

M/s. Mugdha, Through proprietor Mayur Kantilal Faria and others	...	Petitioners/Applicants
vs.		
M/s. Roopam Tex	...	Respondent

Mr. Kunal Bhange a/w. Ms. Sneha V. Agrawal, i/by. Lalit V. Jain for respondent.

CORAM : MANISH PITALE, J
DATE : 21st APRIL, 2023

P.C. :

Heard learned counsel for the parties. By this petition filed under Section 34 of the Arbitration and Conciliation Act, 1996, the petitioners have challenged award dated 27th February, 2020 / 2nd March, 2020, passed by the arbitral tribunal. As per the award, the petitioners have been directed to pay specific amounts alongwith interest to the respondent and costs have also been imposed.

2. The respondent has appeared through counsel and the petition is heard finally.

3. The learned counsel for the petitioners submitted that the arbitral award deserves to be set aside, under Section 34(2)(b)(ii) of the aforesaid Act, as being in conflict with public policy of India. The principal ground of challenge raised in the present petition, is that the purported invocation

notice dated 15th July, 2019 issued on behalf of the respondent could not be said to be a notice contemplated under Section 21 of the aforesaid Act and that therefore, there was no commencement of the arbitral proceeding at all. On this basis, it was submitted that all consequential proceedings, including the arbitral tribunal entering upon reference, conducting the proceedings and pronouncing the award, were rendered unsustainable in law.

4. Learned counsel for the petitioners placed reliance on the judgment of the Delhi High Court, in the case of *Alupro Building Systems Pvt. Ltd. v/s. Ozone Overseas Pvt. Ltd.* (judgment and order dated 28th February, 2017, passed in O.M.P No.3/2015). It was brought to the notice of this Court that the aforesaid judgment has been followed in a judgment of this Court in the case of *D.P. Construction v/s. Vishvaraj Environment Pvt. Ltd.* (**2022 SCC Online Bom 1410**).

5. Apart from this, it was submitted that the arbitral proceedings were taken up by the arbitral tribunal, not just against the petitioner No.1, which could be said to be a party to the arbitration agreement, but also petitioner Nos.2 to 5, who had nothing to do with the transactions in question with the respondent. It was brought to the notice of this Court that the petitioner Nos.2 to 5, being the parents and brother of the sole proprietor of the petitioner No.1, were wrongly made parties, only because the respondent had given their names and addresses, under the title 'list of alternate addresses'. It was submitted that therefore, the arbitral award wrongly issued directions even against the persons, who were not parties to the arbitration agreement. On this basis, it was submitted that the impugned award deserves to be set aside.

6. Learned counsel for the respondent could not dispute the position of law, brought to the notice of this Court, as regards requirement of appropriate notice under Section 21 of the said Act, although it was sought to be contended that the notice dated 15th July, 2019 could be construed as a notice under Section 21 of the said Act. As regards petitioner Nos.2 to 5 being made parties, it was submitted that the petitioner No.4 was indeed the sole proprietor of the petitioner No.1-proprietorship firm.

7. Having heard the learned counsel for the rival parties, this Court has perused notice dated 15th July, 2019, issued by the respondent to petitioner No.4 as the proprietor of the petitioner No.1. The said notice merely refers to the claims of the respondent and thereupon, states that the respondent would reserve its rights to commence legal proceedings. There is no reference to invocation of arbitration or any intention on the part of the respondent to commence the arbitration proceedings. Therefore, the said notice cannot be construed as a notice under Section 21 of the said Act for invoking arbitration.

8. Once this finding is reached, the position of law recognized in the judgment of the Delhi High Court in the case of **Alupro Building Systems Pvt. Ltd. v/s. Ozone Overseas Pvt. Ltd.** (*supra*) followed by this Court in the case of **D.P. Construction v/s. Vishvaraj Environment Pvt. Ltd.** (*supra*), has to be followed. As held in the case of **Alupro Building Systems Pvt. Ltd. v/s. Ozone Overseas Pvt. Ltd.** (*supra*), such an award would be hit by Section 34(2)(b)(ii) of the said Act, as being in conflict with the public policy of India. There is also substance in the contention raised on behalf of the petitioners that the arbitral proceedings could not have been commenced against any party other than petitioner No.1 and that therefore, the arbitral

award, issuing directions to all the petitioners, is also rendered unsustainable in law.

9. In the light of the above, this Court is convinced that the impugned award is rendered unsustainable and deserves to be set aside.

10. Accordingly, the petition is allowed and the impugned award is set aside.

11. As per the settled law, the parties can still go for arbitration, if they so desire. Learned counsel for the parties, on instructions, submit that the parties are agreeable to go for arbitration for resolution of their disputes and that this Court may appoint a sole arbitrator for resolution of such disputes.

12. The arbitration clause in the present case, is contained in invoices and perusal of the same would show that the jurisdiction is limited to that of Mumbai. Although, a specific institution is the named arbitrator, the parties have agreed to appointment of a neutral sole arbitrator. Parties also agree to waive the requirement of invocation of notice under Section 21 of the said Act. This certainly facilitates the appointment of the sole arbitrator on the direction of this Court.

13. Considering the extent of claims, it would be appropriate that an advocate practising in this Court is appointed as the sole arbitrator.

14. Accordingly, Ms. Neeta Jain, Advocate, is appointed as the sole arbitrator for resolution of disputes between the parties. The details of the learned arbitrator are as follows:

3rd floor, Fort Chambers,
Mumbai – 400 001.
Mob.: 93200 03692.
E-mail: neetanaik.jain@gmail.com

15. The parties undertake to inform the learned arbitrator about the order passed today, at the earliest.
16. The learned arbitrator is requested to submit her consent and disclosure statement in terms of Sections 11(8) and 12(1) of the aforesaid Act, within four weeks from today to the Registrar (Judicial) of this Court.
17. All questions are left open for determination by the learned arbitrator.
18. The petition stands disposed of.
19. Pending applications, if any, also stand disposed of.

(MANISH PITALE, J)

Priya Kambli