

**HIGH COURT FOR THE STATE OF TELANGANA
AT HYDERABAD**

**TUESDAY, THE NINTH DAY OF JUNE
TWO THOUSAND AND TWENTY**

**PRESENT
THE HONOURABLE SRI JUSTICE A.RAJASHEKER REDDY**

ARBITRATION APPLICATION NO: 44 OF 2019

Between:

M/s.Sree Balaji Constructions, H.No.29, Sai Plaza, Opp Bank of Maharashtra, KPHB Colony, Hyderabad. Rep.by it's Managing Partner, LS.Naidu, S/o.late Mastan Naidu
...PETITIONER

AND

1. The Registrar, English and Foreign Language University, Taranaka, Hyderabad - 500 605
 2. The Vice Chancellor, English and Foreign Language University, Tharnaka, Hyderabad-500 605
 3. English and Foregin Language University, rep by its Registrar, Taranaka, Hyderabad - 500 605.
(Respondent No.3 is impleaded vide C.O., dt 02/06/2020, in IA No.01/2020)
- ...RESPONDENTS

Application under Section 11 (4) (a) of the Arbitration and Conciliation Act, 1996 read with scheme of Appointment of Arbitrators 2006 praying that in the circumstances stated in the affidavit filed therewith, the High Court may be pleased to appoint sole arbitrator on behalf of both parties for deciding the differences and disputes that arose between the applicant and respondent in pursuance of contract agreement dated 02-12-2008.

This application coming on for hearing, upon perusing the application and affidavit filed in support thereof and upon hearing the arguments of Sri T.B.B.Krishna Mohan, Advocate for the Applicant and of Sri P.S.Rajasekhar, Advocate for Respondents.

The Court made the following: ORDER

HON'BLE SRI JUSTICE A.RAJASHEKER REDDY

ARBITRATION APPLICATION No.44 OF 2019

ORDER:

This Arbitration Application is filed under Section 11(4) of the Arbitration and Conciliation Act, 1996 r/w scheme for appointment of Arbitrators, 1996, for appointment of sole arbitrator on behalf of both the parties for resolving the disputes between the parties.

It is the case of the applicant that the applicant became successful bidder for the project work i.e., 'construction of additional floors on the women's hostel Old at EFL University, Hyderabad in the tender notification issued by the 1st respondent on 26.08.2008. In response to the said tender notice, an agreement was entered into between the applicant and the respondents on 09.03.2009. As the disputes arose between the parties, correspondence ensued between the parties and applicant got issued demand notices for payment of the amounts. Ultimately, the applicant got issued notice invoking arbitration clause in the agreement on 24.11.2018. Though the respondent received the same, there is no response. Hence, this application.

Counter affidavit is filed by the respondents denying the averments in the affidavit filed in support of this application stating that no agreement was entered into with the applicant by the respondents. The applicant has failed to follow the procedure prescribed under Section 25 of the Agreement. It is asserted that there is no existing arbitrable dispute between the parties and the claim made by the applicant falls outside the scope of clause 25 of the agreement. Since the applicant committed irregularities and as the amounts were forfeited on 29.10.2013 itself, the present claim is

barred by limitation. It is asserted that the alleged dispute is also non-arbitrable due to the presence of criminal elements in execution of the contract and sought for dismissal of the application.

Heard Sri T.B.B.Krishna Mohan, learned counsel for the applicant and Sri P.S.Rajasheker, learned counsel for the respondents.

Learned counsel for the applicant submits that when the agreement contains arbitration clause and when the same is invoked, the application is liable to be allowed, as the scope of enquiry in this application is only to the extent of finding as to the existence of arbitration clause in the subject agreement. He also submits that the application is mistakenly filed under Section 11(4) of the Act, but mentioning wrong provision of law is no ground for rejection of the application as this Court has power to appoint an arbitrator under Section 11(6) of the Act. He also submits that the claim of the applicant is not barred by limitation as contended in the counter affidavit because the last payment was made in the year 2017. He also submits that the applicant made several representations to the Registrar as well as Vice Chancellor, as such, he followed the procedure before invoking arbitration clause. In support of his contention, he relied on the judgment reported in **Mayavati Trading (P) Ltd. v. Pradyut Deb Burman**¹.

On the other hand, learned counsel for the respondents submits that in spite of pointing out defect in making application under Section 11(4), petitioner has not chosen to amend the same. He also submits that the contract was terminated in the year 2013 on 29.10.2013 and the applicant has kept quite for long time and without following the procedure for invoking the arbitration clause in the agreement, he filed the present application. At any rate, he submits that the claim of the

¹ [2019] 8 SCC 714

applicant is barred by limitation as the arbitration clause has to be invoked within 120 days from the date of preparation of final bill. He submits that since the applicant admits that the final bill is paid, invocation of arbitration clause after such period, is liable to be dismissed on that ground alone. He submits that criminal proceedings have also been initiated and the same were closed, but still criminality of the matter has not obliterated, as such, the arbitration application is liable to be dismissed on that ground also. In support of his contention, he relied on the judgments reported in **Booz Allen & Hamilton Inc. v. SBI Home Finance Ltd.**,² and **Vimal Kishor Shah v. Jayesh Dinesh Shah**.³

In this case, it is to be seen that the clause 25 of subject tender document contains an arbitration clause, which was invoked by the applicant by notice dated 24.11.2018. Though the respondent received the same, there is no reply, thereby indicates that there is no dispute with regard to existence of arbitration clause and also about the invocation of the same by the applicant. After introduction of Section 11(6-A) by way of Amendment Act, 2015, the only aspect that is required to be considered for deciding this application by this Court is only to see whether there exists an arbitration clause, as held by the Hon'ble Supreme Court in **Mayavati Trading (P) Ltd. v. Pradyut Deb Burman**, wherein it is held as follows:

"9. The 246th Law Commission Report dealt with some of these judgments and felt that at the stage of a Section 11(6) application, only "existence" of an arbitration agreement ought to be looked at and not other preliminary issues.

