

HON'BLE SRI JUSTICE K. LAKSHMAN

ARBITRATION APPLICATION No.148 OF 2021

ORDER:

The present Arbitration Application is filed under Section 11 of the Arbitration and Conciliation Act, 1996 (hereinafter 'the Act, 1996') for appointment of a sole arbitrator to resolve the disputes between the parties.

2. Heard Mr. Dante Srinivas, learned counsel for the Applicant and Ms. G. Nikitha, learned counsel for the Respondents.

3. The Applicant is a company engaged in the business of manufacturing and selling aluminum alloy ingots on job-work basis. The Applicant and the Respondents entered into an agreement dated 29.10.2020 for manufacture of aluminum ingots for 3 months from 15.11.2020 to 15.02.2021. The agreement was renewed for a period from 15.02.2021 to 15.05.2021. Again, the said agreement was renewed for another three months from 16.05.2021 to 15.08.2021 subject to the execution of fresh and final agreement.

4. According to the Applicant, disputes arose between the parties during the execution of works. A legal notice was issued by the Applicant dated 09.07.2021 claiming an amount of Rs. 42,98,464/- The Respondents replied to the said notice on 27.07.2021 denying the claims of the Applicant. Hence, the Applicant invoked Clause 11 of the agreement dated 29.10.2020 and issued an arbitration notice dated 03.08.2021. In the said notice, the Applicant claimed an amount of Rs. 2,71,92,076/- towards dues payable and damages. The Applicant nominated three people as arbitrators and asked the Respondent to choose any one of them to resolve their disputes. The Respondents replied to the said arbitration notice on 01.09.2021 and nominated another person as arbitrator. Hence, the present arbitration applicant is filed.

5. Learned counsel for Respondent No. 2 filed a counter stating that he cannot be made a party to the arbitration. It was contended that the agreement dated 29.10.2020 was executed between Applicant and Respondent No. 1 and Respondent No. 2 was merely a representative

of Respondent No. 2. The said contentions need not be examined as the Applicant had filed a Memo dated 29.06.2022 agreeing to delete the name of Respondent No. 2 as party to the arbitral proceedings.

6. As far as Respondent No. 1 is concerned, a counter affidavit was filed agreeing for appointment of the arbitrator. Therefore, none of the parties dispute the existence of an arbitration agreement which is incorporated in Clause 11 of the agreement dated 29.10.2020. The said clause is extracted below:

“11-Dispute Resolution

- a. The Parties mutually agree that any/all disputes arising from and out of this Contract shall first be settled through negotiation and good office.
- b. Any/all disputes and differences whatsoever arising under or inconnection with this Contract which cannot be settled by the Parties through negotiations shall be referred to Arbitration.
- c. The Parties agree that disputes shall be referred to and adjudicated by an Arbitral Tribunal consisting of a single Arbitrator mutually agreed and appointed by both the

parties and the procedure of Arbitration shall be governed by the Arbitration and Conciliation Act, 1996.

d. All proceedings shall be conducted in English and held at Hyderabad and a daily transcript of the Arbitration proceedings in English shall be prepared by the Arbitral Tribunal.

e. The Award as passed by the Arbitral Tribunal shall be final and binding on the Parties.

f. The Parties shall share the arbitration cost equally amongst themselves.”

7. The Supreme Court in **Vidya Drolia v. Durga Trading Corporation**¹ laid down the test to exercise power under Section 11 of the Act, 1996. In his separate opinion, Hon’ble Sri Justice N.V. Ramana held as follows:

“244. Before we part, the conclusions reached, with respect to Question 1, are:

244.1. Sections 8 and 11 of the Act have the same ambit with respect to judicial interference.

¹. (2021) 2 SCC 1

244.2. Usually, subject-matter arbitrability cannot be decided at the stage of Section 8 or 11 of the Act, unless it is a clear case of deadwood.

244.3. The court, under Sections 8 and 11, has to refer a matter to arbitration or to appoint an arbitrator, as the case may be, unless a party has established a prima facie (summary findings) case of non-existence of valid arbitration agreement, by summarily portraying a strong case that he is entitled to such a finding.

244.4. The court should refer a matter if the validity of the arbitration agreement cannot be determined on a prima facie basis, as laid down above i.e. “when in doubt, do refer”.

244.5. The scope of the court to examine the prima facie validity of an arbitration agreement includes only:

244.5.1. Whether the arbitration agreement was in writing? or

244.5.2. Whether the arbitration agreement was contained in exchange of letters, telecommunication, etc.?

244.5.3. Whether the core contractual ingredients qua the arbitration agreement were fulfilled?

244.5.4. On rare occasions, whether the subject-matter of dispute is arbitrable?”

8. In the present case, there is no dispute that the parties by incorporating Clause 11 had agreed to resolve their disputes through arbitration. Therefore, it is appropriate to refer the dispute to

arbitration. The parties are at liberty take all the available defences before the learned arbitrator.

9. In light of the aforesaid discussion and the law laid down by the Supreme Court, the present arbitration application is allowed. Accordingly, Sri Justice Vilas V. Afzulpurkar, Former Judge, High Court, is appointed as the sole arbitrator to resolve the disputes between the parties.

As a sequel, the miscellaneous applications, if any, pending in the Arbitration Application shall stand closed.

5th July, 2022
Mgr

K. LAKSHMAN, J