

OCD-7

ORDER SHEET

AP-COM/76/2024

IN THE HIGH COURT AT CALCUTTA
Ordinary Original Civil Jurisdiction
ORIGINAL SIDE
(Commercial Division)

PANCHKOTI PROPERTIES PVT. LTD.
VS
VIPUL LTD. AND ANR.

BEFORE:

The Hon'ble JUSTICE MOUSHUMI BHATTACHARYA

Date : February 20, 2024.

Appearance:

Mr. Aniruddha Mitra, Adv.

Mr. Debraj Sahu, Adv.

Ms. Susrea Mitra, Adv.

Mr. Souvik Kundu, Adv.

...for the petitioner

Mr. Rupak Ghosh, Adv.

Mr. A.P. Gomes, Adv.

...for the respondents

The Court: This is an application under Section 11 of The Arbitration and Conciliation Act, 1996 for appointment of an Arbitrator.

Learned counsel appearing for the respondents takes two points of objection on the maintainability of the application. The first is that the Director of the respondents could not have signed a letter dated 23rd February, 2022 in his personal capacity foisting an obligation on the respondent company for repayment of the loan. The second objection is that the letter of invocation is not in accordance with the arbitration agreement.

Before the objections are dealt with, a brief description of the factual matrix of the case is given below.

The parties entered into a Memorandum of Understanding and an agreement for settlement and release on 18th September, 2021. The Agreement was between the petitioner and the respondent company represented by one of its Directors, Mr. Punit Beriwal and also Mr. Punit Beriwal in his personal capacity. The Agreement was for extending a loan of Rs.1 crore to the respondents. The petitioner terminated the Agreement on 2nd November, 2022 on account of the respondents failing to comply with the repayment terms. The respondents thereafter wrote a letter on 23rd February, 2022 giving a modified repayment schedule and reiterating that the Agreement dated 18th September, 2021 would not be altered or modified save and except the repayment schedule. Since there was no headway made by the respondents in terms of the modified repayment schedule, the petitioner invoked the arbitration Agreement by way of a notice dated 15th November, 2023. The respondents did not reply to the notice of invocation.

Apart from the two objections taken on behalf of the respondents, which shall immediately be dealt with, the other issue for consideration is whether the arbitration clause contained in the loan Agreement stands incorporated in the alleged modified Agreement dated 23rd February, 2022.

The two objections, first.

The contention that Mr. Punit Beriwal could not have signed the letter dated 23rd February, 2022 is rejected for the following reasons. The loan

Agreement was entered into between the petitioner and the respondent no.1 company represented by its Director, Mr. Punit Beriwal as well as Mr. Punit Beriwal in his personal capacity. This would be evident from the signatures appearing at the relevant page of the Agreement showing that Mr. Punit Beriwal has signed twice, first as a Director of the respondent no.1 company and second, in his personal capacity. These signatures are repeated in the letter dated 23rd February, 2022 where Mr. Punit Beriwal has again signed twice, first as a Director of the company and second, in his personal capacity.

The second objection with regard to the invocation not being in form is based on the petitioner unilaterally changing the name of the Arbitrator as mentioned in the arbitration clause in the Agreement. It is found that the arbitration Agreement (Clause 8 of the Agreement) mentions a different lawyer who was to be appointed as the Arbitrator compared to the Section 21 notice which mentions a different person. This objection, however, fails to impress the Court since once a party has approached the Court for appointment of an arbitrator in a Section 11 petition, the domain of choosing an Arbitrator rests entirely with the Court. Hence, whether the petitioner unilaterally changed the name of the Arbitrator in his invocation notice becomes completely irrelevant.

The last point is with regard to incorporation of the arbitration Agreement by reference. Section 7(5) of the 1996 Act is the relevant Section. This Section mandates that the reference of the arbitration agreement to a later document must be specific and not be in general terms. The Section also points to an intention evinced by the parties for incorporation of the arbitration

agreement by reference. This was also the view of the Supreme Court in *M. R. Engineers and Contractors Private Limited vs. Som Datt Builders Limited*, (2009)7 SCC 696.

This Court is, however, of the view that Section 7(5) of the Act would only become relevant where there is a second agreement where the parties are required to incorporate the arbitration agreement from the first agreement to the second agreement.

In the facts of the present case, there is no such second agreement since the respondents simply communicated their intention to repay the loan by way of a modified schedule, by way of the letter is of 23rd February, 2022. Even if this letter is taken as a second agreement, there are more than adequate references to the Agreement dated 18th September, 2021 and the respondents' intention to adhere to all the terms of the said Agreement, save and except for the modified repayment schedule. This would be evident from the respondents specifically indicating that the Agreement dated 18th September, 2021 shall stand modified "only to the extent of the repayment schedule" / "that nothing else in the said Agreement would be "touched, modified and/or altered"".

The respondents end the letter by stating that the letter dated 23rd February, 2022 would form part and parcel of the Agreement dated 18th September, 2021.

The above facts would show, without doubt, that the arbitration Agreement remains un-touched and un-disturbed. The letter dated 23rd

February, 2022 does not modify the arbitration Agreement. Even if the letter is taken as an Agreement, the arbitration clause stands fully incorporated in this Agreement by reference to the specific words in the subsequent letter. The Arbitration Agreement dated 18.9.2021 has been bodily-lifted in the letter of 25.2.2022 and made a part thereof.

There is indeed a dispute between the parties which would also be evident from the stand taken on behalf of the respondents. The respondents do not have a defence on merits on their inability/failure to repay the loan taken from the petitioner. The respondents also did not reply to the letter of invocation. The disputes are hence to be adjudicated by an Arbitrator under Section 11(6) of the 1996 Act.

AP-COM/76/2024 is allowed and disposed of by appointing Ms. Noelle Banerjee, counsel, to act as the Arbitrator subject to the learned Arbitrator communicating her consent in the prescribed format to the Registrar, Original Side of this Court within three weeks from date.

The petitioner's advocate-on-record shall communicate this order on the learned Arbitrator by 23rd February, 2024 along with the requisite details of the contact person of the petitioner.

(MOUSHUMI BHATTACHARYA, J.)

sg./bp.