

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
NAGPUR BENCH, NAGPUR.

MISC. CIVIL APPLICATION [ARB] NO. 157/2021.

Automotive manufacturers Private Limited.

-VERSUS-

1.Shivkumar Lalji Patel and others.

Office notes, Office Memoranda of
Coram, appearances, Court's orders
or directions and Registrar's orders.

Court's or Judge's Orders

Shri Y. Maheshwari Advocate h/f. Shri S.V. Bhutada,
Advocate for the Applicant.
Shri H.R.Gadhia, Advocate for Non-applicants.

.....

CORAM : VINAY JOSHI, J.

DATE : AUGUST 23, 2022.

Heard learned Counsel for the parties.

2. This is an application in terms of Section 11[6] of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as "the Arbitration Act"), for appointment of an Arbitrator on account of arbitration clause incorporated in the Memorandum of Understanding (MOU) dated 09.08.2018.

3. The applicant is a Company incorporated under the provisions of the Companies Act, engaged in the business of automobile sales, service and repairs. Non-applicants are

2

lawful owners of a piece and parcel of land agreed to be assigned to the applicant on long term lease. After primary negotiations, non-applicants agreed to lease out the land on certain terms and conditions. In that regard a MOU dated 09.08.2018 came to be executed in between the parties putting the terms, conditions and liabilities on papers. The MOU contains several acts to be complied by both sides. The scope of work has been specified in the agreement. The MOU bears Clause No.1.20 regarding settlement of a dispute, which runs as under :

“1.20. Whereas it is agreed that both the parties shall extend co-operation between themselves to give effect to this memorandum of understanding.

If there is any dispute between the parties, the parties shall first try to sort out between themselves amicably or if the same is not resolved, the matter shall be referred to arbitration in accordance with the Indian Arbitration Act, 1996 and its amendments thereof.”

In terms of said clause, the parties have agreed to refer the matter for arbitration in accordance with the Arbitration Clause.

4. According to the applicant, non-applicants has not

3

complied with the liabilities undertaken in the MOU and subsequent lease agreement. The applicant has deposited certain amounts with non-applicants. Though non-applicants had not complied with the formalities, at the behest of later, the agreement of lease dated 28.01.2019, came to be executed in between the parties by which the terms and conditions of the contract have been reiterated. It is primely alleged that non-applicants have not complied with the formalities for getting complete sanction and enhanced FSI as per the requirement. The applicant insisted for compliance, however, non-applicants did not respond to the same. In view of that the applicant has terminated the lease deed by lodging a claim for compensation, including refund of advance amount. It was followed by a notice dated 31.12.2020 invoking arbitration clause.

5. Non-applicants have resisted to refer the matter to the arbitrator by denying the existence of arbitration clause. It is the stand of non-applicants that though initial MOU contains arbitration clause, however, subsequent lease deed does not bear arbitration clause, and thus, due to novation, arbitration agreement does not exists in between the parties.

4

For that purpose, non-applicants have relied on clause 1.26 of the lease deed dated 12.04.2019, which speaks for approaching to the Court for redressal of grievance.

6. The learned Counsel appearing for non-applicants would submit that unless there exists a clear and unequivocal arbitration clause in between the parties, the matter cannot be referred for arbitration. In support of said contention, reliance is placed on the decision of this Court in case of **Dhargalkar Technoosis (I) Pvt. Ltd. .vrs. Mumbai Metropolitan Regional Development Authority - 2021 (4) Mh.L.J. 108**, wherein this Court has emphasized that there must be clear agreement and parties shall be *ad idem* on a reference of dispute for arbitration. Non-applicants also relied on the decision of Supreme Court in case of **Jagdish Chander .vrs. Ramesh Chander and others – [2007] 5 SCC 719**, to contend that existence of arbitration clause is a condition precedent for exercising powers under Section 11 of the Arbitration Act.

7. Per contra, the learned counsel for the applicant would submit that the scope under Section 11 of the Arbitration Act is quite limited, and if the matter requires investigation regarding novation of contract, then the Court

5

cannot hold mini trial, but, the matter shall be referred for determination to the Arbitrator. To substantiate said contention, reliance is placed on the decision of Supreme Court in case of **Sanjiv Prakash .vrs. Seema Kukreja and others – [2021] 9 SCC 732**. The applicant has also relied on the decision of Supreme Court in case of **Mohammed Masroor Shaikh .vrs. Bharat Bhusan Gupta and others – [2022] 4 SCC 156**, to contend that when contentions are plainly arguable, such issue of non-arbitrability is left open to be decided by the Arbitral Tribunal, as the scope under Section 11 of the Arbitration Act is limited and restricted.

The said submission is countered by non-applicants by relying on the decision of Supreme Court in case of **Indian Oil Corporation Limited .vs. NCC Limited - 2022 Livelaw [SC] 616**, to contend that if facts are very clear and glaring, then Court may prima facie consider even the aspect with regard to the satisfaction of the claim.

8. Reverting to the facts, undisputedly the parties have initially entered into an agreement in the form of MOU dated 19.08.2018, settling down the terms, interse arrived for leasing out the property for industrial purpose. Mutual rights

6

and liabilities have been incorporated in the MOU along with the scope of the expected work. There is no dispute that the MOU bears Clause No.1.20 for arbitration, which is reproduced above. The interse dispute hinges around the effect of subsequent agreement of lease dated 29.01.2019, which does not bear the arbitration clause, but, speaks about approaching Court for redressal of the disputes. The learned Counsel for non-applicants strongly argued that the parties have consciously entered into the subsequent agreement of lease wherein they have chosen to go to the Court for redressal and thus, the earlier arbitration clause incorporated in the MOU does not survive. It is submitted that there was novation of contract by which the parties have consciously not mentioned the arbitration clause, thus, the parties were not in agreement of resorting to the remedy of arbitration.

9. Close perusal of the MOU indicates that this was initial step in between the parties, by which they have agreed for the leased transaction. Under MOU they have undertaken to enter into lease agreement to further the case of MOU. Thus, the subsequent agreement of lease is an outcome of the initial agreed terms of the MOU. The agreement of lease no

7

where speaks that the MOU has no applicability due to execution of the agreement, rather there is no reference of MOU in the subsequent lease agreement. It is well settled that interference of Court at referral stage is quite limited. All the terms and conditions and the liabilities which have been incorporated in the MOU are clearly percolated in the subsequent lease document. It is a matter of detail enquiry to consider whether due to execution of lease deed, earlier MOU has been eclipsed. Whether the execution of lease deed amounts to novation of contract, is a matter of fact, which cannot possibly be decided in the limited jurisdiction. Certainly, the said aspect is open for non-applicants to agitate before the Arbitrator. As noted above, the initial contract bears arbitration clause and as there is live dispute between the parties, a case is made out to exercise jurisdiction under Section 11 of the Arbitration Act.

10. At this stage, learned Counsel appearing for the respective parties were called upon to suggest name of Arbitrator by consent. However, both of them have left it to the Court to pass appropriate orders. In view of this, Justice Mrs. Pushpa V. Ganediwala, (Former Judge), is appointed as

8

sole Arbitrator.

11. It is made clear that the objections sought to be raised on behalf of non-applicants are kept open to be raised before the learned Arbitrator.

12. Registry is directed to request the learned Arbitrator for consent letter and for disclosure statement as per the provisions of the Arbitration Act.

JUDGE