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AP/18/2023

IN THE HIGH COURT AT CALCUTTA
Constitutional Writ Jurisdiction
ORIGINAL SIDE

BALAJEE EDUCATION PRIVATE LIMITED
VS
CHANDRA PRATAP

BEFORE:

The Hon'ble JUSTICE SABYASACHI BHATTACHARYYA

Date: 17th April, 2023.

Appearance:

Mr. Aniruddha Mitra, Adv.

Ms. Arijita Ghosh, Adv.

...for the petitioner

Mr. Saikat Roy Chowdhury, Adv.

Mr. Aritra Ghosh, Adv.

...for the respondent

The Court: The present application under Section 11 of the Arbitration and Conciliation Act, 1996 is moved on the ground that the endeavour to have a reference to the arbitrator in the matter has failed.

Learned counsel for the petitioner places reliance on two documents, one an employment agreement and the other a non-disclosure agreement, both entered into between the parties on the same date. It is submitted that the employment agreement itself, in one of its clauses, categorically mentioned that the non-disclosure agreement would be treated to be a part of the employment

agreement. As such, a composite show cause notice was issued to the respondent and subsequently an invocation under section 21 of the 1996 Act followed.

Learned counsel further places reliance on the arbitration clauses of the said two agreements and submits that an arbitrator be appointed to resolve the dispute between the parties.

Learned counsel appearing for the respondent submits at the outset that the present respondent was not a permanent employee of the petitioner Company at any juncture. As such, in the absence of any confirmation as a permanent employee, the clause in the employment agreement pertaining to arbitration cannot operate inasmuch as the respondent is concerned.

That apart, it is submitted that the two agreements in question carry overriding clauses respectively, which confer precedence on each of the agreements over the other. The said two agreements contain distinct and different arbitration clauses, which envisage separate and different procedures. As such, the present application under Section 11 of the 1996 Act seeking to club both the said arbitration clauses together and asking for a reference on issues involving both the said agreements is not maintainable in law.

It is further submitted that the respondent also denies the allegations made by the petitioner on merits.

Be that as it may, it is clear from the employment agreement itself that under the heading 'Confidentiality', it is clearly stipulated that the provisions of the said clause would be in addition to, and not in substitution of, the provisions of the non-disclosure agreement executed by the parties. It is further provided that the non-disclosure agreement executed by and between the parties shall be deemed to form a part of the employment agreement.

In view of such specific provision in the employment agreement, construed in conjunction with the fact that the two agreements were entered into between the same parties and on the same date, it has to be deemed that the non-disclosure agreement forms a part of the employment agreement and cannot be dissociated from the latter.

Although there are clauses in both the said agreements giving overriding effect to each of the agreements, the said clauses contemplate that the agreement in question embodies the entire understanding between the parties in respect of the subject matter of each of the agreements and supersedes any and all 'prior' negotiation, correspondence, understandings between the parties in respect of the subject matter of the agreement.

From a plain reading of the said overriding clauses, it cannot but be said that the said clauses refer to earlier agreements which might have been entered into between the parties on the subject matter covered by the two. However, since the present two agreements were entered into on the same date and there is a clause in the employment agreement deeming the non-disclosure agreement to be a part thereof, it cannot be said that the overriding effect contemplated in each of the agreements apply to the other.

Inasmuch as the expression "prior" is concerned, considering that the same has been used to qualify the negotiation, correspondence, etc. which are excluded, it has to be observed that the said overriding clauses could not operate vis-à-vis the other document in so far as each of the documents is concerned.

A mere perusal of the show cause notice preceding the invocation notice as well as the invocation notice under section 21 of the 1996 Act indicates that it was specifically mentioned in both the notices that the non-disclosure

agreement, along with the employment agreement and the Faculty Member Handbook, were to be collectively referred to as the employment documents.

Hence, the disputes referred to in both the said notices clearly indicate towards the employment document having included both the employment agreement as well as the non-disclosure agreement which, in any event, have been deemed to be part of one another.

Hence, the objection taken on the score of non invocation in respect of the non-disclosure agreement cannot be upheld. The Division Bench judgment of the Delhi High Court reported at *2022 SCC Online Delhi 3412* and the Co-ordinate Bench judgment of this court reported at *2022 SCC Online Cal 3036* specifically refer to situations where there is no invocation under Section 21 of the 1996 Act at all. However, in the present case, for the reasons as indicated above, the principle laid down in the said judgments is not attracted.

In so far as the disputes raised by the parties are concerned, those pertain to both the agreements, that is, the employment agreement as well as the non-disclosure agreement and it cannot but be said that those components, which go on to form the entire cause of action of the dispute, are inextricable from each other and form a chain of events by themselves. Hence, relegating the petitioner to a separate proceeding merely for the purpose of reference of the matter to arbitration would be a futile exercise inasmuch as both the parties are concerned.

The other point canvassed by the respondent is that the arbitration clauses in both the documents are distinct and different from each other.

It is seen from the employment agreement that the same contemplates a specific procedure by which the matter has to be referred for arbitration to a sole

arbitrator appointed by the Director of the petitioner-Company in accordance with the 1996 Act, whereas the arbitration clause in the non-disclosure agreement merely contemplates a reference by the Company under the 1996 Act itself.

Read in conjunction, there is no substantial difference between the said two clauses in so far as a reference under Section 11 of the 1996 Act is concerned, since the procedure envisaged in the arbitration clause of the employment agreement has failed in view of the respondent having not concurred with the petitioner insofar as the appointment of arbitrator is concerned. Both the said clauses refer to a proceeding under the 1996 Act and cannot be distinguished on such general terms. In so far as the appointment of the “Director” of the Company and the Company itself is concerned, there is nothing to discern between the two in the present context.

Moreover, since the stages contemplated in the procedures as provided in the said two agreements have already been exhausted in the absence of any consensus between the parties regarding the arbitrator to be appointed, the said chapter is a closed one and it cannot now be said that there is any substantial difference between the crux of the two arbitration clauses in the two agreements. Hence, the objection as to maintainability taken by the respondent has to be turned down.

As regards the first point agitated by the respondent, nothing hinges on the respondent being or not being a permanent employee of the Company, since the employment agreement, whatever be its worth regarding permanence of employment of the respondent, specifically includes an arbitration clause contemplating arbitration in case of disputes arising within the scope of the said

agreement itself. Hence, irrespective of the nomenclature, it cannot be said that the arbitration clause is to be divorced from the agreement itself merely on an irrelevant ground of the respondent not being a “permanent” employee of the Company, which cannot be factored into the question of arbitrability.

In such view of the matter and since the dispute raised is otherwise arbitrable and falls within the purview of the arbitration clauses of the agreements, which have to be read as one, the power conferred on this Court by authority from the Chief Justice under Section 11 of the Arbitration and Conciliation Act, 1996 is required to be exercised.

Accordingly, AP/18/2023 is disposed of by appointing Ms. Senjuti Sengupta (Mobile No. – 9433665266), an advocate practising in this Court, as the Sole Arbitrator to resolve the dispute between the parties, subject to obtaining declaration/consent from her under section 12 of the Arbitration and Conciliation Act, 1996.

It is made clear that the merits of the respective contentions of the parties regarding the principal dispute have not been gone into by this Court in any manner.

(SABYASACHI BHATTACHARYYA, J.)