

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD**

933 ARBITRATION APPLICATION NO.1 OF 2015

M/s Ghai Construction,
Through its Proprietor
Mr. Jaspalsingh hardayalsingh Ghai,
Having office at Shop No.2,
Tulsi Arcade, CIDCO,
Cannaught Market, Aurangabad ... APPLICANT

VERSUS

1. Maharashtra State Road Development Corporation,
Through it's Vice Chairman and Managing Director, Nepeon Sea Road, Priyadarshini Park,
Mumbai- 400 036
2. The Executive Engineer (TMU)
M.S.R.D.C. Ltd.,
Toll Monitoring Unit, 322,
Arun Chambers,
Tardeo Mumbai-400 034 ... RESPONDENTS

...
Advocate for Applicant : Mr. Amol K. Gawali
Advocate for Respondent nos. 1 & 2 : Mr. S. V. Adwant

...

CORAM : AVINASH G. GHAROTE, J.

DATED : 9th JULY, 2021.

...

PER COURT :

1. Mr. Adwant, learned counsel for the respondents, in reference to the arbitration clause contained clause 6.1 (V) at

record page 83 submits, that this is not an arbitration clause between the parties, as the same is contained in the sample forms which commence from page 60 on wards and is therefore is not governing the parties. Mr. Gawali, learned counsel for the applicant agrees to this position and submits, that the above mentioned clause 6.1(V), is not the one, which he is relying upon, as that does not govern the parties. The position therefore, is clear, that the parties, agree that clause 6.1(V), is not material and relevant for the purpose of deciding the present application.

2. That leaves the parties with clause 39.0, and both the learned counsel admit that is the only clause by which the parties are governed.

3. Heard Mr. Gawali, learned counsel for the applicant, who contends that clause 39 at page 58 is an arbitration clause. For the sake of ready reference clause 39 is reproduced as under :

“39.0 : DISPUTES AND RESOLUTION : In case of disputes or difference of opinion arising, the decision of the Vice Chairman and Managing Director shall be final and binding on the Contractor. The Contractor shall be given

reasonable opportunity to represent his case before the Vice Chairman and Managing Director”.

4. Mr. Gawali, learned counsel placed his reliance upon the decision in ***M/s Balaji Enterprises vs. MSRDC, Arbitration Application No. 13 of 2021***, decided on 06/07/2012 to contend, that the above clause, was considered and it was held to be an arbitration clause.

5. Mr. Adwant, learned counsel invites my attention to the decision in ***M/s Kalyan Toll Infrastructure Vs. MSRDC in Arbitration Petition no. 13 of 2013***, decided on 26/02/2014, where a clause identical to clause 39 in the present matter has been held not to be an arbitration clause.

6. Mr. Gawali, learned counsel for the petitioner relying upon ***Vishnu Vs. State of Maharashtra (2014)1 SCC 516*** and specifically para 19 and 30, contends that the ingredients necessary for construing a clause as an arbitration clause as spelt out in ***Vishnu*** (supra), have not been considered in ***M/s***

Kalyan Toll Infrastructure (supra) and therefore, the it would be appropriate to follow the decision in **Balaji Enterprises**.

7. It is pertinent to note that the clause in **Balaji Enterprise** (supra), relied upon by Mr. Gawali, was not identical to clause 39, in the present case, whereas in **M/s Kalyan Toll Infrastructure** (supra) identically worded clause has been held not to be and arbitration clause.

8. In **Vishnu** (supra), the Hon'ble Apex Court has laid down the necessary ingredients for a valid arbitration clause, relying upon **K. K. Modi vs. K. N. Modi (1998)3 SCC 573**, which are as under :

- “17. (1) The arbitration agreement must contemplate that the decision of the tribunal will be binding on the parties to the agreement,
- (2) that the jurisdiction of the tribunal to decide the rights of parties must derive either from the consent of the parties or from an order of the court or from a statute, the terms of which make it clear that the process is to be an arbitration.
- (3) the agreement must contemplate that substantive rights of parties will be determined by the agreed tribunal,

(4) that the tribunal will determine the rights of the parties in an impartial and judicial manner with the tribunal owing an equal obligation of fairness towards both sides,

(5) that the agreement of the parties to refer their disputes to the decision of the tribunal must be intended to be enforceable in law and lastly,

(6) the agreement must contemplate that the tribunal will make a decision upon a dispute which is already formulated at the time when a reference is made to the tribunal.

