

IN THE HIGH COURT AT CALCUTTA
Ordinary Original Civil Jurisdiction
ORIGINAL SIDE

AP/229/2023

M/S. BRIGHT CHEM
VERSUS
GTL INFRASTRUCTURE LIMITYED

BEFORE :
THE HON'BLE JUSTICE SABYASACHI BHATTACHARYYA
Date : 10th May, 2023.

Appearance:

Mr. Suman Sengupta, Adv.
Mr. Dip Jyoti Chakraborty, Adv.
Mr. Rahul Kumar Singh, Adv.
...for the petitioner.

Mr. Pratip Mukherjee, Adv.
Sk. Jahadar Alam, Adv.
Mr. Pinaki Brata Ghosh, Adv.
...for the respondent.

The Court : Learned Counsel for the petitioner contends that there was a license agreement between the parties dated July 29, 2009, containing an arbitration clause (Clause 16). Since a dispute has arisen within the purview of such clause, the petitioner gave an invocation notice to the respondent, to which a reply was also given by the respondent. However, there has been no consensus between the parties as to the particular Arbitrator who is to be appointed.

At the outset, learned Counsel for the respondent raises two preliminary objections touching the maintainability of the present application.

First, that neither the original nor the certified copy of the agreement-in-question, containing the arbitration clause, has been produced with the application under Section 11 of the Arbitration & Conciliation Act, 1996.

Secondly, the agreement, although described as a license agreement by the petitioner, is in substance a lease agreement, for which a higher stamp duty was required to be paid. The petitioner having not done so, the application under Section 11 cannot be looked into by this Court.

In this context, learned Counsel for the respondent places reliance on the latest Five-Judge Bench decision of the Supreme Court in *M/s. N.N.Global Mercantile (P) Ltd. –versus- Indo Unique Flame Ltd. & Others*, reported at 2023 SCC Online SC 495.

Learned Counsel appearing for the respondent further points out that the agreement-in-question, at least in its copy which has been annexed to the application, does not contain the name of one of the parties and, as such, cannot be the original or a true copy.

In controverting such objections as to maintainability, learned Counsel for the petitioner submits that the document is a license agreement not only in nomenclature but in substance as well.

That apart, it is argued that the license agreement does contain the name of the parties.

It is submitted by learned Counsel for the petitioner, by placing reliance on the opening page of the said agreement, that although the initial two paragraphs contain blank spaces regarding the name, the name of M/s. Bright Chem., the present petitioner, has indeed been mentioned, having been inserted by hand and duly signed against.

As regards the argument of the certified copy not being produced, it is submitted by learned Counsel for the petitioner that the document is not a public document. The original, it is claimed by the petitioner, is lying in the custody of the respondent and, as such, could not be produced along with present application.

Learned Counsel for the petitioner files a supplementary affidavit, with leave of Court, in paragraph no.5 of which the averment regarding custody, as indicated above, has been specifically made.

A perusal of the Five-Judge Bench judgment in *M/s. N.N. Global* (supra) clearly indicates that the relevant paragraphs, that is, paragraphs 98 to 101, primarily deal with public documents and what is a certified copy of such documents. Section 76 of the Indian Evidence Act has been quoted in paragraph 98, which clearly indicates that

the present agreement, which is a private document between the parties, does not come under the ambit of public documents.

Although learned Counsel seeks to rely on Section 74 as well as Section 63 of the Indian Evidence Act to seek to impress upon the Court that a private document which is a copy of public record may qualify as a public document, such condition is also not fulfilled in the present case, since the documents are private documents and are coming from the private custody of the parties.

Hence, the argument as regards the certified copy of the document not having been produced cannot be accepted at this stage.

In so far as the original of the document not being produced, the same has been ably dealt with by the petitioner by arguing on the basis of the pleading in the supplementary affidavit that the original, according to the petitioner, is lying in the custody of the respondent. Even without going into the question of the veracity of such statement, since such an averment has been made, it is the prerogative of the judicial authority which decides the dispute on merits to consider such issue and to adjudicate even on the question as to whether the petitioner is entitled to lead secondary evidence.

However, the said adjudication would be premature at this stage, in view of the several judgments of the Supreme Court restricting the scope of enquiry of the Court under Section 11, sub-sections (6) and (6A), of the 1996 Act.

In so far as the objection regarding the document not containing the names of the parties is concerned, the petitioner is justified in submitting that the name of the petitioner has been inserted by hand and a signature has been put against the same in the copy of the license agreement which has been annexed herewith.

Hence, it cannot be construed per se that the document is not a true copy of the original. In the supplementary affidavit, the petitioner has annexed another copy of the same license agreement which tallies with that annexed to the application under Section 11, containing a signature of one of the partners of the petitioner firm. Hence,

there is substantial satisfaction of the scheme framed by the Chief Justice of this Court in 1997 in that regard.

Inasmuch as the argument of the agreement being not a license agreement but a lease, the same is a part of the adjudication on the merits of the case to the extent that the intention of the parties, interpretation and construction of the terms of the agreement as well as surrounding circumstances might be required to be looked into by the judicial authority deciding the issue. Hence, it is premature to be taken up such issue for adjudication at this stage, while hearing an application under Section 11 of the 1996 Act.

In such view of the matter, none of the objections to the maintainability of the application, taken by the respondent, can be entertained.

In so far as the validity of the arbitration clause and the arbitrability of the issue is concerned, this Court is satisfied in that regard. Moreover, the respondent itself has given a reply to the invocation letter of the petitioner under Section 21 of the 1996 Act, where no dispute was raised on such questions.

Hence, in the light of the above discussions, AP No.229 of 2023 is allowed, thereby appointing Mr. Sabyasachi Choudhury (Mobile No. 9831034562), an Advocate of this Court and a member of the Bar Library Club, as the sole Arbitrator to resolve the disputes between the parties, subject to obtaining consent and declaration from him under Section 12 of the 1996 Act.

It is made clear that all questions on the issue of maintainability of the action as well as other issues are kept open to be decided by the Arbitrator.

(SABYASACHI BHATTACHARYYA, J.)