arbitration clause constitutes an arbitration agreement if the contract is in writing”

15. Section 7(5) therefore requires a *conscious* acceptance of the arbitration clause from another document, by the parties, as a part of their contract, before such arbitration clause could be read as a part of the contract between the parties. But the Act does not contain any indication or guidelines as to the conditions to be fulfilled before a reference to a document in a contract can be construed as a reference incorporating an arbitration clause contained in such document into the contract. In the absence of

1 (2009)7 SCC 696

such statutory guidelines, the normal rules of construction of contracts will have to be followed.

... ..

19. Sub-section (5) of Section 7 merely reiterates these well-settled principles of construction of contracts. It makes it clear that where there is a reference to a document in a contract, and the reference shows that the document was not intended to be incorporated in entirety, then the reference will not make the arbitration clause in the document, a part of the contract unless there is a special reference to the arbitration clause so as to make it applicable.”

7. I find myself in complete agreement with the respondents. Applying the well settled principles of law, I am of the clear opinion that there is no arbitration agreement between the parties and more particularly as contained in Clause 10 of the work order. The application is accordingly misconceived. The applicant would not be entitled to the reliefs under Section 11 of the Act. It is accordingly rejected. The applicant is at liberty to pursue appropriate proceedings. All contentions of the parties in that regard are expressly kept open.

[G.S. KULKARNI, J.]