

Vidya Amin

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

**COMMERCIAL ARBITRATION APPLICATION NO. 79 OF 2022
AND
COMMERCIAL ARBITRATION APPLICATION NO. 85 OF 2022
a/w.
COMMERCIAL ARBITRATION PETITION NO. 27 OF 2022
AND
COMMERCIAL ARBITRATION PETITION NO. 30 OF 2022**

Blue Star India Ltd.

..Applicant

Vs.

Alliance Mall Developers Co. Pvt. Ltd.

..Respondent

Mr.Zain Mookhi with Ms.Dipti Das and Mr.Sunil Vyas, for the Applicant/
Petitioner.

Mr.Piyush Raheja with Naser Ali Rizvi i/b. Dua Associates, for the
Respondent.

CORAM : G.S. KULKARNI, J.

DATE : JULY 04, 2022.

PC.:

1. Commercial Arbitration Application Nos. 79 of and 85 of 2022 are filed under section 11 of the Arbitration and Conciliation Act, 1996 (for short, "the Act") wherein the applicant has prayed for appointment of an arbitral tribunal to adjudicate the disputes and differences between the parties, which have arisen under the Work Order dated 18 December, 2015. Commercial Arbitration Petition Nos. 27 of 2022 and 30 of 2022 are filed under section 9 of the Arbitration and Conciliation Act, 1996 praying for interim measures pending the arbitral proceedings.

2. Under the General Conditions of Contract, Clause 28.0 provides for 'Settlement of Disputes', Clause 28.1 is 'Engineer's Decision' and Clause 28.2 provides for 'Arbitration'.

3. The applicant contends that after a recourse to Clause 28.1 was taken between the parties, the Engineer should have taken a decision within the prescribed period of 42 days, as provided in Clause 28.1 which being not taken, the applicant's by its advocate's notice dated 29 October, 2021, invoked the arbitration agreement and had requested the respondent to appoint an arbitral tribunal.

4. The respondent has disputed the applicant's contention on the procedure under Clause 28.1 was appropriately invoked and has been exhausted by the applicants. Mr. Raheja, learned counsel for the respondents has drawn the Court's attention to the correspondence on record in supporting such contention, hence according to him the present application is pre-mature.

5. Having heard the learned counsel for the parties on the rival contentions, in my opinion, as there is an existence of the arbitration agreement as also by the applicant's notice dated 29 October, 2021 there is an invocation of arbitration agreement, and considering the fact that

there was no consensus between the parties, to the appointment of an arbitral tribunal, the Court needs to exercise jurisdiction under section 11(6) r/w. Section 11(6A) of the Act (see: **M/s. Duro Felguera S.A vs M/ S. Gangavaram Port Limited, (2017) 9 SCC 729** and **Mayavati Trading Pvt. Ltd. vs. Pradyut Deb Burman, (2019) 8 SCC 714**).

6. However, insofar as the contention as urged on behalf of the respondent is concerned, that the pre-arbitral mechanism being not resorted by the applicant would bar the arbitrability, would be an issue which required to be inquired into and findings arrived at. In my opinion such exercise can be undertaken by the arbitral tribunal on any such objection being raised by the respondent in an application it may file under section 16 of the Act. All contentions in that regard are expressly kept open.

7. In the above circumstances, Mr. Raheja, on instructions, would be agreeable that such objection of the respondent being expressly kept open, his clients are agreeable for the disputes to be referred to arbitration. Mr. Mookhi, learned counsel for the applicant would also not be averse as to what has been suggested as made by Mr. Raheja on the respondent's objection.

8. In view of such consensus between the parties, the proceedings

are accordingly disposed of by the following order:

ORDER

- (i) Mr. Rohaan Cama, Advocate is appointed as a sole arbitrator to adjudicate the disputes between the parties which have arisen under under the Work Order dated 18 December, 2015.
- (ii) The learned sole arbitrator, before entering the arbitration 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) At the first instance, the parties shall appear before the prospective arbitrator within 10 days from today on a date which may be mutually fixed by the learned sole arbitrator;
- (iv) The respondent's contention in regard to the jurisdiction of the arbitral tribunal and more particularly on Clause 28.1, is kept open to be agitated by the respondent by an application to be filed under Section 16 of the Act. All contentions of the parties all such issues are expressly kept open.
- (v) Insofar as Section 9 petition is concerned, the parties have agreed that such petition can be permitted to be converted into an Application under section 17 of the Act to be adjudicated by the

arbitral tribunal. According to the Section 9 petition along with pleadings thereon are permitted to be converted into an Application under section 17 of the Act to be adjudicated before the arbitral tribunal on their own merits. Parties are permitted to present Section 17 application at the very first meeting which may be held by the arbitral tribunal. All contentions of the parties on the Section 17 applications are expressly kept open.

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

(vii) All proceedings are accordingly disposed of in terms of the above terms. No costs.

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

Mr. Rohaan J. Cama, Advocate
Room No. 17-18, Islam Building,
VN. Road, Fort,
Mumbai – 400 001.
Contact Nos. 9821067945/022-22870883

[G.S. KULKARNI, J.]