



IN THE HIGH COURT OF JUDICATURE AT BOMBAY
NAGPUR BENCH AT NAGPUR

MISC. CIVIL APPLICATION NO. 578 OF 2023

M/s. Laxmi Civil Engineering Services **APPLICANT**
Private Limited, A company
incorporated under the Companies Act,
having its Corporate Office at 1031/K-2,
3rd Floor, Sterling Tower, Kolhapur –
416001 & Regional office at 244, 2nd
Floor, Narayani House, Hill Road, Ram
Nagar, Dharampeth Extension, Nagpur
440010, through its Director, Mr. Manish
Vijay Shah, Aged 54 years, Occ.
Business, R/o Nagpur

VERSUS

- 1 Forest Development Corporation of **NON-**
Maharashtra Limited, **APPLICANTS /**
Through its Managing Director, **RESPONDENTS**
F.D.C.M. Bhawan, Higna Road,
Ambazari, Nagpur – 440036
- 2 Forest Development Corporation of
Maharashtra Limited,
Through its Divisional Manager,
F.D.C.M. Gorewada Project, Hindustan
Lever Godown Square, Fetri, Mahurzari
Road, Nagpur 441501

Mr. N.R. Nebhani, Advocate for Applicant

Mr. N.S. Khubalkar, Advocate for Respondents / Non-applicants

CORAM : **BHARAT P. DESHPANDE, J.**

RESERVED ON : **22nd MARCH, 2024**

PRONOUNCED ON : **27th MARCH, 2024**

JUDGMENT**ADMIT.**

2. Heard finally at the admission stage itself since an application for appointment of Arbitrator under Section 11(6) of the Arbitration and Conciliation Act is under consideration.

3. The applicant preferred the present application, claiming that there is an agreement / contract executed between the applicant and respondent and since the dispute arose, the matter needs to be referred to arbitration.

4. The applicant claimed that the respondent on the basis of tender invited applications from the eligible contractors for construction of Indian Safari ancillary activities at Gorewada, Nagpur in the year 2016. The applicant was interested in the said work, participated in the e-tender process by depositing earnest money. After opening of the tenders, the applicant's tender was accepted by the competent authorities on 08/11/2016. The applicant deposited the security deposit and agreement was executed on 11/10/2017. The work order was issued on the same day.

5. Since the dispute arose, the application by invoking clause No. 61 of the agreement, requested the respondent to appoint an Arbitrator, however, there was no response. Legal notice was issued on 15/03/2023, which was replied by the respondent on 10/04/2024, thereby refusing to appoint Arbitrator.

6. The respondent appeared and filed reply affidavit, thereby opposing the prayer of appointment of Arbitrator. It is the contention of the respondent that first of all, there is no agreement to refer any dispute to the arbitration and therefore, the application itself is not maintainable. It is the contention of the respondent that there is separate dispute redressal system in Clause 61 itself and on failure of it, the applicant is free to approach the Civil Court.

7. The learned counsel for the applicant strongly contended that Clause 61 itself is an agreement for providing arbitration though in specific words it is not said so but the intention of the parties is clear and thus this Court is very much entitled to interpret such clause for the purpose of referring the dispute to an independent Arbitrator.

8. While relying upon the case of **SMC Infrastructure Private Limited Vs. M/s Maharashtra Jeevan Pradhikaran** in Arbitration Petition No. 118/2023, decided by the Single Bench of this Court sitting at the Principal Seat (Coram : Dr. Neela Gokhale,J.) on 17/01/2024, the learned counsel for the applicant would submit that in similar circumstances, wherein there is specific reference to the arbitration, the matter was considered and referred to the Arbitrator.

9. The learned counsel for the applicant while placing reliance in the case of **NTPC Ltd. Vs. SPML Infra Ltd.** reported in **2023(2) ARBLR 213 (SC)** would submit that this Court is very much entitled to consider about the existence and validity of arbitration agreement which also includes the enquiry as to the parties of the agreement and applicant's privity to the said agreement.

10. Per contra, the learned counsel appearing for the respondent while distinguishing the judgment in the case of **SMC Infra Pvt. Ltd.** (supra) would submit that such decision cannot be relied upon since the same is contrary to the law laid down by the Hon'ble Supreme Court in the case of **Vishnu (Dead) by LRs**

Vs. State of Maharashtra reported in (2013) 11 SCC 340.

