

Sharayu Khot.

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

COMMERCIAL ARBITRATION PETITION NO. 14 OF 2023

Shree Ganesh Forgings Limited

...Petitioner

Versus

M/s. Goodwill Dwellings LLP

...Respondent

Mr. Akhilesh Dubey a/w Mr. Vagish Mishra, Mr. Amit Dubey, Mr. Uttam Dubey, Mr. Rajuram Kukreja i/by M/s. Law Counsellors for the Petitioner.

Ms. Ritika Agarwal i/by Acelegal for the Respondent.

CORAM : R.I. CHAGLA J

DATE : 6 September 2023

ORDER :

1. By this Commercial Arbitration Petition, the Petitioner is seeking appointment of Sole Arbitrator in the matter of adjudication of disputes and differences arising between the parties in respect of Deed of Assignment dated 31st December 2020 (*"the said Agreement"*) executed by and between the parties.

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2. A preliminary objection has been raised by the learned

Counsel appearing for the Respondent on the ground that the Petition is not maintainable as the procedure contemplated under the Dispute Resolution viz. Article 10 of the said Agreement has not been complied with. Under Article 10(2), it is provided that any dispute, controversy or claim arising under, out of or is relating to the said Agreement, shall be submitted to mediation in accordance with the Arbitration and Conciliation Act, 1996. Further in Article 10(3) it is provided that if the dispute, controversy or claim has not been settled pursuant to the mediation within the 30 days by commencement of mediation, the party upon filing a request for arbitration be referred to and finally determined by arbitration in accordance with the Arbitration and Conciliation Act, 1996. This period of 30 days may be extended by parties by mutual consent.

3. The learned Counsel appearing for the Respondent has submitted that the Notice invoking mediation had been issued on 27th October 2022 and by which the Respondent was called upon to initiate mediation proceedings within a period of two days from the date of receipt of notice, failing which the Petitioner be constrained to file appropriate legal proceedings to safeguard its rights and interest in the matter solely at the risks, costs and consequences of

the Respondent.

4. The learned Counsel for the Respondent has submitted that the non-observance of the mandatory period of 30 days for settlement of dispute pursuant to mediation is contrary to Article 10(3). The Petitioner had in violation of this Article, invoked arbitration by its Advocate's Notice dated 11th November 2022. She has submitted that the Respondent had responded to the Notice invoking arbitration through its Advocate's letter dated 17th November 2022, wherein it was submitted that the request for mediation was received on 1st November 2022. Since the partner of the Respondent LLP had been tending to his ailing father, who had thereafter passed away on 8th November 2022, the mediation process could not be carried out in such a short time. Accordingly, the Notice invoking arbitration is invalid and denied by the Respondent.

5. The learned Counsel for the Respondent has submitted that the parties had thereafter, agreed to once again refer their disputes for mediation. This is borne out from the Petitioner's Advocate's letter dated 2nd December 2022 addressed to the Advocate for the Respondent. The Petitioner nominated Awadesh

Mani Tiwari to mediate in the matter. The Respondent was called upon to confirm the proposed name within 7 days, failing which the Petitioner would be constrained to file appropriate legal proceedings.

6. The learned Counsel for the Respondent has submitted that thereafter mediation process was held and by Notice dated 30th January 2023, the mediator declared the mediation as failed. She has accordingly, submitted that a fresh notice invoking arbitration is required to be issued by the Petitioner in conformity with Article 10(3) of the said Agreement. She has submitted that the Petitioner having failed to do so has violated the procedure under Dispute Resolution viz. Article 10 and hence, this Petition ought not to be entertained by this Court.

7. The learned Counsel appearing for the Petitioner has submitted that under Article 10(4) of the Dispute Resolution, it is provided that alternatively, if, before the expiration of the said period of 30 days, either party fails to participate or to continue to participate in the mediation, the dispute, controversy or claim shall, upon the filing of a Request for Arbitration by the other party, be referred to and finally determined by arbitration in accordance with

the Arbitration and Conciliation Act, 1996. The Arbitral Tribunal shall consist of a sole arbitrator.

8. The learned Counsel appearing for the Petitioner has accordingly submitted that the Respondent had failed to participate in the mediation upon receipt of the Petitioner's Advocate's Notice invoking mediation dated 27th October 2022 and hence, the Petitioner has invoked arbitration in conformity with Article 10(4) of the said Agreement.