18. The other factors which are relevant include, whether the agreement contemplates that the tribunal will receive evidence from both sides and hear their contentions or at least give the parties an opportunity to put them forward; whether the wording of the agreement is consistent or inconsistent with the view that the process was intended to be an arbitration, and whether the agreement requires the tribunal to decide the dispute according to law”.

9. The same position has been reiterated, in **Deepak Cables (India) Ltd.** (*supra*) in para 19 and it has also been held, that in case there is any exclusion of any of the attributes of an arbitration agreement, it would not amount to an arbitration agreement. This is stated in following words:

“19 In **Jagdish Chander** (AIR 2000 SC 1379) (supra), the Court, after referring to the earlier decisions, culled out certain principles with regard to the term “arbitration agreement”. The said principles basically emphasize on certain core aspects, namely, (i) that though there is no specific form of an arbitration agreement, yet the intention of the parties which can be gathered from the terms of the agreement should disclose a determination and obligation to go to arbitration; (ii) non-use of the words “arbitration” and “arbitral tribunal” or “arbitrator” would not detract from a clause being interpreted as an arbitration agreement if the attributes or elements of arbitration agreement are established, i.e., (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; and (iii) where there is specific exclusion of any of the attributes of an arbitration agreement or contains anything

that detracts from an arbitration agreement, it would not be an arbitration agreement. In this context, the two-Judge Bench has given some examples and we think it apt to reproduce the same:

“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.”

(emphasis supplied)

10. Similarly, in ***Jagdish Chander Vs. Ramesh Chander and others, (2007) 5 SCC 719***, the following has been said about the requirement of an arbitration clause :

“(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 exclude 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 or 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 have at a further agreement to go to arbitration, as and when the disputes arise. Any agreement or clause in 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”.

11. The relevant clause in ***Vishnu*** (Supra) read as under :

“30. Except where otherwise specified in the contract and subject to the powers delegated to him by the Government under the Code Rules then in force the decision of the Superintending Engineer of the Circle for the time being shall be final, conclusive, and binding on all parties to the contract upon all question, relating to the

meaning of the specifications, designs, drawings, and instructions hereinbefore mentioned and as to the quality of workmanship, or materials used on the work, or as to any other question, claim, right, matter, or thing whatsoever, if any way arising, out of, or relating to the contract designs, drawings, specifications, estimates, instructions, orders, or these conditions or otherwise concerning the works, or the execution, or failure to execute the same, whether arising, during the progress of the work, or after the completion or abandonment thereof”.

12. After applying the principles as culled out in para 19 of ***Vishnu*** (supra), the Hon’ble Apex Court therein held that clause 30, was not an arbitration clause.

13. In ***International Amusement Ltd., vs. India Trade Promotion Organization (2015)12 SCC 677***, relied upon by learned counsel Mr. Adwant in respect of clause 28 it was held as follows :

“Clause 28 of the agreement provided that “in case of any dispute arising out of or in connection with this agreement the disputes shall be referred to the sole arbitration of the Chairman, India Trade Promotion Organisation or

his nominee whose decision / award shall be final, conclusive and binding on the parties". Clause 28, thus held, not an arbitration agreement between the parties “.

14. The clause 39, quoted above, in the present contract, thus therefore, in view of the principles and parameters laid down above, cannot be considered to be an arbitration clause. The application under Section 11, therefore is not tenable in law and same is dismissed.

15. Needless to say that the applicant shall have liberty to take recourse to any remedy, which may be available and permissible to him under law.

(AVINASH G. GHAROTE, J.)

vsm/-