11. The learned counsel for the respondent would submit that in the case of **State of Orissa and another Vs. Damodar Das** reported in (1996) 2 SCC 216, the Hon'ble Supreme Court while deciding the question whether there is any arbitration agreement for the resolution of the dispute observed that when the contents of the agreement are clear and intention shows that the dispute is to be resolved by the regular mode i.e. the Civil Court, such intention has to be replied and the Court cannot refer the dispute to the arbitration.

12. While placing reliance in the case of **Karnataka Power Transmission Corporation Limited and another Vs. Deepak Cables (India) Limited** reported in (2014) 11 SCC 148, the learned counsel for the respondent would submit that the interpretation of the agreement has to be properly carried out and if such clause refers to the decision of the competent Court, it cannot be termed as an arbitration agreement.

13. While referring to the decision in the case of **Jagdish Chander Vs. Ramesh Chander and others** reported in (2007) 5

SCC 759, the learned counsel for the respondent would submit that the question as to whether the clause in the agreement is an arbitration agreement within the meaning of Section 7 of the Arbitration and Conciliation Act needs to be considered on case to case basis.

14. The rival contentions fall for determination.

15. There is no dispute that the agreement was executed between the applicant and the respondent dated 11/10/2017 by which the work order was issued on 11/10/2017 itself. Clause 61 of the said agreement reads thus :

Dispute Redressal Clause 61 :

System Arbitration	/(1) If any dispute or difference of any kind what-so-ever shall arises in connection with or arising out of this Contract or the execution of Works or maintenance of the Works there under, whether before its commencement, or during the progress of Works or after the termination, abandonment or breach of the Contract, it shall, In the first Instance, be referred for settlement to the competent authority within 45 days of arising the dispute or difference, described along with their powers In the Contract Data, above the rank of the Consultant. The competent authority shall, within a period of forty- five days after being requested in writing by the Contractor to do so, convey his decision to the Contractor. Such decision in respect of every matter so referred shall, subject to review as hereinafter provided, be final and binding upon the contractor. In case the Works Is already in progress, the Contractor shall proceed with the execution of the Works, Including maintenance thereof, pending receipt of the decision of the competent authority as aforesaid, withal due diligence. (2) Either party will have the right of appeal, against the decision of the competent authority, to the Standing Empowered Committee within 90 days of the decision of the competent authority.
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(3) The composition of the Empowered Standing Committee will be:

1. One official member, Chairman of the Standing Empowered Committee not below the rank of PCCF to the State Government.

II. One official member not below the rank of CCF and

III. One non-official member who will be technical expert of Chief Engineer's level selected by the Contractor from a panel of three persons given to him by the Employer.

(4) The Contractor and the Employer will be entitled to present their case in writing duly supported by documents. If so requested, the Standing Empowered Committee may allow one opportunity to the Contractor and the Employer, for oral arguments for a specified period. The Empowered Committee shall give its decision within a period of ninety days from the date of appeal, falling which the contractor can approach, the appropriate court for the resolution of the dispute.

(5) The decision of the Standing Empowered Committee will be binding on the Employer for payment of claims upto five percent of the initial Contract Price. The Contractor can accept and receipt payment after signing as "in full and final settlement of all claims". If he does not accept the decision, he is not barred from approaching the courts. Similarly, if the Employer does not accept the decision of the Standing Empowered Committee above the limit of five percent of the Initial Contract Price, he will be free to approach the courts applicable under the law.

(6) Any legal matter should be resolved within the Jurisdiction of Nagpur Courts.

Note: In case provisions of this form B-1 conflicts with those In detailed conditions attached to this tender. The detailed conditions attached would prevail over those in this form 'B-1'

16. Bare perusal of this Clause would go to show that there is a mechanism provided for dispute redressal system / arbitration. However, it is also clear from the contents of Clause 61 that it is nowhere agreed between the parties that the matter could be referred to the Arbitrator for deciding the dispute. Therefore, it is necessary to interpret the contents of the said

Clause in order to find out whether it contains the agreement for arbitration.

17. Section 7 of the Arbitration and Conciliation Act reads thus:

“7. Arbitration agreement.

(1) In this Part, arbitration agreement means an agreement by the parties to submit to arbitration all or certain disputes which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not.

(2) An arbitration agreement may be in the form of an arbitration clause in a contract or in the form of a separate agreement.

(3) An arbitration agreement shall be in writing.

(4) An arbitration agreement is in writing if it is contained in

(a) a document signed by the parties;

(b) an exchange of letters, telex, telegrams or other means of telecommunication [including communication through electronic means] [Inserted by Act No.3 of 2016 dated 31.12.2015.] which provide a record of the agreement; or

(c) an exchange of statements of claim and defence in which the existence of the agreement is alleged by one party and not denied by the other.