9. The learned Counsel appearing for the Petitioner has submitted that it was only by Reply Letter to the Notice invoking arbitration which letter is dated 17th November 2022 that the Advocate for the Respondent had communicated to the Advocate for the Petitioner that the mediation process could not be carried out in view of the partner of the Respondent LLP having been tending to his ailing father, who had passed away on 8th November 2022. He has submitted that subsequent mediation between the parties was without prejudice to the Notice invoking arbitration. This is mentioned in the Rejoinder Notice dated 2nd December 2022 addressed by the Advocate of the Petitioner to the Advocate of the

Respondent as under:

“Also please take notice that our earlier notice for invocation of arbitration clause is not being withdrawn by virtue of proposal of mediator’s name in as much as the same is done considering your request and that must not be used to the detriment of our client.”

10. The learned Counsel appearing for the Petitioner has accordingly submitted that the procedure contemplated under Article 10-Dispute Resolution has in fact been complied with by the Petitioner and accordingly, the Arbitrator may be appointed.

11. Having considered the rival submissions as well as the preliminary objection taken by the Respondent, I am of the view that the sub-clauses in Article 10-Dispute Resolution viz. (2), (3) and (4) are to be read together and cannot be read independently. It is provided in the said sub-clauses that the parties are first to explore the possibility of settlement of their dispute by way of mediation in accordance with the Arbitration and Conciliation Act, 1996 and upon

failure to settle the dispute by mediation within 30 days of commencement of mediation, either party made request for arbitration and the dispute will then be referred to and finally determined by arbitration under the Arbitration and Conciliation Act, 1996. Under Article 10(4), it is provided that alternatively, if the dispute cannot be settled before expiration of period of 30 days i.e. either party fails to participate or continue to participate in the mediation, then upon filing request for arbitration by the other party, the dispute shall be referred to and finally determined by arbitration under the Arbitration and Conciliation Act, 1996.

12. In the facts of the present case, it is apparent that there was non participation on the part of the Respondent after the Petitioner had invoked mediation by Notice dated 27th October 2022. Sub-clause 4 of Article 10 did not contemplate the Petitioner to wait for a period of 30 days and then invoke arbitration.

13. In my view, the Petitioner has correctly invoked arbitration by Notice dated 11th November 2022 in view of the Respondent failing to respond to the Notice invoking mediation. It was only for the first time that the Respondent through their Reply

dated 17th November 2022 to the Notice invoking arbitration had conveyed that the Respondent had not participated in the mediation, as the partner of the Respondent LLP had been tending to his ailing father, who unfortunately passed away on 8th November 2022.

14. Further, the subsequent mediation which was agreed between the parties, was without prejudice to the Notice invoking arbitration and this is borne out by the Petitioner's Advocate's Rejoinder Notice dated 2th December 2022. The relevant part of the Rejoinder Notice has been extracted above. Thus, the Petitioner through its Advocate made it amply clear that the earlier Notice invoking arbitration has not been withdrawn by virtue of proposal of the mediator's name inasmuch as the same is being done considering the request of the Respondent. Accordingly, the subsequent failure of mediation process by Notice dated 30th January 2023 sent by the Mediator does not give cause to the issuance of fresh Notice invoking arbitration.

15. In my view, the Notice invoking arbitration having already been issued on 11th November 2022 is material, being in conformity with Article 10-dispute resolution, in particular Article

10(4), and the relief sought for is required to be granted.

16. Accordingly, relief sought in the Arbitration Petition is granted. The following order is passed.:-

- (i) Mr. Ramesh Dhanuka (retired Judge of this Court) is appointed as a Arbitrator under Article 10-Dispute Resolution of the Deed of Assignment dated 31st December 2020 executed by and between the parties for adjudicating the disputes and differences that have arisen between the parties.
- (ii) The venue of arbitration shall be in Mumbai.
- (iii) Office to inform the Sole Arbitrator regarding appointment.
- (iv) The Sole Arbitrator is requested to file the Disclosure Affidavit of Arbitration under Section 11(8)(i) of the Arbitration and Conciliation Act, 1996 within a period of three weeks from the date of receipt of the

notice issued by the Registrar Judicial-I and provide copies to the parties.

- (v) Parties to appear before the Sole Arbitrator on the date fixed.
- (vi) Fees of the Sole Arbitrator will be payable in accordance with the Bombay High Court (O.S.) Rules, 2018.
- (vii) Arbitration Petition is disposed of in the above terms.
- (viii) No costs.

[R.I. CHAGLA J.]