IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION

ARBITRATION APPLICATION NO. 23 OF 2021

Hitesh Coal Traders ..Applicant
Vs.
Shetrunjay Dyeing & Weaving Mills Ltd. ..Respondent

Ms. Sheetal Prakash with Mr. Chinmay Mehta i/b. R. V. J. Associates for Applicant.
Ms. Dipsy Sequeira i/b. Agam Doshi & Co. for Respondent.

CORAM : G.S. KULKARNI, J.
DATE : JUNE 30, 2022.

P.C.:

1. This is an application filed under Section 11 of the Arbitration and Conciliation Act, 1996 (for short, “the Act”) whereby the applicant has prayed for appointment of an arbitral tribunal for adjudication of disputes and differences which have arisen between the parties under a contract for supply of coal. The applicant’s claim is on the basis of three invoices dated 10 December, 2015, 22 December, 2015 and 05 January, 2016. The applicant contends that the contract material was supplied by the applicant to the respondents, which according to the applicant, is evident and indisputed, as seen from the delivery challans endorsed by the respondent in respect of each of the invoices.

2. It is the case of the applicant that there is an arbitration agreement between the parties as contained in all the three invoices which according to the applicant is not disputed by the respondent. The

arbitration clause, which is common in all the three invoices, reads thus:-

> "Disputes, if any, subject to provisions of Arbitration and Conciliation Act, 1996 as amended to date. Subject to Mumbai Jurisdiction only."

3. The applicant contends that as the amounts under the invoices were not paid by the respondent to the applicant, the applicant issued a demand notice dated 19 September, 2016 on the respondent, thereby demanding a total amount of Rs.64,167/- being due and payable under the said invoices. The applicant's notice specifically recorded that if the respondent was not to make payment of the said amounts within seven days from the receipt of the said notice, the applicant in that event would be forced to institute civil/criminal proceeding or to invoke the arbitration agreement. Thus, according to the applicant, such notice of the applicant specifically indicated, that the applicant would invoke the arbitration agreement. The respondent replied to the said notice of the applicant, by its letter dated 23 September, 2016 whereby the respondent although disputed the liability, did not dispute the existence of the arbitration agreement.

4. On the above premise, disputes and differences having arisen between the parties, on the non-payment of the amounts under the invoices, the applicant by its letter dated 01 December, 2016 addressed to the proposed arbitrator invoked the arbitration agreement as

contained in the invoices. A copy of such letter was forwarded to the respondent. The said letter, although does not concern the invocation in regard to the present proceedings, however, the same needs to be noted, to appreciate the case of the applicant that the respondent never disputed the arbitration agreement. The said letter reads thus:-

> " 01.12.2016
>
> *To:*
> *Shri Ashvin Mehta,*
> *Ninad Block No. 5,*
> *Ranade Road, Shivaji Park,*
> *Dadar, Mumbai – 400 028.*
>
> *Sir,*
>
> *Sub: <u>Invocation of Arbitration Proceedings under the provisions of Arbitration and Conciliation Act, 2015</u> against M/s. Shetrunjay Dyeing & Weaving Mills Ltd.*
> *Ref: Sales Invoice, Delivery Challans and Debit Notes issued by us.*
>
> *This letter is with reference to the delivery challans, sales invoice and debit notes issued by us for the business transactions effected between M/s. Shetrunjay Dyeing & Weaving Mills Ltd. and our firm during the period 09/12/2015 and 30/11/2016, with respect to supply of Indonesian Coal to the former. We wish to inform that despite several requests and reminders, both, email and verbal, M/s. Shetrunjay Dyeing & Weaving Mills Ltd. has deliberately failed to repay us, a sum of Rs.75,643/- outstanding as on 30/11/2016.*
>
> *We wish to inform that as per the terms and conditions of the delivery challans, sales invoice and debit notes issued by us in favor of M/s. Shetrunjay Dyeing & Weaving Mills Ltd. and accepted by them, the disputes will be referred to the provisions of Arbitration and Conciliation Act, 1996. The extract of the said term and condition is reproduced as under:*
>
> > *"Disputes, if any, subject to provisions of Arbitration and Conciliation Act, 1996 as amended to date. Subject to Mumbai jurisdiction."*
>
> *Since M/s. Shetrunjay Dyeing & Weaving Mills Ltd. has failed to repay the dues to us despite several reminders, a dispute has arisen between them and our firm.* ***On the basis of the ordinance No.9 of 2015, dated 23/10/2015, an amendment to the Arbitration and Conciliation Act, 1996 has been done and the disputes therefore will now be governed by the provisions of Arbitration and Conciliation Act, 2015 as per the clause 25A of the Arbitration and Conciliation***

