

THE HONOURABLE SRI JUSTICE M.S.RAMACHANDRA RAO

Arbitration Application No.38 of 2018

ORDER :

This Arbitration Application is filed under Section 11(6) of the Arbitration and Conciliation Act, 1996 to appoint an Arbitrator to adjudicate the dispute between the applicant and three respondents.

2. It is contended that the 1st respondent desired to fit-out certain new offices in Hyderabad and floated a Request for Proposal dt.09.06.2016 (hereinafter referred to as 'R.F.P.') for 'Design-Build and Turnkey of Flydubai's India Development Center (I.D.C.) Offices Fit-Out Works' (hereinafter referred to as 'the Project') on a lumpsum basis; that the applicant bid for the project and after detailed correspondence between the applicant and 1st respondent, the 1st respondent issued a 'Letter of Acceptance' dt.21.09.2016 (hereinafter referred to as 'L.O.A.') in favour of applicant; that under the said L.O.A., the contract price was Rs,4,30,00,299/- and the time for completion of works was 45 days from the commencement date; that the L.O.A. further provided that a contract would be compiled upon receipt of final layout, programme of works and drawings approved by relevant authorities; that a formal contract titled 'Contract Documents for Fit-Out Works', was entered between the applicant (as the Contractor) and 1st respondent (as the Employer) in November, 2016; and that the following documents are deemed to form part of the contract, viz., (a) The Conditions of Contract; (b) The Employer's

Requirement (Part I); (c) The Employer's Requirement (Part II); (d) Preambles to Schedule of Rates; (e) The Schedule of Rates; (f) Contractor's Responsibility for Design and Drawings; and (g) Letter of Award.

3. It is further contended that as per the Project Schedule at Appendix F to the Contract, the works were to commence on 11.10.2016 and be completed within (45) days thereof, i.e., on or before 24.11.2016; that later, under an e-mail dt.25.11.2016, time for completion was extended up to 30.11.2016 on the condition that all works would be completed and the site will be ready by 30.11.2016; and in the event that all works are not completed by 30.11.2016, liquidated damages would be applied from 24.11.2016.

4. It is contended by the applicant that it executed the works for which some interim payments were released on 23.12.2016, 23.03.2017 and 05.07.2017; some extra items were installed which were approved by 2nd respondent's representative; the applicant raised an invoice for additional works but only Rs.6,51,285/- was sanctioned and Rs.26,64,705.06 ps. was unpaid. It is further contended that 5% of the Contract Price, which is the retention amount, was to be released upon issuance of taking over certificate against unconditional and irrevocable Bank guarantee with an operative period of (12) months post handing over and termed as 'Defects Liability Period' (01.01.2017 to 31.12.2017), but this was not refunded.

5. It is contended by the applicant that it commenced its work on 11.10.2016, that the date of completion of the work was 24.11.2016 and though time was extended till 30.11.2016, the works were not completed due to the fault of the respondents; and that payments were not released by the respondents for works done under revised work subsequent to the issuance of 'Letter of Acceptance'.

6. It is contended that applicant requested the respondent no.2 to settle the dispute or nominate its arbitrator to resolve the disputes between the parties through notice dt.06.11.2017; but the 2nd respondent did not nominate its arbitrator or settle the matter by negotiation and release the amounts payable to the petitioner; that the amounts payable to the applicant are (i) the retention amount of Rs.21,82,579.25 ps and (ii) amounts due under Invoice for additional works amounting to Rs.26,64,705.06 ps; and the applicant is entitled to receive Rs.48,47,282.31 ps from the respondents.

7. The applicant relied upon Clause 20.6 of the Contract and contended that this Court should appoint as 'Sole Arbitrator', a Retired District Judge for deciding the disputes between the applicant and the respondents.

8. Clause 20.6 of the General Conditions of Contract dt.28.11.2016 between the parties states :

"In the event of any dispute arising out of or in connection with this Agreement, including any question regarding its existence, validity or termination, within seven (7) calendar days of such dispute arising,

*the Parties' representatives shall seek to negotiate a resolution. If the Parties are unable to resolve the matter within seven (7) calendar days from the dispute arising the **matter may be referred** to and finally resolved by arbitration."*

9. To this, the parties had added vide Appendix to Tender the following :

"Insert the following paragraph at the end of the first paragraph of this Sub-Clause :

Each party shall nominate one member, with one member being nominated by the Hyderabad Court (who shall act as the chairman of the three member committee)."

