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**\* IN THE HIGH COURT OF DELHI AT NEW DELHI**

**Date of Decision: 27<sup>th</sup> May 2024**

+ ARB.P. 1315/2023

MADHUR COMPUTECH PVT.LTD

..... Petitioner

Through: Mr. Sanyam Jain, Advocate *via*  
video-conferencing.

versus

M/S AFFORDABLE EXPORTS PVT LTD & ANR.

..... Respondents

Through: Mr. Vinit Trehan, Mr. Sushant Pal  
and Mr. Yash Srivastava, Advocates.

**HON'BLE MR. JUSTICE ANUP JAIRAM BHAMBHANI**

**J U D G M E N T**

**ANUP JAIRAM BHAMBHANI J.**

By way of the present petition under section 11(6) of the Arbitration & Conciliation Act 1996 ('A&C Act'), the petitioner seeks appointment of a Sole Arbitrator to adjudicate upon the disputes that are stated to have arisen with the respondents from registered Lease Agreement dated 12.09.2019 ('Agreement').

2. Notice on this petition was issued on 12.12.2023; consequent whereupon reply dated 28.03.2024 has been filed by the respondents. Mr. Sanyam Jain, learned counsel appearing for the petitioner submits, that they do not wish to file a rejoinder in the matter.
3. Mediator's report dated 01.05.2024 records that the mediation has ended as 'Not-Settled'.

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4. Mr. Jain has drawn the attention of this court to clause 32 of the Agreement which comprises the arbitration agreement; and contemplates reference of disputes between the parties to arbitration in accordance with the A&C Act; with the 'seat' of arbitration being at New Delhi.
5. For facility of reference, the relevant clauses of the Agreement are extracted below :

**“32 ARBITRATION**

*In the event a dispute arises in connection with the validity, interpretation, implementation or alleged breach of this Agreement, the Parties shall attempt in the first instance to resolve such dispute through negotiation. If the dispute is not resolved through negotiation then either party may refer the dispute for resolution to the Arbitration of a Sole Arbitrator in consonance with the provisions of the Arbitration and Conciliation Act, 1996 or any subsequent enactment or amendment thereto, and the decision of the Arbitrator shall be binding, upon the LESSOR and the LESSEE. The LESSOR shall appoint an arbitrator within thirty (30) days of the receipt by such party of the other party's request to initiate arbitration. However, during the pendency of the dispute, in case the LESSEE enjoys the benefits of the Demised Premises, the LESSEE shall not stop payment of Rent and the other charges mentioned herein. The seat of Arbitration shall be New Delhi. The provisions of this Article shall survive the term/termination of this Agreement. The lessee shall bear cost of the arbitration.*

**“33 Dispute Resolution** - *In the event of any dispute or differences between the parties relating to this lease deed or any part thereof the same shall be referred to the Jurisdiction of Distt.- Gautam Budh Nagar (U.P.).”*

(emphasis supplied)



6. Learned counsel for the petitioner further contends that, despite the existence of clause 33 of the Agreement, which refers to “... .. *Jurisdiction of Distt. Gautam Budh Nagar (U.P.)*.”, the territorial jurisdiction of this court is well-founded since the aforesaid is a general dispute resolution clause which would apply in relation to a civil suit, but has no application to arbitration proceedings, especially since there is a specific arbitration agreement between the parties, which designates New Delhi as the ‘seat’ of the arbitral proceedings. It is submitted that insofar as arbitration proceedings are concerned, the ‘seat’ of arbitration, as agreed to between the parties must be the basis of deciding the territorial jurisdiction of a court in relation to arbitration proceedings, as clause 32 of the Agreement does in the present case.
7. As per the record, the petitioner invoked arbitration *vide* Notice dated 13.10.2023, to which the respondents did not send any reply.
8. The principal contention raised by Mr. Vinit Trehan, learned counsel appearing for the respondents is that the arbitration agreement embedded in clause 32 of the Agreement, is a non-binding clause, inasmuch as it only says that if a dispute remains unresolved through negotiation, “... .. *either party may refer the dispute ... ..*” to arbitration. On the other hand, counsel argues that clause 33 of the Agreement, which is the general jurisdiction clause, stipulates that any disputes or differences between the parties “... .. *shall be referred to the Jurisdiction of Distt.-Gautam Budh Nagar (U.P.)*.”
9. The submission therefore is that while on the one hand, the arbitration provision is not mandatory; on the other hand, the reference of



disputes to the courts in District Gautam Budh Nagar, Uttar Pradesh is binding upon the parties.

