

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

ARBITRATION APPLICATION NO.10 OF 2018

Babanrao Rajaram Pund

Applicant

Versus

M/s Samarth Builders and
Developers, a partnership firm,
through its partner Vinod C. Tange
and another

Non Applicants

Mr. Amol K. Gawali, advocate for the applicant.

Mr. Ranbir L. Chhabda, i/by Legal United Law Firm, for Non
Applicant No.1.

CORAM : AVINASH G. GHAROTE, J.

DATE : 07th July, 2021.

PC :

1 Heard Mr.Amol K.Gawali, learned Counsel for the
applicant and Mr.R.L.Chhabda, learned Counsel for Respondent
No.1.

2 There is no dispute between the parties regarding the
execution of the development agreement dated 29.05.2014, which
is a registered document. There is also no dispute about the
existence of clause 18 in the agreement, which requires the
disputes to be referred to arbitration. The bone of contention, is

that the necessary ingredient of a legal and valid arbitration agreement, namely, that the decision of the arbitrator shall be binding upon the parties, is absent.

3 For the sake of ready reference, the arbitration clause is reproduced as under:

“18 All the disputes or differences arising between the parties hereto as to the interpretation of this Agreement or any covenants or conditions thereof or as to the rights, duties or liabilities of any part hereunder or as to any act, matter or thing arising out of or relating to or under this Agreement (even though the Agreement may have been terminated), the same shall be referred to arbitration of a Sole Arbitrator mutually appointed, failing which, to Arbitrators, one to be appointed by each party to dispute or difference and these two Arbitrators will appoint a third Arbitrator and the Arbitration shall be governed by the arbitration and Conciliation Act, 1996 or any re-enactment thereof.”

4 Mr. Chhabda, learned Counsel for non applicant no.1, places reliance upon **Bihar State Mineral Development Corporation & another Vs. Encon Builders (I) Pvt. Ltd.**, AIR 2003 SC 3688 and **Karnataka Power Transmission Corporation Ltd. Vs. M/s Deepak Cables (India) Ltd.**, AIR 2014 SC 1626.

5 The Hon'ble Apex Court in **Encon Builders (I) Pvt.Ltd.**, (*supra*), has laid down the essential elements of an arbitration agreement, as follows:

“13 The essential elements of an arbitration agreement are as follows:

(1) There must be a present or a future difference in connection with some contemplated affair.

(2) There must be the intention of the parties to settle such difference by a private Tribunal.

(3) The parties must agree in writing to be bound by the decision of such Tribunal.

(4) The parties must be *ad idem*.”

(emphasis supplied)

6 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)

7 It is, thus, apparent that the essential attributes of an arbitration clause is a consensus between the parties, that any decision by an arbitrator would be final and binding upon them, which attribute has to be contained in the arbitration clause. The arbitration clause 18 in the agreement dated 29.05.2014 lacks this essential criteria, as it does not mandate that the decision of the arbitrator shall be final and binding upon the parties.

8 Thus, in the light of what has been held in **Encon Builders and Deepak Cables** (*supra*) and the language of clause 18 in the agreement dated 29.05.2014, the application is clearly not maintainable and the same is accordingly dismissed.

(AVINASH G. GHAROTE)
JUDGE

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