

IN THE HIGH COURT AT CALCUTTA
Original Civil Jurisdiction
Original Side

Present:

The Hon'ble Justice Shekhar B. Saraf

A.P. No. 70 of 2022

SUKUMAR RAY

Versus

MESSRS. INDO-INDUSTRIAL SERVICES AND ORS.

For the Petitioner : Mr. Sounak Mukherjee, Adv.
Ms. Taniya Bhowmik, Adv.
Mr. Anupam Ghosh, Adv.

For the Respondent : Mr. Supratim Laha, Adv.
Mr. Binay Kumar Jain, Adv.
Mr. Piyush Jain, Adv.

Heard on: March 29, 2022 & April 13, 2022

Judgment on: April 21, 2022

Shekhar B. Saraf, J.:

1. The parties in the present case had entered into an agreement dated May 29, 2018 for financial accommodation. In terms of the said agreement, the petitioner lent and advanced a sum of INR 10,00,000 by way of cheque to the respondents. The agreement included an arbitration clause, Clause (viii), the same is reproduced below:

“viii That in case of any dispute between the First Party and all or any partner of the Second Party regarding this Financial Accommodation the

same shall be referred to a sole arbitrator, and the award of such Arbitrator shall be binding upon both the parties to this presents and in this regard the provisions of the Arbitration & Conciliation Act, 1996 as amended up to date shall be applicable.”

2. Later on, the parties entered into a subsequent agreement dated May 29, 2019. The said agreement extended the time for repayment of the loan amount of INR 10,00,000 till May 28, 2020. The quarterly payments of the accrued interest were also continued and extended till May 28, 2020.

3. The petitioner submitted that the respondents failed to make payment of the accrued interest along with the principle amount since October 20, 2020. On several occasions the petitioner demanded payment of the aforesaid loan amount along with accrued interest, but the same has not been paid. The petitioner had written letters to the respondents to mutually decide on the issue of appointment of an arbitrator as per the agreement, but the same has not been confirmed by the respondent. Therefore, the present application has been filed to seek appointment on an arbitrator as per Clause (viii) of the arbitration agreement dated May 29, 2018. Counsel for the petitioner has placed reliance on ***Chatterjee Petrochem Company and Another -v- Haldia Petrochemicals Limited and others*** reported in ***(2014) 14 SCC 574*** to contend that the subsequent agreement entered into between the parties is valid and both the parties are bound by it.

4. Counsel for the respondent submitted that there is no valid and binding arbitration agreement between the parties and the same has expired due to efflux of time. Further, it is submitted that the subsequent agreement for financial accommodation dated May 29, 2019 does not contain an arbitration clause and there is no specific adoption of Clause (viii) of the Agreement for Financial Accommodation dated May 29, 2018. Reliance has been placed on ***M.R. Engineers and Contractors Private Limited -v- Som Datt Builders Limited*** reported in ***(2009) 7 SCC 696*** to contend that specific adoption of the arbitration clause should take place in a subsequent agreement and only then the court can refer the dispute to arbitration by appointing an arbitrator as per the earlier agreement.
5. I have heard the Counsel appearing for both the parties. In my opinion, the subsequent agreement dated May 29, 2019 is a mere agreement for extension of validity of the original agreement and adopts all the provisions of the original agreement on the aspect of resolution of disputes between the parties by arbitration. The New Clause of the subsequent agreement provides for a specific reference to the original agreement dated May 29, 2018 and extends the same till May 28, 2020. It is to be noted that apart from mutual extension of time, the agreement does not contain any other provision which would indicate that the original agreement has come to an end. The wording of the subsequent agreement for extension of validity of the original agreement is as follows:

“1. That, the first party and the second party hereby agree to extend the validity of the original agreement dated May 29, 2018 for further 1 (one) year starting from May 29, 2019 and remaining valid till May 28, 2020.

2. That, all other terms and conditions will remain same as per the original agreement dated May 29, 2018.”

6. The object and intent behind the subsequent agreement is unequivocal. Upon a reading of the relevant clauses mentioned above, nowhere it appears that the parties intended to enter into a new agreement for any specific purpose other than extension of validity of the original agreement. The words, that is, “*all other terms*” used in Clause 2 of the subsequent agreement make it apparent that the parties intended to adopt the arbitration clause of the original agreement.

7. The case law relied on by the respondents is not applicable to the facts of the instant case and is accordingly distinguishable. In ***M.R. Engineers (supra)***, the provision for arbitration contained in the contract between the principal employer and the contractor was incorporated by reference in the sub-contract between the contractor and the sub-contractor. The Court decided the issue involved against the sub-contractor by drawing a clear distinction between the reference to another document and the incorporation of another document in a contract. If mutual intention between the parties is not showcased clearly by specifically incorporating the arbitration agreement, it would not be right to state that the parties are bound by the principle agreement. In the present case, the Court is not dealing with a situation where another agreement with separate rights and obligation

between the parties has emerged like in that of the above case. The nature of a sub-contract is different than that of an agreement entered subsequently for extension of validity of time. Moreover, ***M.R. Engineers (supra)*** emphasises on the point of mutual intention between the parties and interprets the contracts entered into between the parties. In the present case, the point of mutual intention and its interpretation as discussed in paragraphs 5 and 6 goes on to show that the mutual intention between the parties and the nature of subsequent agreement in the present case are to continue with the arbitration clause in the earlier agreement. In light of the above discussion, the present application for appointment of an arbitrator is allowed.

8. I, therefore, appoint Mr. Meghnad Dutta, Advocate (Mobile No. 9830175672) as the Arbitrator. The appointment is subject to submission of declaration by the Arbitrator in terms of Section 12(1) in the form prescribed in the Sixth Schedule of the Act before the Registrar, Original Side within four weeks from today. I make it clear that all points are kept open before the arbitrator.
9. Urgent Photostat certified copy of this order, if applied for, should be made available to the parties upon compliance with the requisite formalities.

(Shekhar B. Saraf, J.)