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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

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Date of Decision: 04.04.2022

+ **ARB.P. 1197/2021**

M/S GREEN POWER INTERNATIONAL PVT LTD..... Petitioner
Through: Mr Atul Kumar Sinha, Advocate.

versus

THE DIRECTOR MANAGING DIRECTOR
NAYATI HEALTH CARE AND RESEARCH
PVT LTD Respondent
Through: Mr Rohit Khanna, Advocate.

CORAM:
HON'BLE MR. JUSTICE VIBHU BAKHRU

VIBHU BAKHRU, J. (ORAL)

1. The petitioner has filed the present petition under Section 11 of the Arbitration and Conciliation Act, 1996 (hereafter 'the A&C Act'), *inter alia*, praying that an Arbitrator be appointed to adjudicate the disputes that have arisen in connection with the Annual Operation and Maintenance Contract dated 03.05.2017.

2. The terms and conditions included as a part of said contract also contains the following sentence:

'Jurisdiction: The Arbitration proceedings shall be conducted in the Courts of New Delhi'.



3. Mr Sinha, learned counsel appearing for the petitioner, contends that the said sentence constitutes an arbitration agreement as contemplated under Section 7 of the A&C Act. Mr Khanna, learned counsel appearing for the respondent has countered the aforesaid submission. He relies upon the decision of the Supreme Court in *Jagdish Chander v. Ramesh Chander and Ors.: Civil Appeal No. 4467/2002 decided on 26.04.2007* as well as the decision of the Coordinate Bench of this Court in *Avant Garde Clean Room & Engg. Solutions Pvt. Ltd. v. Ind Swift Limited: (2014) 210 DLT 714*. On the strength of the said decision, he submits that the aforementioned clause cannot be construed as an arbitration agreement.

4. It is relevant to refer to Section 7 of the A&C Act, which defines an arbitration agreement. The same is set out below: -

“ 7. Arbitration agreement. —

(1) In this Part, “arbitration agreement” means an agreement by the parties to submit to arbitration all or certain disputes which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not.

(2) An arbitration agreement may be in the form of an arbitration clause in a contract or in the form of a separate agreement.

(3) An arbitration agreement shall be in writing.

(4) An arbitration agreement is in writing if it is contained in—



- (a) a document signed by the parties;
 - (b) an exchange of letters, telex, telegrams or other means of telecommunication which provide a record of the agreement; or
 - (c) an exchange of statements of claim and defence in which the existence of the agreement is alleged by one party and not denied by the other.
- (5) The reference in a contract to a document containing an arbitration clause constitutes an arbitration agreement if the contract is in writing and the reference is such as make that arbitration clause part of the contract.”

5. It is clear from the plain language of Section 7 of the A&C Act that in order to constitute an arbitration agreement, the parties must agree to submit all or certain disputes to arbitration in respect of a defined legal relationship, whether contractual or not. The minimal, that is, required is that the arbitration agreement/clause should clearly indicate an intention of the parties to refer the disputes to arbitration and that they would be bound by the decision of the arbitral tribunal. It is difficult to accept that the aforementioned clause establishes any such intention on the part of the parties.

6. In *Jagdish Chander v. Ramesh Chander and Ors.* (*supra*), the Supreme Court had referred to its earlier decisions and set out the principles as to what constitutes an arbitration agreement. Paragraph 8 of the said decision is relevant and set out below: -



“8. This Court had occasion to refer to the attributes or essential elements of an arbitration agreement in *K.K. Modi v. K.N. Modi* [(1998) 3 SCC 573], *Bharat Bhushan Bansal v. U.P. Small Industries Corpn. Ltd.* [(1999) 2 SCC 166] and *Bihar State Mineral Development Corpn. v. Encon Builders (I) (P) Ltd.* [(2003) 7 SCC 418]. In *State of Orissa v. Damodar Das* [(1996) 2 SCC 216] this Court held that a clause in a contract can be construed as an “arbitration agreement” only if an agreement to refer disputes or differences to arbitration is expressly or impliedly spelt out from the clause. We may at this juncture set out the well-settled principles in regard to what constitutes an arbitration agreement:

(i) The intention of the parties to enter into an arbitration agreement shall have to be gathered from the terms of the agreement. If the terms of the agreement clearly indicate an intention on the part of the parties to the agreement to refer their disputes to a private tribunal for adjudication and a willingness to be bound by the decision of such tribunal on such disputes, it is arbitration agreement. While there is no specific form of an arbitration agreement, the words used should disclose a determination and obligation to go to arbitration and not merely contemplate the possibility of going for arbitration. Where there is merely a possibility of the parties agreeing to arbitration in future, as contrasted from an obligation to refer



disputes to arbitration, there is no valid and binding arbitration agreement.