(5) 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.”

18. While discussing Section 7 of the Act, the Hon’ble Apex Court in the case of **Jagdish Chander Vs. Ramesh Chander** (supra) has observed that the agreement by the parties to secure to the arbitration all or certain disputes, which have arisen or

which may arise between them in support of the defined legal relationship, whether contractual or not. Sub-section 2 provides that an arbitration agreement may be in the form of arbitration clause in a contract or in the form of a separate agreement. However, it must be in writing, duly signed by the parties. While referring to the earlier decision in the case of **K.K. Modi Vs. K.N. Modi** reported in **(1998) 3 SCC 573**, the Hon'ble Apex Court observed that the Clause in a contract can be construed as arbitration agreement only if the agreement to refer dispute or differences to the arbitration is expressly or impliedly spelt out from the clause. Accordingly, the Hon'ble Apex Court spelt out well settled principles in this regard as to what constitute an arbitration clause i.e.

(i) The intention of the parties to enter into arbitration agreement shall have to be gathered from the terms of the agreement; if the terms of the agreement clearly indicate an intention on the part of the parties to the agreement to refer their dispute to private Tribunal for adjudication and willingness to be bound by the decision of such Tribunal on such disputes, is arbitration agreement. While there is no specific form of an

arbitration agreement, the words used and disclosed determination and obligation to go to the Arbitrator and not merely contemplated possibility of going for arbitration. Whether there is possibility of parties agreeing to arbitration in future as contract from the application if referred dispute to arbitration, there is no authority and binding the arbitration agreement.

(ii) Even if the words arbitration and arbitral Tribunal or Arbitrator are not used with reference to the process of settlement or with reference to the private Tribunal which has to adjudicate upon the dispute, in a clause relating of settlement of disputes, it does not distract from clause being arbitration agreement, if it has attributed or element of arbitration agreement. Therefore (a) agreement should be in writing (b) the parties should have agreed to refer any disputes (present) future between them to the decision of a private Tribunal (c) The private Tribunal should be empowered to adjudicate upon the disputes in an impartial manner, giving due opportunity to the parties, put-forth their case before it; (d) The parties should have agreed that the decision of the private Tribunal in respect of the dispute will be binding on them.

(iii) Whether the clause provides that in the event of disputes arising between the parties the dispute shall be referred to arbitration. It is arbitration agreement. Whether there is a specific and direct expression of the incident to have the dispute settled by arbitration, it is not necessary to set out the arbitration attributes of an arbitration agreement to make it an arbitration agreement. But whether the clause relating to settlement of disputes, the contents words which specifically excluded any of the attributes of the arbitration agreement or contents anything without determining from the arbitration agreement, it will not be an arbitration agreement. For example, where an agreement requires or directed the authority to decide the claim or dispute without hearing or requires authority to act in the interest of only one of the parties, or provides that the decision of the party will not be final and binding on the parties or that if other party is not satisfied with the decision of the authority he may file civil suit seeking relief, it may not be termed as arbitration agreement.

(iv) It mere use of the words “arbitration” or “arbitrator” in a clause will make it an arbitration clause, if it required or

contemplated further fresh consent of the parties for reference to the arbitration. For example use of words such as “parties can, if they so desire refer their dispute to arbitration” or “in the event of any dispute, the parties may also agreed to refer the same to arbitration” or “if any dispute arise between the parties, they should consider settlement by arbitration” in clause related to settlement of disputes, in fact that clause is not entitled to be arbitration agreement. Similarly, the clause which stated that “if parties so decided, the disputes shall be referred to arbitration” or “any dispute between the parties, if they so agreed shall be referred to arbitration” is not an arbitration agreement. Such clause merely indicates a desire or hope to have the dispute settled by arbitration or agreement to explore arbitration as a method of settlement if and when dispute arise. Such clause required the parties to arrive at further agreement to go to arbitration, as and when the dispute arise. In agreement or clause in an agreement requiring or contemplating further consent or consensus before reference to arbitration is not an arbitration agreement, but an agreement to enter into an arbitration agreement in future.

19. In the case of **DLF Home Developers Limited Vs. Rajapura Homes Privated Limited** reported in (2021) 16 SCC 743, the Hon'ble Apex Court while dealing with the scope of Section 11 qua the appointment of Arbitrator, observed in para 20 to 24 as under :

“20. There is no gainsaying that by virtue of the Arbitration and Conciliation (Amendment) Act, 2015 by which Section 11 (6-A) was introduced, the earlier position of law as to the scope of interference by this Court at the stage of referral has been substantially restricted. It is also no more res integra that despite the subsequent omission of Section 11 (6-A) by the Arbitration and Conciliation (Amendment) Act, 2019, the legislative intent behind thereto continues to be a guiding force for the Courts while examining an application under Section 11 of the Act.

