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

AP/249/2023

PC RESTAURANT LLP
VS
MERLINZ RESTAURANTS PVT LTD

BEFORE:

The Hon'ble JUSTICE SABYASACHI BHATTACHARYYA

Date : 4th May, 2023

Appearance:

Mr. Shaunak Ghosh, Adv.

Ms. Saheli Sen, Adv.

Ms. Rajib Mullick, Adv.

...for the petitioner

Mr. Surya Prasad Chattopadhyay, Adv.

Mr. Arjun Samanta, Adv.

Mr. Saptarshi Kumar Mal, Adv.

...for the respondent

The Court:- Learned counsel for the petitioner places reliance on Clause 3.6 of an agreement dated December 1, 2018 entered into between the parties, which provides for arbitration in case of any dispute or difference arising under or in connection with or regarding the interpretation of the agreement.

Learned counsel further produces a supplementary agreement entered into subsequently, which clearly refers to the previous agreement and indicates in paragraph no. 2 thereof that the parties had mutually agreed to add and alter certain terms and conditions of the previous agreement dated December 1, 2018 and, thus, were executing the supplementary agreement to incorporate the said terms and conditions.

It is submitted that a single invocation notice was, accordingly, issued by the petitioner to the respondent, preceded by a demand notice, for reference to arbitration. The respondent, however, although did not dispute the arbitration clause in reply, indicated that it is not agreeable to the name of the arbitrator suggested by the petitioner.

Learned counsel appearing for the respondent opposes the application under Section 11 of the Arbitration and Conciliation Act, 1996 on several grounds. First, it is contended that no original or certified copy of the arbitration agreement or the agreement containing the arbitration clause has been produced along with the application under Section 11. Secondly, there are other supplementary agreements which also form a part of the parent agreement, which contains the arbitration clause. Those agreements have not been referred to in the present application.

It is next argued that there was a previous invocation notice issued by the petitioner, which was stayed by an order of Court within the contemplation of Section 9 of the 1996 Act. It was further observed by the Division Bench of this Court that all connected matters related to the arbitral proceedings and the dispute shall be moved before the City Civil Court at Calcutta.

However, despite such specific order and stay of the operation of the previous arbitration invocation notice, the petitioner is seeking to refer the matter to arbitration afresh, thereby giving a go-bye to the said order of this Court.

Learned counsel appearing for the petitioner contends that the clause in the scheme framed by the Chief Justice of this Court in 1997 regarding

production of original or certified copy of the agreement is not mandatory but directory. That apart, it is submitted that the petitioner is agreed to produce an authenticated copy of the agreement in question, if so directed by the Court.

It is denied by the petitioner that there are other supplementary agreements which are relevant to the dispute at hand.

Moreover, the present application has been filed on the premise of a subsequent invocation, which was issued in the form of a notice subsequent to the order staying the previous notice of invocation and, as such, constitutes a fresh cause of action for the present application.

It is further pointed out by learned counsel for the petitioner that the notice referred to by the respondent, dated August 8, 2022, which is annexed at page 41 of the present application, was not an invocation notice but a demand notice preceding the invocation. The invocation notice has also been annexed to the present application and the same was dated March 3, 2023.

A perusal of the scheme framed by the Chief Justice of this Court in 1997 pertaining to applications under Section 11 of the 1996 Act indicates that Clause 7 thereof leaves ample discretion on the Court, being the designate of the Chief Justice or the Chief Justice herself/himself, to reject the application or direct the same to be filed afresh, for the lack of the original and or certified copy of the arbitration agreement. The expression “may” used in Clause 7 of the scheme clearly indicates the same.

Moreover, as such a defect is curable, since the petitioner is agreeable to produce an authenticated copy of the agreement if need be, non-supply of the

same would be a hyper-technical ground of refusal of an application under Section 11.

As regards the second point argued by the respondent, the existence or otherwise or other supplementary agreements relating to the parent agreement, which is relied on by the petitioner, is immaterial for the purpose of considering the question of whether the matter should be referred to arbitration within the conspectus of Section 11 of the 1996 Act. As is well-known, the scope of Section 11, particularly in view of Sub Section 6(A) thereof, is extremely limited. Although learned counsel for the respondent indicates to the recent five-Judge Bench decision in *N.N. Global Mercantile Private Limited Vs. Indo Unique Flame Limited and others*, delivered this year, to argue that the production of the original agreement is mandatory, the judgment primarily pertains to the issue whether an unstamped and unregistered document, which is otherwise required to be stamped and registered, has to be impounded prior to the matter being referred to arbitration under Section 11 of the 1996 Act. Since such question has not arisen in the present case, there is no occasion for this Court to follow the said five-Judge Bench decision of the Supreme Court in the facts and circumstances of this case.

Moreover, as discussed above, the filing of the original is not mandatory as such. In fact, a perusal of Sections 8 and 11 of the 1996 Act clearly indicates that the consideration under Section 8 is by a “judicial authority” whereas Sub-Section (6A) of Section 11 restricts enquiry of the Court only to whether there is an arbitration clause or an arbitration agreement between the parties. Although

it is arguable whether the said question includes the fact whether the clause is valid, such distinction does not have any direct bearing on the present dispute.

Inasmuch as invocation by a previous notice under Section 21 having been stayed by the Division Bench is concerned, such order does not have any relevance in the present context, simply because the present invocation has been done under Section 21 of the 1996 Act afresh on March 3, 2023, which is subsequent to the order of stay of the previous arbitration invocation notice.

That apart, it has been rightly contended by learned counsel for the petitioner that the notice dated August 8, 2022 was merely a demand notice, where it was indicated by the petitioner in unambiguous terms that failure to comply with the said notice would make it evident that disputes had arisen between the parties and as such the petitioner would be constrained to invoke the arbitration clause contained in Clause 3.6 of the agreement between the parties. Such use of the future tense clearly shows that the same was not an invocation notice but a preceding demand notice.

In view of the subsequent notice under Section 21 having been issued, which is the cause of action of the present application, there cannot be any impediment in appointing an arbitrator to resolve the dispute between the parties.

It is also germane to mention here that the respondent itself has taken out a proceeding under Section 9 of the 1996 Act, as has the petitioner, before the appropriate court, thereby admitting the fact that there is an arbitration clause between the parties which is referable to the dispute.

Moreover, it is clearly mentioned in the reply of the respondent to the invocation dated March 15, 2023 that the respondent merely disagrees with the name of the arbitrator sought to be appointed by the petitioner and not to the existence of the arbitration clause itself.

In such view of the matter, AP/249/2023 is allowed, thereby appointing Justice Tapan Kumar Dutt (Mobile No. 9831066037), a former Judge of this Court, as the sole arbitrator to resolve the disputes between the parties, subject to obtaining his declaration/consent under Section 12 of the Arbitration and Conciliation Act, 1996.

(SABYASACHI BHATTACHARYYA, J.)