> ***(Amendment) Bill, 2015.***
>
> <u>*Accordingly, we hereby nominate your goodself as an Arbitrator for adjudicating our claims against M/s. Shetrunjay Dyeing & Weaving Mills Ltd*</u>*. We wish to inform that an arbitration invocation letter has also been forwarded to M/s. Shetrunjay Dyeing & Weaving Mills Ltd. Further to inform, that in view of the Jurisdiction Clause to be Mumbai, the venue of the proposed arbitration proceedings will be confined to Mumbai.*
>
> *Looking forward to your acceptance,*
>
> *Yours faithfully,*
> *For HITESH COAL TRADERS,*
>
> *Sd/-*
> *(Hitesh Daga)*
> *(Manager).”*

(Emphasis supplied)

5. As the respondent did not respond to the above invocation notice and/or by consensus an arbitrator could not be appointed, the applicant proceeded to appoint an arbitral tribunal. The sole arbitrator, as appointed by the applicant, accordingly, entered an arbitral reference. The respondent failed to appear before such arbitral tribunal. Consequently, the learned arbitrator proceeded to publish an award dated 14 December, 2017.

6. The respondent being aggrieved by the said arbitral award, approached this Court by filing a petition under Section 34 of the Act being Arbitration Petition No. 583 of 2018. The said petition was disposed of by a coordinate Bench of this Court by an order dated 22 August, 2019 which reads thus:-

> “ This arbitration petition challenges an award of a sole arbitrator in an arbitration reference.

> Learned Counsel for the Respondent concedes that the arbitrator did not have jurisdiction to hear the reference and dispose of the award. The award is, accordingly, set aside. <u>The parties are free to take steps for appointment of a new arbitrator</u>. The arbitration petition is disposed of.
>
> (emphasis supplied)

7. What is clearly seen from the above order as passed by this Court is that the parties were granted liberty to take steps for appointment of a new arbitrator which is an order on the respondent's own petition. On such background, the applicant issued a fresh notice dated 22 August, 2019 to the respondent invoking the arbitration agreement as contended in the invoice. As the respondent did not take any steps to appoint an arbitral tribunal, the present application has been filed.

8. Learned counsel for the applicant has made submissions referring to the documents on record and the prior proceedings between the parties as noted above. She would contend that all the facts as noted above would make it clear that an arbitration agreement exists between the parties, which was never disputed by the respondent at any point of time and in fact, this position stands confirmed by the order dated 22 August, 2019 passed by this Court (supra), which permitted the applicant to invoke the arbitration agreement and take steps to appoint a new arbitrator. It is her submission that such order being passed on the respondent's own proceedings, the respondent cannot take a position that there is no arbitration agreement.

9. On the other hand, learned counsel for the respondent has limited submissions. She would submit that the respondent had acknowledged only one invoice and therefore a claim being made by the applicant to demand payment of the remaining two invoices is misconceived. She is not in a position to counter the submission as urged on behalf of the applicant that the arbitration agreement as contained in the invoices was not only acknowledged but accepted and acted upon between the parties. She would also not dispute the position that the order dated 22 August, 2019 being passed by this Court in the proceedings filed by the respondent permitted the parties to invoke arbitration afresh. She would also not dispute that the said order has attained finality, being not challenged by the respondent on any count, including the Court's observation that the parties are free to take steps for appointment of a new arbitrator. Learned counsel for the respondent is also not in a position to dispute the correspondence between the parties in which her client had never taken a position that there was no arbitration agreement between the parties and to the fact that the correspondence indeed reflects that the arbitration agreement was never disputed.

10. I have heard learned counsel for the parties. Having perused the record, it is clear that an arbitration agreement is contained in the invoices in question, being the basis on which present application under Section 11 of the Act has been filed. It appears to be not in dispute, that

in the past such arbitration agreement was in fact acted upon and never disputed by the respondent. This is not only clear from the previous arbitral proceedings as entered between the parties, but also from the proceedings filed before this Court by the respondent under Section 34 of the Act, challenging the arbitral award dated 14 December, 2017 passed by the learned arbitrator who was unilaterally appointed by the applicant. It is interesting to note some of the grounds of assail as raised by the respondent in the Section 34 petition, which clearly indicate that there is not a whisper of a dispute raised by the respondent to the existence of arbitration agreement between the parties. The grounds raised by the applicant in the Section 34 petition hence are required to be noted, which read thus:-

> “ GROUNDS
>
> A. The Impugned Award passed by the Ld. Arbitrator is completely contrary to the substantive laws of India, inter alia, in as much as the Ld. Arbitrator has passed the Impugned Award in ignorance of the law relating to Arbitration and the Impugned Award has been induced by fraud and corruption.
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> B. The Impugned Award is in conflict with the Public Policy of India.
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> C. The Impugned Award is passed without application of judicial mind.
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> D. The impugned Award is contrary to law and is patently illegal.
>
> E. The Impugned Award is not in accordance with the substantive law for the time being in force in India.
>
> F. That the Arbitration proceeding commenced in violation of the mandate of Section 21 of the Act. The Petitioner never received any chance to nominate the arbitrator and his appointment is illegal.
>
> G. That the reference to arbitration was a unilateral decision of the Respondent, since no request for referring the dispute was received by the Petitioners and hence the Ld. Arbitrator had no jurisdiction to enter into reference and pass an award against the Petitioners, and hence the Impugned Award is bad in law.
>
> H. That the learned arbitrator failed to appreciate that the parties have never agreed to any “fast track” arbitration process and

the arbitration is governed by the principles of the Act and therefore any such "fast track" process is invalid and bad in law.