10. It is the contention of the respondent no.1 that the above Clause 20.6 is to be understood as suggesting that the dispute *may* be referred to arbitration; and so, the Clause is not intended to be an arbitration agreement. It is contended that under such a clause, parties merely indicated a desire to have the dispute settled by arbitration and it is only a tentative agreement to explore arbitration as a mode of settlement, if and when a dispute arises. It is contended that such clauses require parties to arrive at a further agreement to refer them to go to arbitration. Though in the F.I.D.I.C. Conditions of Contract the arbitration clause stated that disputes *shall* be finally decided by international arbitration, this phrase was consciously amended in the contract by the parties making it only a tentative agreement to explore arbitration when disputes arise. It is contended that there is no valid and binding agreement between the parties to refer disputes to arbitration.

11. It is contended that under Section 11 (6-A) of the Act, a Court, while considering an application for appointment of Arbitrator has to confine itself to the existence of an arbitration agreement; and since there is no valid arbitration agreement between the parties, the instant arbitration application is not maintainable. It is contended by counsel for the respondents that applicant has to file a civil suit for recovery of the amounts claimed by it.

12. It is also contended that the 3rd respondent is not a legal entity and it is only the name of the project where the applicant was to carry out works and no action can be brought against it.

13. It is also contended that the contract was executed between 1st respondent and the applicant only; that respondent nos.2 and 3 are not parties to the contract; and there is no cause of action to implead them to the application.

14. The contentions on merits raised by the applicant were disputed.

15. The applicant filed a reply contending that 2nd respondent is a necessary party because the 'Letter of Acceptance' was issued by the 2nd respondent and was subscribed by 1st respondent and stamped by 2nd respondent. It is also contended that 2nd respondent is the foreign company of which the 1st respondent is the Indian subsidiary incorporated and registered with the Registrar of Companies, New Delhi; that communications by e-mail were between the team of the

2nd respondent and the applicant; that the ‘Letter of Acceptance’ was drawn on the letter-head of 2nd respondent and contains the seal of the 2nd respondent. It is also contended that 1st respondent did not give any instructions regarding execution of the work and representatives of 2nd respondent were flying from Dubai during execution and instruction. It is also contended that sub-Clause 20.6 of the Contract was received in the e-mail of 2nd respondent and was signed and sent to 2nd respondent.

16. It is also contended by counsel for the applicant that since Clause 20.6 uses the words “*the matter may be referred to and **finally resolved by arbitration***”, it has to be construed that the parties clearly intended that only arbitration should be the method to resolve their disputes.

17. I have noted the contentions of both sides.

18. The question which arises for consideration is :

“Whether the parties desired the dispute to be resolved only by arbitration or not ?”

19. I have already extracted the Clause 20.6 in the General Conditions of Contract.

20. It contemplates that if a dispute arises between the parties, they should first seek to negotiate a resolution; and if they are unable to resolve it in seven days, the matter *may* be referred to and finally

resolved by arbitration. No doubt, the Appendix to Tender added that each party *shall* nominate one member, with one member being nominated by the Hyderabad Court who shall act as the Chairman of the Three-Member Committee.

21. In Wellington Associates Ltd. vs. Kirit Mehta¹, the Supreme Court considered an arbitration clause [Clause (5)] which stated “*it is also agreed by and between the parties that any dispute or differences arising in connection with these presents may be referred to arbitration in pursuance of the Arbitration Act, 1947, by each party appointing one arbitrator and the arbitrators so appointed selecting an umpire*”. The Supreme Court held that the preceding clause (4) in the agreement desired that disputes between parties should be adjudicated in a suit by the Civil Courts at Bombay; that Clause (5) suggests that parties need not necessarily go to the Civil Court by way of suit, but can also go before an arbitrator; that it is only an enabling provision. It observed that normally, there is a sole arbitration clause couched in mandatory language and it is not preceded by a clause disclosing a general intention of the parties to go before a civil court by way of a suit; and it suggests that parties can “also” go to arbitration in case the aggrieved party does not wish to go to a civil court by way of a suit, but in that event, fresh consent to go to arbitration is necessary. It observed that the Clause (5) is not a firm or

¹ (2000) 4 S.C.C. 272

mandatory arbitration clause and it postulates a fresh agreement between the parties that they will go to arbitration.