10. In support of his contention, Mr. Trehan cites the decision of the Supreme Court in ***Jagdish Chander vs. Ramesh Chander and Ors.***<sup>1</sup>, to urge that in paras 8(iii) and 8(iv) of that judgment, the Supreme Court has dealt with a similar situation and has interpreted that where the word ‘may’ is used in the context of an arbitration clause, such clause is not intended to be an arbitration agreement, which is also the case in the present matter.
11. The relevant extract of *Jagdish Chander* (supra), to which learned counsel for the respondents draws attention, reads as follows :

*“8. This court had occasion to refer to the attributes or essential elements of an arbitration agreement in K.K. Modi, Bharat Bhushan Bansal v. U.P. Small Industries Corpn. Ltd. and Bihar State Mineral Development Corpn. v. Encon Builders (I) (P) Ltd. In State of Orissa v. Damodar Das this court held that a clause in a contract can be construed as an “arbitration agreement” only if an agreement to refer disputes or differences to arbitration is expressly or impliedly spelt out from the clause. We may at this juncture set out the well-settled principles in regard to what constitutes an arbitration agreement.*

(i) \* \* \* \* \*

(ii) \* \* \* \* \*

(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*

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<sup>1</sup> (2007) 5 SCC 719



*settlement of disputes, contains words which specifically exclude 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.”*

(emphasis supplied)



12. Upon considering the submissions made by the parties, this court is of the following opinion :

12.1. The phrases interpreted by the Supreme Court in para 8(iv) of *Jagdish Chander* (supra) are not the same as the phrase appearing in clause 32 of the Agreement in the present case.

12.2. An arbitration clause has to be read carefully, and specifically in its terms, to determine whether or not the parties had agreed to arbitration as a method of dispute resolution; or whether they had only envisaged a possible agreement in the future to refer disputes to arbitration for purposes of dispute resolution.

12.3. It is noticed that the scenarios contemplated in para 8(iv) of *Jagdish Chander* (supra) are cases where the concerned clause is worded in a manner, which shows that a *further or fresh consent* of the parties would be required for their disputes to be referred to arbitration. It is in that context that the Supreme Court has alluded to the phrase “*in the event of any dispute, the parties may also agree to refer the same to arbitration*” (as highlighted above), to hold that such a phrase does not comprise an arbitration agreement.

12.4. In the present case however, clause 32 does *not* require or contemplate that any *further or fresh consent* of the parties would be necessary for their disputes to be referred to arbitration. In fact the said clause only gives an *option to either party to refer* their disputes to arbitration. The word ‘may’ appearing in clause 32 has therefore been used apropos the phrase “either party” and not in the context of reference of



disputes to arbitration. The clause must accordingly be interpreted to mean that it *stands agreed* between the parties that their disputes would be referred to arbitration; and that *either party may refer* the disputes to arbitration. In the opinion of this court, it is with this intention and meaning that the phrase “*either party may refer the dispute for resolution to the Arbitration*” appears in clause 32 of the Agreement.

12.5. Accordingly, this court is of the view that clause 32 of the Agreement *does comprise* a concluded arbitration agreement between the parties.

12.6. It may also be noticed in the passing, that clause 33 of the Agreement does not mention the word ‘*court*’ anywhere; and only suggests that any dispute or difference between the parties shall be subject to the territorial jurisdiction of a certain district. This evidently, is only faulty drafting; and even if the word ‘*court*’ is read into this clause, that would not detract from the position that there is a concluded arbitration agreement between the parties, which even specifies that the ‘seat’ of the arbitration shall be New Delhi. Clause 33 is therefore yet another example of ambiguous drafting, which leads to avoidable, contentious litigation; and highlights the need for at least *some* of the provisions of a contract, such as the arbitration and territorial jurisdiction clause, to be drafted with more care and attention, so that the necessary legal ingredients are not missed-out.

13. Accordingly, in the opinion of this court, there is a valid, subsisting and concluded arbitration agreement between the parties; this court



has territorial jurisdiction to entertain and decide the present petition; and the disputes that are stated to have arisen between the parties, as set-out *inter-alia* in invocation notice dated 13.10.2023, do not appear *ex-facie* to be non-arbitrable.

14. In view of the above, at this stage, learned counsel for the parties jointly request that this court may refer the matter for arbitration under the aegis of the Delhi International Arbitration Centre, New Delhi ('DIAC'), keeping all their respective factual and legal contentions open.
15. Accordingly, the present petition is allowed and **Mr. Akshay Sehgal, Advocate (Cellphone No.: +91 9899579000)** is appointed as the learned Sole Arbitrator to adjudicate upon the disputes between the parties; with arbitration proceedings to be conducted under the aegis of the DIAC, in accordance with applicable rules.
16. The learned Arbitrator would furnish to the parties requisite disclosures as required under section 12 of the A&C Act; and in the event there is any impediment to the appointment on that count, the parties are given liberty to file an appropriate application in this court.
17. The learned Arbitrator shall then proceed with the arbitral proceedings in accordance with the rules and regulations of DIAC and subject to arbitrator's fee and arbitration costs, as may be applicable.
18. All rights and contentions of the parties in relation to the claims/ counter-claims are kept open, to be decided by the learned Sole Arbitrator on merits, in accordance with law.
19. A copy of this order be communicated *forthwith* to the Co-ordinator, DIAC, for information and compliance.



20. A copy of this order be communicated by the Registry *via* e-mail to the learned Sole Arbitrator, as also to learned counsel for the parties.
21. The petition stands disposed-of in the above terms.
22. Pending applications, if any, also stand disposed-of.

**ANUP JAIRAM BHAMBHANI, J**

**MAY 27, 2024/V.Rawat**

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