

Neutral Citation No. 2024:PHHC:022829

IN THE HIGH COURT OF PUNJAB AND HARYANA AT
CHANDIGARH

ARB-283-2021 (O&M)
Date of Decision: 31.01.2024

M/s Surya Wires Pvt. Ltd.

... Petitioner

Vs.

Haryana State Rural Livelihood Mission

... Respondent

CORAM: HON'BLE MR. JUSTICE SUVIR SEHGAL

Present: Mr. Vaibhav Tanwar, Advocate for the petitioner.

Mr. B.R. Mahajan, Senior Advocate with
Mr. Arvind Seth, Advocate for the respondent.

SUVIR SEHGAL, J.

1. This is a petition filed under Section 11(6) of the Arbitration and Conciliation Act, 1996 (for short 'the Act') for appointment of an independent Arbitrator.
2. Case of the petitioner is that it is registered under the Ministry of Rural Development for Implementation of Deendayal Upadhyay Grameen Kaushal Yojna (DDUGRKY) as a Project Implementation Agency (PIA) and by order dated 17.10.2017, Annexure P-1, sanction was issued to the petitioner for placement linked skill development of 1850 rural youth in different districts of the State of Haryana. A Memorandum of understanding (MOU), dated

26.10.2017, Annexure P-2, was signed between the parties. The total duration of the project was three years, and its cost was Rs.21,38,21,725. After depositing the requisite bank guarantee, the petitioner started execution of the project, but the respondents created hurdles in its implementation and after issuing a show cause notice, respondent terminated the MOU vide letter dated 07.08.2019, Annexure P-5. Petitioner filed an appeal but it was dismissed by order dated 24.12.2019, Annexure P-8. Petitioner issued a notice, Annexure P-9 under Clause 10.1 of the MOU for amicable settlement, but without responding to it, the respondents encashed the Bank guarantee furnished by the petitioner. Petitioner served a notice dated 22.02.2021, Annexure P-11 invoking the arbitration clause and an Empowered Committee comprising of Government officials was appointed, some meetings were held, but without any result.

3. Upon notice, petition has been contested by the respondents on the ground that there is no arbitration clause in the MOU between the parties and the dispute is not arbitrable. It has been further submitted that the Principal Secretary to Government of Haryana, Rural Development Department, who decided the appeal, is a necessary party and has not been impleaded.

4. Counsel for the petitioner has placed reliance upon the judgment of the High Court of Rajasthan in SB Arbitration Application No.29/2021 titled as ***Disha Education Society and another Vs. Rajasthan Skills and Livelihood Development Corporation***, decided on 04.11.2022 and judgment of the High Court

of Himachal Pradesh in Arbitration case No.1 of 2022 titled as ***M/s Apollo Med Skills Ltd. Versus HP State Rural Livelihood Mission*** decided on 25.03.2022 to contend that in a similar situation, arbitrator was appointed by the High Court to adjudicate the dispute between the parties.

5. On the other hand, counsel for the respondent has argued that in the absence of an arbitration clause, there can be no reference to an arbitrator. He has placed reliance upon the judgments of the Supreme Court in ***Jagdish Chander Vs. Ramesh Chander and ors***, (2007) 5 SCC 719, ***State of Orissa and ors. Vs. Bhagyadhar Dash*** (2011) 7 SCC 406, ***Mahanadi Coalfields Ltd. and another Vs. M/s IVRCL AMR Joint Venture***, 2023(1) Apex Court Judgments (SC) 370 and an unreported judgment of High Court of Gujarat in Arbitration Petition No.107 of 2021 titled as ***Surya Wires Private Limited Through Managing Director S K Jain Vs. Gujarat Livelihood Promotion Corporation Limited*** decided on 18.02.2022.

6. I have heard counsel for the parties and considered their respective submissions.

7. After referring to the case law on the subject, in ***Jagdish Chander's*** case (supra), Supreme Court has set out the following principles in regard to what constitutes an arbitration agreement:-

“(i) The intention of the parties to enter into an 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 disputes to a private tribunal for adjudication and an willingness to be bound by the decision of such tribunal on such disputes, it is arbitration agreement. While there is no specific form of an arbitration agreement, the words used should disclose a determination and obligation to go to arbitration and not merely contemplate the possibility of going for arbitration. Where there is merely a possibility of the parties agreeing to arbitration in future, as contrasted from an obligation to refer disputes to arbitration, there is no valid and binding 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 disputes, in a clause relating to settlement of disputes, it does not detract from the clause being an arbitration agreement if it has the attributes or elements of an arbitration agreement. They are: (a) The agreement should be in writing. (b) The parties should have agreed to refer any disputes (present or 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 to put forth their case before it. (d) The parties should have agreed that the decision of the Private Tribunal in respect of the disputes will be binding on them.

