

ORDER SHEET

AP/650/2022

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

CIVCON CONSTRUCTION PVT. LTD.
VS
M/S. SPICES BOARDN AND ANR.

BEFORE:

The Hon'ble JUSTICE SABYASACHI BHATTACHARYYA

Date : 9th July, 2024.

Appearance:

*Mr. Sarajit Sen, Adv.
Ms. Arijita Ghosh, Adv.
..for the petitioner*

*Ms. Chandreyi Alam, Adv.
..for the respondents*

The Court: The present application has been filed under Section 11 of the Arbitration and Conciliation Act, 1996 seeking appointment of an Arbitrator to resolve the disputes between the parties.

The brief facts are that an agreement was entered into between the respondents and the petitioner regarding a proposed construction work, in which one M/s. Kitco was appointed as consultants.

Clause 12 of the said agreement contains the arbitration clause which contemplates that in the event of any question, dispute and/or difference whatsoever arising under the agreement or in connection therewith including any question relating to existence, meaning and interpretation of the agreement or any alleged breach thereof, if not settled, the same shall be referred to an Arbitrator nominated by the respondents.

It is contended that the provision in the General Conditions of Contract which stipulates that the agreed Court for resolving disputes would be the principal civil court of Ernakulum in Kerala, which does not come within the purview of the definition of “Court” in the 1996 Act.

Learned counsel for the petitioner cites an unreported Division Bench judgment of the Kerala High Court in support of his contention. It is argued that since the present dispute has arisen between the petitioner and the respondents, M/s. Kitco, who were merely the consultants, is not a necessary party and, as such, the matter is required to be referred to arbitration.

Learned counsel appearing for the respondents cites *B.E. Simoes Von Staraburg Niedenthal vs. Chattisgarh Investment Limited* reported at (2015) 12 SCC 225 in support of the proposition that if there is a forum selection clause in the agreement between the parties, the same shall prevail in the matter of applications pertaining to the 1996 Act.

Secondly, it is argued that M/s. Kitco has been left out in the present application and the proposed reference whereas it was a necessary party to the dispute. Thus, it is submitted by the respondents that the matter be dismissed, since this Court does not have territorial jurisdiction to take up the matter.

Upon a careful perusal of the agreement between the parties, it transpires that M/s. Kitco has been referred to as consultants appointed by the owners, that is, the present respondents, whereas the signatories to the agreement was the owner, that is, the respondents on the one hand and the contractor/petitioner on the other. Hence, M/s. Kitco may or may not be a

necessary or proper party which is best left to the discretion of the Arbitrator to decide.

The more important issue involved in the present matter is whether this Court has territorial jurisdiction to take up the matter.

Clause 13 of the agreement in question provides that the documents referred to therein shall be deemed to form and to be read and construed as part of the agreement in question.

Among the said documents referred to in Clause 13 of the said agreement is included the General Conditions of Contract, to which the petitioner is otherwise not a party. In Clause 55.1 of the said General Conditions of Contract, it is stipulated that all disputes which may arise under that contract will have to be filed before the principal sub-court, Ernakulum where the headquarters of the accepting party is located.

There are three reasons why the said Clause does not confer jurisdiction on the Kerala High Court to take up an application under Section 11 of the 1996 Act.

First, Section 7(5) of the 1996 Act, in no uncertain terms, provides that the reference in a contract to a document containing an arbitration clause constitutes an arbitration agreement, if the contract is in writing and the reference is such as to make that arbitration clause part of the contract.

Hence, in order for an arbitration clause in a different document to be deemed to be a part of the agreement in question, the agreement in question has to specifically incorporate the said arbitration clause embodied in the other contract as a part of the agreement in question. In the present case, Clause 13 of the agreement in question merely provides that the General

Conditions of Contract, among other documents, shall be deemed to form and be read and construed as part of the agreement, without specific reference to the arbitration agreement and/or providing specifically that such arbitration clause is to be deemed to be a part of the present agreement.

Secondly, in any event, the General Conditions of Contract do not contemplate any arbitration at all. Conspicuously, there is no arbitration clause embodied in the said document. Thus, read in appropriate context, Clause 55.1 of the General Conditions of Contract stipulates the forum selection clause in matters where there is no scope of arbitration but a civil dispute has to be referred to the civil court having jurisdiction. Only in such context has it been stipulated therein that disputes arising under the said General Conditions of Contract have to be filed before the principal sub-court, Ernakulum, where the headquarters of the accepting authority therein is located. Thus, the said forum selection clause, apart from not being a part of the present agreement, merely refers to disputes otherwise than those referred to arbitration. Hence, the said forum selection clause is completely divorced from the arbitration clause as mentioned in the present agreement and it cannot be construed that the said forum selection clause also governs applications filed under the 1996 Act in terms of the arbitration clause in the present agreement in question.

Thirdly, another aspect of the matter cannot be lost sight of.

Even if Clause 55.1 of the General Conditions of Contract were to be construed in the light of the 1996 Act, the principal sub-court at Ernakulum does not come within the ambit of the definition of "Court" as defined in

Section 2(1)(e) of the 1996 Act, which contemplates only the principal civil court of original jurisdiction in a district to have determination to take up the applications regarding an arbitral dispute.

The principal sub-court, by definition, is not the principal court of the district or the district judge's court and as such, any attempt to read Clause 55.1 with reference to the 1996 Act will be an exercise in futility.

Thus seen from all perspective, the forum selection clause in the General Conditions of Contract relates to suits filed under the said document and cannot, in any manner, govern the jurisdiction of this Court to take up an application under Section 11 of the 1996 Act.

In any event, since a part of the cause of action has arisen within the territorial jurisdiction of this Court as per the pleadings of the petitioner, it will be premature for this Court to decide on the territoriality of jurisdiction regarding the main dispute at this juncture. Hence, this Court is of the opinion that in view of a part of the cause of action arising within the territory of West Bengal, this Court is clothed fully with the jurisdiction to take up the present application as a designate of The Hon'ble The Chief Justice of the Calcutta High Court.

Since the dispute is otherwise arbitrable and comes within the ambit of the arbitration clause, AP/650/2022 is allowed on contest, thereby appointing Justice Subrata Talukdar (Retired), as the sole Arbitrator to resolve the dispute between the parties, subject to a disclosure being obtained from the said learned Arbitrator in terms of Section 12 of the Arbitration and Conciliation Act, 1996. The remuneration of the learned

Arbitrator shall be decided by the Arbitrator within the framework of the Arbitration and Conciliation Act, 1996, read with its Schedules.

(SABYASACHI BHATTACHARYYA, J.)

R.Bhar/bp