

IN THE HIGH COURT OF PUNJAB AND HARYANA AT CHANDIGARH

Arbitration Case No.130 of 2017 (O&M)

DATE OF DECISION: 08.02.2019

M/s Shivam Trading Company

....Applicant

versus

State of Haryana and others

.....Respondents

CORAM:- HON'BLE MR.JUSTICE KRISHNA MURARI, CHIEF JUSTICE

Present: Shri Satnam Singh Thakur, Advocate for
Shri Abhimanyu Singh, Advocate for the applicant
Shri Deepak Balyan, Additional Advocate General,
Haryana

..

KRISHNA MURARI, CHIEF JUSTICE (Oral):

This is an application under Section 11(6) of the Arbitration and Conciliation Act, 1996, for appointment of an arbitrator.

Admittedly, there exists an agreement between the parties, clause 26 whereof contains an arbitration clause which reads as under:-

"26. All the minor disputes and differences arising out of interpretations or in any manner touching or concerning this agreement whatsoever (except as to any matter the decision of which is expressly provided for in the contract) shall be referred to the sole arbitrator of the Director Food and Supplies, Haryana/Managing Director of the Agency or any person appointed by him in this behalf. There will be no objection to any such appointment that the person appointed is or was an employee of Food and Supplies Department, Haryana/Agency and he had expressed views on all or any of the matter in dispute or difference. The award of such arbitration

shall be final and binding on both the parties to this contract. It is a term of this contract that in the event of transfer, vacation of office or being unable to act for any reason of a person appointed as an arbitrator by the Director Food and supplies, Haryana/Managing Director at the time of such transfer, vacation of office, death or inability shall appoint another person to act as an arbitrator. Such a person shall be entitled to proceed with reference form (sic) the stage where it was left by his predecessor.

Provided that any demand for arbitration in respect of any claim(s) of the Miller/Second Party, under the contract shall be in writing and made within one year of the date of completion or expiry of the period of contract. If the demand is not made within the period, the claim(s) of the Miller/Second party shall be deemed to have been waived off and released of all liabilities under the contract in respect of these claims. The cost for and in connection with arbitration shall be the discretion of the arbitrator who may make suitable orders in his award.

Subject as aforesaid, the Arbitration and Conciliation Act, 1996, shall apply to the arbitration provided under this clause. However, the cases of fraud, theft or misappropriation etc. on the part of Second Party are not covered under this clause and in such cases legal proceedings as deemed fit will be initiated by the First Party against the second party as well as against the sureties."

Learned Additional Advocate General, appearing for the State of Haryana, states that since it is a case of fraud, theft, misappropriation, etc., the dispute is not liable to be referred for arbitration and, thus, the appointment of Arbitrator would not be justified. However, the assertions made by learned State counsel have been specifically denied by learned counsel for the applicant. This aspect of the matter is thus also in dispute between the parties. In view of sub section 6A) of Section 11 brought on the statute book by way of amendment vide Act No. 3 of 2016, all that is required to be examined while considering an application made under section 11 of the Act is whether or not an arbitration agreement exists between the parties which is relatable to a dispute at hand. It is only when on a bare perusal of the agreement it is found that a particular dispute is not relatable to the arbitration agreement, then perhaps the Court is empowered to decline the relief sought for by a party in proceedings under section 11 of the Act. Even in matters where there is a contest with regard to the issue as to whether the dispute falls within the realm of the arbitration agreement then the only course available is to allow the arbitrator to hear the parties and formulate the view in the matter. The reason for this view being taken is twofold. Firstly adjudication of the question as to whether or not a particular dispute falls within the ambit of the arbitration agreement may more than often require evidence to be led by the parties. Secondly, the party opposing the reference to arbitration can agitate its point of view before the arbitrator at the preliminary stage itself by taking recourse to Section 16 of the Act. The view taken by me finds support from the decision of the Apex Court in the case of ***Duro Felguera S.A. v. Gangavaram Port Limited (2017) 9 SCC 729*** wherein it has been observed as under:-

"From a reading of Section 11(6-A), the intention of the legislature is crystal clear i.e. the court should and need only look into one aspect--the existence of an arbitration agreement. What are the factors for deciding as to whether there is an arbitration agreement is the next question. The resolution to that is simple--it needs to be seen if the agreement contains a clause which provides for arbitration pertaining to the disputes which have arisen between the parties to the agreement.

xxx xxx xxx

59. The scope of the power under Section 11(6) of the 1996 Act was considerably wide in view of the decisions in [SBP and Co. \[SBP and Co. v. Patel Engg. Ltd., \(2005\) 8 SCC 618\]](#) and Boghara Polyfab [National Insurance Co. Ltd. v. Boghara Polyfab (P) Ltd., (2009) 1 SCC 267 : (2009) 1 SCC (Civ) 117] . This position continued till the amendment brought about in 2015. After the amendment, all that the courts need to see is whether an arbitration agreement exists--nothing more, nothing less. The legislative policy and purpose is essentially to minimise the Court's intervention at the stage of appointing the arbitrator and this intention as incorporated in Section 11(6-A) ought to be respected."

In such circumstances, while leaving it open to the respondents to raise all such pleas as may be available to them in this regard before the arbitrator, I hereby appoint Hon'ble Justice R.C. Lahoti, Retired Chief Justice of India, to act as sole Arbitrator in the matter to settle the disputes and differences between the parties. The fee, etc. shall be as may be settled by the parties with the learned Arbitrator.

08.02.2019
Parkash/ravinder

(KRISHNA MURARI)
CHIEF JUSTICE

NOTE:

Whether speaking/non-speaking: Speaking
Whether reportable: YES/NO