21. The jurisdiction of this Court under Section 11 is primarily to find out whether there exists a written agreement between the parties for resolution of disputes through arbitration and whether the aggrieved party has made out a prima facie arbitrable case. The limited jurisdiction, however, does not denude this Court of its judicial function to look beyond the bare existence of an arbitration clause to cut the deadwood. A three-judge bench in *Vidya Drolia* (Supra), has eloquently clarified that this Court, with a view to prevent wastage of public and private resources, may conduct ‘prima facie review’ at the stage of reference to weed out any frivolous or vexatious claims.

22. In this context, the Court, speaking through Sanjiv Khanna, J. held that:

“154.2. Scope of judicial review and jurisdiction of the court under Section 8 and 11 of the Arbitration Act is identical but extremely limited and restricted.

154.3. The general rule and principle, in view of the legislative mandate clear from Act 3 of 2016 and Act 33 of 2019, and the principle of severability and competence-competence, is that the Arbitral Tribunal is the preferred first authority to determine and decide all questions of non-arbitrability. The court has been conferred power of “second look” on aspects of non-arbitrability post the award in terms of sub-clauses (i), (ii) or (iv) of Section

34(2)(a) or sub-clause (i) of Section 34(2)(b) of the Arbitration Act.

154.4. Rarely as a demurrer the court may interfere at Section 8 or 11 stage when it is manifestly and ex facie certain that the arbitration agreement is non-existent, invalid or the disputes are non-arbitrable, though the nature and facet of non-arbitrability would, to some extent, determine the level and nature of judicial scrutiny. The restricted and limited review is to check and protect parties from being forced to arbitrate when the matter is demonstrably “non-arbitrable” and to cut off the deadwood. The court by default would refer the matter when contentions relating to non-arbitrability are plainly arguable; when consideration in summary proceedings would be insufficient and inconclusive; when facts are contested; when the party opposing arbitration adopts delaying tactics or impairs conduct of arbitration proceedings. This is not the stage for the court to enter into a mini trial or elaborate review so as to usurp the jurisdiction of the Arbitral Tribunal but to affirm and uphold integrity and efficacy of arbitration as an alternative dispute resolution mechanism.”

23. N.V. Ramana, J. (as His Lordship then was) in his supplementary opinion further crystalised the position as follows:

“244. Before we part, the conclusions reached, with respect to Question 1, are:

244.1. Sections 8 and 11 of the Act have the same ambit with respect to judicial interference.

244.2. Usually, subject-matter arbitrability cannot be decided at the stage of Sections 8 or 11 of the Act, unless it is a clear case of deadwood.

244.3. The court, under Sections 8 and 11, has to refer a matter to arbitration or to appoint an arbitrator, as the case may be, unless a party has established a prima facie (summary findings) case of non-existence of valid arbitration agreement, by summarily portraying a strong case that he is entitled to such a finding.

244.4. The court should refer a matter if the validity of the arbitration agreement cannot be determined on a prima facie basis, as laid down above i.e. “when in doubt, do refer”.

244.5. The scope of the court to examine the prima facie validity of an arbitration agreement includes only:

244.5.1. Whether the arbitration agreement was in writing? Or

244.5.3. Whether the core contractual ingredients qua the arbitration agreement were fulfilled?

244.5.4. On rare occasions, whether the subject-matter of dispute is arbitrable?” [Emphasis Applied]

24. To say it differently, this Court or a High Court, as the case may be, are not expected to act mechanically merely to deliver a purported dispute raised by an applicant at the doors of the chosen Arbitrator. On the contrary, the Court(s) are obliged to apply their mind to the core preliminary issues, albeit, within the framework of Sections 11(6-A) of the Act. Such a review, as already clarified by this Court, is not intended to usurp the jurisdiction of the Arbitral Tribunal but is aimed at streamlining the process of arbitration. Therefore, even when an arbitration agreement exists, it would not prevent the Court to decline a prayer for reference if the dispute in question does not correlate to the said agreement.”

20. In the present matter, the agreement was executed between the parties, which is found in the work order and the conditions for construction of Indian Safari and ancillary activities at Gorewada, Nagpur.