I. That the learned arbitrator completely failed and ignored to follow the cardinal principles of law and trial and passed the Impugned Award in haste, without application of mind and in a completely arbitrary manner.

J. That the learned arbitrator did not pass any order/decision on the interim application dated 22.11.2017 filed the Petitioner and straight away proceeded to pass the Award.

K. That the Petitioner was unable to present its case before it Ld. Arbitrator as the Ld. Arbitrator failed to provide the Petitioner with the opportunity of inspection of documents, leading evidence and bypassed the cardinal principles of law for the arbitration to be fast tracked.

L. That the Ld. Arbitrator has without application of mind considered the claim of the Petitioner whereby interest of 36% p.a. was compounded without there being any agreement to do so. Further, the Award has been passed with interest on an amount of Rs. 75,643 (which already included the purported interest) and therefore the Arbitrator has awarded compound interest on already compounded interest and has fraudulently passed the Award to benefit himself and the Respondent.

M. That the Ld. Arbitrator has also failed to evaluate the evidence placed by the Respondent as contemplated under Section 25(c) of the Act, and hence the award is bad in law.

N. That the Ld. Arbitrator has failed to communicate the award to the Petitioners as mandated under section 31(5) of the Act and hence the award is bad and liable to be set aside.

O. The Award is hit by Section 34(2)(a)(iii), (v) and Section 34 (2)(b)(ii) of the Act and deserves to be set aside.

P. That the arbitration is a facade and a conspiracy by the Respondent to baloon the alleged sum due of Rs. 20,225 to Rs. 1,54,290 (7.62 times, i.e. 762% of the principal amount) by adding unreasonable arbitration fee and costs and is an abuse of process and the provisions of the Act.

Q. That the Learned Arbitrator's fee is approximately 5 times the principal amount and the Learned Arbitrator has acted in a manner which is fraudulent and corrupt.

R. The Ld. Arbitrator in ignorance of the substantive law in force in India passed the Impugned award without appreciating the mandatory requirements of service of notice in respect of reference of dispute to arbitration."

11. From the orders passed by the coordinate Bench of this Court on the Section 34 petition as noted above, it is beyond a pale of doubt that while setting aside the impugned arbitral award, this Court categorically granted liberty to the parties to take steps to appoint a new arbitrator.

Even at such juncture the respondent did not contend before the Court that an arbitration agreement did not exist between the parties and rightly so. Hence, it was never the contention of the respondent that there was no arbitration agreement between the parties. Thus, although the arbitration agreement is contained in the invoices in the present case, the same was accepted and completely acted upon by the respondent. The intention of the parties, is thus clear namely to recognise and act upon the arbitration agreement as existing between the parties. There is complete meeting of minds between the parties to refer the disputes to arbitration. For the above reasons as there exists an arbitration agreement as also there being a lawful invocation of the arbitration agreement, the Court needs to exercise jurisdiction under Section 11(6) of the Act to appoint an arbitral tribunal.

12. The application is accordingly allowed by the following order:-

ORDER

(i) Mr. Mandar Limaye Advocate of this Court, is appointed as a sole Arbitrator to arbitrate the disputes and differences between the parties under the contract for supply of coal;

(ii) The learned prospective sole arbitrator, before entering the reference, shall forward a statement of disclosure as per the requirement of Section 11(8) read with Section 12(1) of the Arbitration and Conciliation Act, 1996, to the Prothonotary & Senior Master of this Court, to be placed on record of this application with a copy to be forwarded to both the parties;

(iii) The fees payable to the arbitral tribunal shall be as prescribed under the Bombay High Court (Fees Payable to Arbitrators) Rules, 2018.

(iv) At the first instance, the parties shall appear before the prospective arbitrator on a date which may be mutually fixed by the prospective sole arbitrator;

(v) All contentions of the parties are expressly kept open;

(vi) The application is disposed of in the above terms. No costs.

(vii) Office to forward a copy of this order to the learned Arbitrator on the following address:

"Address : Apte Rugnalaya, Ram Maruti Road, Cross Lane No.1,
Naupada, Thane (W.) - 400 602.
Contact No. 9820401315
E-Mail: limaye10mandar@gmail.com".

[G. S. KULKARNI, J.]