(ii) Even if the words “arbitration” and “Arbitral Tribunal (or arbitrator)” are not used with reference to the process of settlement or with reference to the private tribunal which has to adjudicate upon the disputes, in a clause relating to settlement of disputes, it does not detract from the clause being an arbitration agreement if it has the attributes or elements of an arbitration agreement. They are: (a) The agreement should be in writing. (b) The parties should have agreed to refer any disputes (present or future) between them to the decision of a private tribunal. (c) The private tribunal should be empowered to adjudicate upon the disputes in an impartial manner, giving due opportunity to the parties to put forth their case before it. (d) The parties should have agreed that the decision of the private tribunal in respect of the disputes will be binding on them.

(iii) Where the clause provides that in the event of disputes arising between the parties, the disputes shall be referred to arbitration, it is an arbitration agreement. Where there is a specific and direct expression of intent to have the disputes settled by arbitration, it is not necessary to set out the attributes of an arbitration agreement to make it an arbitration agreement. But where the clause relating to settlement of disputes, contains words which specifically exclude any of the attributes of an arbitration agreement or



contains anything that detracts from an arbitration agreement, it will not be an arbitration agreement. For example, where an agreement requires or permits an authority to decide a claim or dispute without hearing, or requires the authority to act in the interests of only one of the parties, or provides that the decision of the authority will not be final and binding on the parties, or that if either party is not satisfied with the decision of the authority, he may file a civil suit seeking relief, it cannot be termed as an arbitration agreement.

(iv) But mere use of the word “arbitration” or “arbitrator” in a clause will not make it an arbitration agreement, if it requires or contemplates a further or fresh consent of the parties for reference to arbitration. For example, use of words such as “parties can, if they *so desire*, refer their disputes to arbitration” or “in the event of any dispute, the parties *may* also agree to refer the same to arbitration” or “if any disputes arise between the parties, they should consider settlement by arbitration” in a clause relating to settlement of disputes, indicate that the clause is not intended to be an arbitration agreement. Similarly, a clause which states that “if the parties so decide, the disputes shall be referred to arbitration” or “any disputes between parties, if they so agree, shall be referred to arbitration” is not an arbitration agreement. Such clauses merely indicate a desire or hope to have the disputes settled by arbitration, or a tentative arrangement to explore arbitration as a mode of



settlement if and when a dispute arises. Such clauses require the parties to arrive at a further agreement to go to arbitration, as and when the disputes arise. Any agreement or clause in an agreement requiring or contemplating a further consent or consensus before a reference to arbitration, is not an arbitration agreement, but an agreement to enter into an arbitration agreement in future.”

7. On the anvil of the aforesaid principle, it is clear that there is no arbitration agreement between the parties. The sentence relied upon by the petitioner merely mentions that the arbitration proceedings will be conducted in the Courts of New Delhi. This sentence is also erroneous inasmuch as, the arbitration proceedings are not conducted in the Courts but by an arbitral tribunal. This Court is unable to accept that the said sentence indicates a consensus between the parties to refer the disputes to arbitration and an intention to be bound by the decision of the arbitral tribunal. Merely because the said clause uses the term ‘arbitration proceedings’ does not necessarily lead to the conclusion that the said clause embodies an arbitration agreement.

8. In *Avant Garde Clean Room & Engg. Solutions Pvt. Ltd. v. Ind Swift Limited: (2014) 210 DLT 714*, this Court had considered a clause, which reads as under: -

“Arbitration-Dispute if any arising out of this Agreement shall be subject to the exclusive jurisdiction of the courts in city of Delhi.”



9. The Court had held that mere reference to the word ‘arbitration’, is not sufficient to construe the said clause as an arbitration agreement.

10. In the present case, the use of the expression ‘arbitration proceedings’ in a sentence, is clearly insufficient to construe the said sentence as an arbitration agreement.

11. The petition is, accordingly, dismissed.

VIBHU BAKHRU, J

APRIL 4, 2022

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[Click here to check corrigendum, if any](#)



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