(iii) Where the clause provides that in the event of disputes arising between the parties, the disputes shall be referred to Arbitration, it is an arbitration agreement. Where there is a specific and direct expression of intent to have the disputes settled by arbitration, it is not necessary to set out the attributes of an arbitration agreement to make it an arbitration agreement. But where the clause relating to settlement of disputes, contains words which specifically excludes any of the attributes of an arbitration agreement or contains anything that detracts from an arbitration agreement, it will not be an arbitration agreement. For example, where an agreement requires or permits an authority to decide a claim or dispute without hearing, or requires the authority to act in the interests of only one of the parties, or provides that the decision of the Authority will not be final and binding on the parties, or that if either party is not satisfied with the decision of the Authority, he may file a civil suit seeking relief, it cannot be termed as an arbitration agreement.

(iv) But mere use of the word 'arbitration' or

'arbitrator' in a clause will not make it an arbitration agreement, if it requires or contemplates a further or fresh consent of the parties for reference to arbitration. For example, use of words such as "parties can, if they so desire, refer their disputes to arbitration" or "in the event of any dispute, the parties may also agree to refer the same to arbitration" or "if any disputes arise between the parties, they should consider settlement by arbitration" in a clause relating to settlement of disputes, indicate that the clause is not intended to be an arbitration agreement. Similarly, a clause which states that "if the parties so decide, the disputes shall be referred to arbitration" or "any disputes between parties, if they so agree, shall be referred to arbitration" is not an arbitration agreement. Such clauses merely indicate a desire or hope to have the disputes settled by arbitration, or a tentative arrangement to explore arbitration as a mode of settlement if and when a dispute arises. Such clauses require the parties to arrive at a further agreement to go to arbitration, as and when the disputes arise. Any agreement or clause in an agreement requiring or contemplating a further consent or consensus before a reference to arbitration, is not an arbitration agreement, but an agreement to

enter into an arbitration agreement in future.”

8. In ***Bhagyadhar Dash’s*** case (supra) the Supreme Court has held that an arbitration agreement is not required to be in any particular form and what is required to be ascertained is as to whether the parties have agreed that in case a dispute arises between them in respect to the subject matter of contract, such dispute shall be referred to arbitration.

9. The Arbitration clause in the present case has to be examined in the backdrop of the above settled legal position. Clause 10 of the MOU Annexure P-2, deserves to be noticed and is reproduced as under:-

“10. Arbitration and Applicable laws:

10.1 *The parties hereby agreed that any controversy, claim or dispute arising in connection with this MOU, and which cannot be resolved amicably shall be referred to Governing body of HSRLM in the State or State Level Co-ordination Committee of DDU-GKY and later to the Empowered Committee of Ministry of Rural Development, Government of India, whose decision shall be final and binding on all parties.*

10.2 *The agreement shall be construed and interpreted in accordance with the laws governed by the Government of India, and the courts at Panchkula shall have exclusive jurisdiction over*

matters arising out of or relating to this agreement.”

10. This clause shows that the parties had mutually agreed that in case of any controversy, claim or difference between them, which cannot be resolved amicably, it has to be referred to the Governing body of the respondent or the State level co-ordination committee and later to the Empowered Committee, whose decision was agreed to be final. An analysis of the clause shows that there is no agreement between the parties to refer the dispute to any private tribunal whose decision is to be treated as final. This clause does not refer to arbitration as the mode of settlement of dispute between the parties nor does it provide for reference of dispute to arbitration. This clause does not provide for any procedure which would show that the Governing body or the State level coordination committee or even the Empowered Committee is to act judicially after considering the submissions of both the parties. It does not disclose that the authorities enumerated therein are to act as an arbitrator in respect of disputes that may arise between the parties. Mere fact that the clause has been titled as “Arbitration and Applicable Laws” and it has been agreed that the decision of the Empowered Committee shall be final and binding would not bring it within the ambit of an arbitration agreement within the meaning of Section 7 of the Act.

11. In ***Mahanadi Coalfields’s*** case (supra), although the clause was titled as “Settlement of disputes/Arbitration” but the Supreme Court held that where the substantive part of the provision makes it

abundantly clear that there is no arbitration agreement between the parties agreeing to refer either present or future disputes to arbitration, the clause cannot be said to be an arbitration clause. It was further held that the clause of the contract agreement is merely a dispute resolution mechanism at the company level rather than an arbitration clause. Similar is the position in the present case.

12. In the judgments relied upon by counsel for the petitioner, the clauses which came up for consideration, are differently worded. There is nothing to show that the respondents had taken an objection regarding the existence of an arbitration clause. Rather in the case before the High Court of Himachal Pradesh, the respondent had conceded the existence of the arbitration agreement and the matter was referred to an independent Arbitrator for adjudication.

13. For the foregoing reasons, this court is of the view that as clause 10 *ibid* does not constitute an arbitration agreement and in absence thereof, the very invocation of jurisdiction under Section 11(6) of the Act is not valid. As such, reference cannot be made to an Arbitrator.

14. There is no merit in the petition, which is hereby dismissed.

31.01.2024
pooja saini

(SUVIR SEHGAL)
JUDGE

Whether Speaking/Reasoned	Yes/No
Whether Reportable	Yes/No