21. A dispute redressal system / arbitration is found in Clause 61 as quoted above would clearly go to show that any dispute or differences of any kind whatsoever which arise in connection with or arising out of the said contract or execution of work or maintenance of the work thereunder whether before

its commencement or during the progress of the work or after termination, abandonment or breach of contract shall in the first instance be referred to settlement before the competent authority within 45 days of arising of the dispute. The competent authority shall within a period of 45 days shall convey its decision to the contractor. Such decision shall be final and binding upon the contractor. Clause 2 says that every party will have a right to appeal against the decision of the appellate authority to the standing empowered Committee within 90 days. The empowered Committee shall give its decision within 90 days, failing which the contractor can approach appropriate Court for the resolution of the dispute. Thus, it is clear that the two tyre system is created for the resolution of the dispute, firstly, by the competent authority and then by the standing empowered Committee. Only in case if the standing empowered Committee failed to decide the dispute within 90 days, the contractor is at liberty to approach the Court for resolution of the dispute.

22. Further sub-clause 5 of Clause 61 provide that the decision of the standing empowered committed will be binding

on the employer. However, the contractor can accept and receipt payment after signing as settlement of all claims in full and final, however, after he does not accept the decision, he is not barred from approaching the Court. As far as employee is concerned, if he does not accept the decision of the standing empowered committee above the limit of 5% of the initial contract addressed, the employer will be free to approach the Court applicable under the law.

23. Thus, *prima facie* there is agreement between the parties for resolution of the dispute by the mechanism provided by the competent authority and standing empowered committee. The employer as well as contractor are free to challenge such decisions as provided above. However, the words mentioned therein “approach appropriate Court”, would mean that the party who is not satisfied with such decision of the competent authority and standing empowered committee is free to approach the Court of law having jurisdiction at Nagpur for resolution of such dispute. Thus it is clear from this clause that the parties intending to refer the dispute to the arbitration in case any of the parties not satisfied with the decision of any

house committees.

24. The contention of the learned counsel for the respondent that the words “approach the Court of law for redressal of the dispute” cannot be only construed as the Civil Court having original ordinary jurisdiction. It clearly suggest that the intention of the parties to settle the dispute through arbitration.

25. In view of the above settled proposition of law as considered by the Hon’ble Apex Court in the case of **DLF Home** (supra), the applicant is succeeded in demonstrating that the parties intended to refer the dispute to arbitration.

26. Notice dated 15/03/2023 issued by the applicant, thereby invoking Clause 61 of the contract and specifically requesting the respondent to refer the dispute to former Judge of this Court by way of arbitration, is replied cryptically vide the reply dated 10/04/2023. Except claiming that there is no dispute existing between the parties, no other ground was raised.

27. Thus to my mind, Clause 61 of the contract, prima facie provide for referring the dispute to Arbitrator. Accordingly

application stands allowed as per prayer clause (A). Justice Rohit Deo, former Judge of this Court is appointed as Arbitrator.

28. Learned counsel for the applicant shall communicate copy of this order to the learned Sole Arbitrator within a period of one week from today.

29. The learned Sole Arbitrator is requested to forward his Statement of Disclosure under Section 11(8) read with Section 12 (1) of the Arbitration and Conciliation Act, 1996 to the learned counsel for applicant so as to enable him to file the same in the Registry of this Court. The Registry of this Court shall retain the said statement on the file of this application and copy of the same shall be furnished to the learned counsel for the applicant and learned counsel for the respondent.

30. The parties shall appear before the learned Sole Arbitrator on such date and at such place as he nominates to obtain appropriate directions with regard to fixing a schedule for completing pleadings etc. The Arbitral Tribunal shall give all further directions with reference to the arbitration and also as to how it is to proceed.

31. Contact and communication particulars shall be provided by both sides to the learned Sole Arbitrator within a period of one week from today. This information shall include a valid and functional email address as well as mobile numbers of the respective Advocates.

32. The parties have agreed that the Sole Arbitrator shall charge his fees as per the 4th Schedule of the Arbitration and Conciliation Act, 1996 read with the Bombay High Court (Fee payable to Arbitrators) Rules, 2018. The parties have further agreed that all the arbitral costs and the fees of the Arbitrator will be borne by the applicant and the respondent equally and will be subject to the final Award that may be passed by the Tribunal.

33. The parties immediately shall consent to a further extension of six months to complete the arbitration, if the learned Sole Arbitrator finds it necessary.

34. The parties have agreed that the seat of the arbitration will be at Nagpur. However, the venue of the arbitration shall be decided by the Sole Arbitrator taking into

consideration convenience of the parties as well as his convenience.

35. Parties to act upon authenticated copy of this order.

(BHARAT P. DESHPANDE, J.)

MP Deshpande