.....

14. A reading of the Law Commission Report, together with the Statement of Objects and Reasons, shows that the Law Commission felt that the judgments in *SBP & Co. v. Patel Engg. Ltd.*, [2005] 8 SCC 618 and *Boghara Polyfab v. National Insurance Co. Ltd.*, [2009] 1 SCC 267 : [2009] 1 SCC (Civ) 117 required a relook, as a result of which, so far as Section 11 is concerned, the

² [2011] 5 SCC 532

³ [2016] 8 SCC 788

Supreme Court or, as the case may be, the High Court, while considering any application under Sections 11(4) to 11(6) is to confine itself to the examination of the existence of an arbitration agreement and leave all other preliminary issues to be decided by the arbitrator."

As already observed supra, existence of arbitration clause as well as invocation of the same is not in dispute, as such, as per the principle laid down by the Hon'ble Supreme Court in the judgment referred supra, this application is liable to be allowed.

As far as the contention of the learned counsel for the respondents with regard to claim of the applicant is barred by limitation is concerned, it is the assertion of the applicant that the last payment was made in the year 2017, as such, the said contention needs to be considered by arbitrator.

Learned counsel for the respondents vehemently contends that the applicant has not followed the procedure before invoking arbitration clause as per clause 25 of the agreement. A perusal of the affidavit along with the material filed by the applicant goes to show that the applicant made representations to the Registrar as well as Vice Chancellor, as such, it cannot be said that the applicant, without following the procedure filed the present application. As far as contention of the learned counsel for the respondents that the dispute is non arbitrable due to the presence of criminal elements in execution of the contract, it is to be noted that the criminal case filed against the partners of the applicant company has been finally closed vide orders dated 19.03.2015 in referred Charge Sheet entered as Sl.No.2 of 2015 in FIR No.R.C.10(A)/2012 and has become final, as the same was not challenged. He also relied on the judgments reported in i) **Booz Allen & Hamilton Inc. v. SBI Home Finance Ltd.,(supra)**, wherein the Hon'ble Supreme Court held as follows:

*36. The well-recognised examples of non-arbitrable disputes are:
(i) disputes relating to rights and liabilities which give rise to or

arise out of criminal offences; (ii) matrimonial disputes relating to divorce, judicial separation, restitution of conjugal rights, child custody; (iii) guardianship matters; (iv) insolvency and winding-up matters; (v) testamentary matters (grant of probate, letters of administration and succession certificate); and (vi) eviction or tenancy matters governed by special statutes where the tenant enjoys statutory protection against eviction and only the specified courts are conferred jurisdiction to grant eviction or decide the disputes."

ii) Vimal Kishor Shah v. Jayesh Dinesh Shah(supra), the Hon'ble

Supreme Court held as follows:

"54. We thus add one more category of cases i.e. Category (vii), namely, cases arising out of trust deed and the Trusts Act, 1882, in the list of six categories of cases specified by this Court in para 36 at pp. 546-47 of the decision rendered in *Booz Allen & Hamilton Inc. [Booz Allen & Hamilton Inc. v. SBI Home Finance Ltd., (2011) 5 SCC 532 : (2011) 2 SCC (Civ) 781]* which as held above cannot be decided by the arbitrator(s)."

There is no dispute with regard to the principle laid down in the aforesaid judgments, but the same are not applicable to the facts of the present case on hand, as present dispute does not fall within the excepted categories mentioned therein.

As far as the contention of the learned counsel for the respondents that the applicant filed this application under Section 11(4) of the Act, instead of Section 11(6) of the Act, as such, this application is not maintainable. It is well settled law that mere mentioning of wrong provision of law or non-mentioning of correct provision of law is not a fatal to the application if the power to pass such an order is available with the Court. (See **Pruthvirajsinh N Jadeja(D) By . vs. Jayeshkumar Chhakaddasm Shah** in CIVIL APPEAL NO. 10521 OF 2013, decided **on 4 October, 2019**).

Accordingly, this Arbitration Application is allowed nominating Hon'ble Sri Justice M.Venkateshwar Reddy, former Judge of this Court an arbitrator for resolving the disputes between the parties.

There shall be no order as to costs. As a sequel thereto, miscellaneous applications, if any, pending in this Arbitration Application, shall stand closed.

//TRUE COPY//

Sd/-B.S.CHIRANJEEVI
JOINT REGISTRAR


SECTION OFFICER

To

1. Sri Justice M.Venkateswara Reddy, Villa No.1, Maple Town, Sun City, Bandlaguda, Jagir Don Bosco Post, Hyderabad-86. (By Special Messenger) (along with a copy of arbitration application, affidavit and the material papers filed with arbitration application)
2. One cc to Sri T.B.B.Krishna Mohan, Advocate (OPUC)
3. One cc to Sri P.S.Rajasekhar, Advocate (OPUC)
4. Two CD Copies

Kj.



HIGH COURT

DATED:09/06/2020

ORDER

ARBITRATION APPLICATION No.44 of 2019



CLOSING THE A.A.

(5) VLV
7/7/20