22. In **Jagdish Chander vs. Ramesh Chander and others**², the Supreme Court considered an arbitration clause which stated :
“If during the continuance of the partnership or at any time afterwards any dispute touching the partnership arises between the partners, the same shall be mutually decided by the partners or shall be referred for arbitration if the parties so determine”. The Supreme Court held that if the clause had merely said that in the event of disputes arising between the parties, they “shall be referred to arbitration”, then it would have been an arbitration agreement; but the use of the words “shall be referred for arbitration if the parties so determine” completely changes the complexion of the provision. It held that the expression “determine” indicates that the parties are required to reach a decision by application of mind, i.e., it is not an arbitration agreement, but a provision which enables arbitration only if the parties mutually decide after due consideration as to whether the disputes should be referred to arbitration or not. In effect, the clause requires the consent of parties before the disputes can be referred to arbitration and the main attribute of an arbitration agreement, i.e., *consensus ad idem* to refer the disputes to arbitration is missing in the above clause relating to settlement of disputes; and consequently it is

² (2007) 5 S.C.C. 719

not an arbitration agreement and there is no question of exercising power under Section 11 of the Act to appoint an arbitrator.

23. The counsel for applicant placed reliance on the decision in **Powertech World Wide Limited vs. Delvin International General Trading LLC**³ and contended that the decision in **Wellington Associates** (1 supra) was distinguished in the said judgment. He also relied on a statement in para 20 of the said judgment that no party can be allowed to take advantage of inartistic drafting of arbitration clause in any agreement as long as clear intention of the parties to go for arbitration in case of any future disputes is evident from the agreement and the material on record including the surrounding circumstances. In that case, the arbitration clause stated : “*any disputes arising out of this purchase contract shall be settled amicably between both the parties or through an arbitrator in India / U.A.E.*”. Interpreting the said clause, the Supreme Court held that there was apparently some ambiguity caused by the arbitration clause, but the correspondence between the parties makes it clear that 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. The Court then referred the correspondence between the parties and, in particular, a letter addressed by the respondent to the applicant wherein the respondent neither denied the existence nor the binding nature of the arbitration clause. On the contrary, it had requested the

³ (2012) 1 S.C.C. 361

applicant not to take any legal action for appointment of an arbitrator, as they wanted to suggest some other name as an arbitrator, that too, subject to consent of the petitioner. So, the court held that this letter conclusively proves that the respondent had admitted the existence of an arbitration agreement between the parties and consented to the idea of appointing a common / sole arbitrator to determine the disputes between the parties.

24. Such is not the situation in the instant case. Though in the correspondence exchanged between the parties there was discussion about the language of the arbitration clause, it is apparent that the respondent wanted arbitration under London Court of International Arbitration at D.I.F.C., Dubai, U.A.E., but the applicant refused the said proposal in its letter dt.07.09.2016. Counsel for the applicant however contended that parties had disagreed about the place of arbitration and the rules which would apply to it, but had agreed in principle for arbitration. I do not accept the said contention because parties are required to agree specifically to arbitration, and may also agree to the rules which govern the arbitration as well as the venue for arbitration. There being no such consensus, it cannot be said that parties had agreed mandatorily for arbitration.

25. This conclusion is also supported by the fact that the F.I.D.I.C. conditions of contract use the terms “any dispute ... *shall* be finally decided by international arbitration”. Though the Letter of Acceptance dt.21.09.2016 referred to the F.I.D.I.C. conditions of

contract, in the General Conditions Of Contract signed by the parties on 28.11.2016 they adopted Clause 20.6 as extracted above and used the words “*the matter may be referred to and finally resolved by arbitration*”. Therefore, there is a deliberate departure by the parties from the wording of the arbitration clause as mentioned in the F.I.D.I.C. Conditions Of Contract.

26. In my opinion, Clause 20.6 merely indicates a desire of the parties to have the dispute settled by arbitration and it is only a tentative agreement to explore arbitration as a mode of settlement, if and when a dispute arises. Such clauses require parties to arrive at a further agreement to refer them to go to arbitration.

27. Though counsel for applicant placed emphasis on the words “and finally resolved by arbitration” as indicating the mandatory nature and intention of the parties to go for arbitration, in my opinion, the said words do not convey any such intention and are wholly unnecessary because if they intended to go for arbitration, the dispute will anyway be finally resolved by arbitration.

28. For the aforesaid reasons, I hold that there is no arbitral agreement between the parties, that clause 20.6 conveys only a tentative agreement to refer disputes to arbitration, and therefore no relief can be granted to the applicant in this application.

29. This application is therefore dismissed. No costs.

30. This Court has not expressed any opinion on the other contentions canvassed by both sides because it is not necessary for it to do so.

31. As a sequel, miscellaneous applications, pending if any, shall stand closed.

JUSTICE M.S.RAMACHANDRA RAO

Date: 01.05.2019

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