

ORDER

OCD – 5

IN THE HIGH COURT AT CALCUTTA
(COMMERCIAL DIVISION)
ORIGINAL SIDE

AP-COM/1081/2024

KARMA NORBU BHUTIA
VS
NATIONAL PROJECTS CONSTRUCTION
CORPORATION LTD. (NPCCL) & ANR.

BEFORE:
THE HON'BLE JUSTICE SHAMPA SARKAR
Date : 18th February 2025.

APPEARANCE:

Mr. Tanmoy Roy, Advocate
..... for petitioner.

Mr. Debajyoti Basu, Advocate
Mr. Shamba Chakraborty, Advocate
Mr. Diptomoy Taluker, Advocate
Mr. D. Ghosh
..... for respondents

1. This is an application for appointment of an Arbitrator on the strength of Clause 76.0 of the General Conditions of Contract. The General Conditions of Contract (GCC) was made applicable to the agreement between the petitioner and the respondents. The petitioner is a government enlisted contractor in the State of Sikkim. National Projects Construction Corporation Ltd (NPCCL), i.e., the respondent had awarded a contract to the petitioner for construction/upgradation of the existing lane, to 2 lane with paved shoulder, including geometric improvement from Ranipool to Pakyong from KM 8.00 to KM 16.167 in NH 717A in the state of Sikkim, on the terms and conditions contained in the Letter of Intent.

2. The petitioner contends that disputes cropped up with regard to withholding of the Running Account bills, invocation of bank guarantee upon termination of the contract, non-refund of security deposit etc. Ultimately, the notice invoking arbitration was issued by the petitioner on September 25, 2024. The third and final RA bill allegedly became due and payable sometime in February/March 2021.
3. Mr. Roy, learned advocate on behalf of the petitioner, submits that in terms of the GCC, the parties were entitled to refer the dispute to arbitration. The demand notices raised by the petitioner would clearly indicate that the disputes had been raised by the petitioner long time ago. The demand notices were unanswered. Ultimately, finding no other alternative, the arbitration clause was invoked. The respondent did not take any step despite such invocation. Names of learned senior advocates of the Sikkim High Court were also suggested. However, no steps were taken. Finding no other alternative, the petitioner has approached this Court for appointment of an arbitrator.
4. In support of his contention that Clause 76 of the GCC was a valid clause, Mr. Roy has relied on the following decisions:-
 1. ***Enercon (India) Ltd. and Ors. Vs. Enercon GMBH and Ors.***, reported at **MANU/SC/0102/2014**.
 2. ***Tarun Dhameja vs. Sunil Dhameja & Anr.***, 2024 INSC 973.
 3. ***Babnrao Rajaram Pund vs. Samarth Builders & Developers and Ors.***, reported in **MANU/1113/2022**.

4. ***Powertech World Wide Limited vs. Delvin International General Trading LLC***, reported in ***MANU/1333/2011***.
5. Mr. Roy submits that the petitioner was made to sign on a dotted line contract. The GCC was framed by the respondent. The petitioner/contractor did not have any say in the drafting of the clauses. Moreover, the very mention of the fact that the arbitration would be conducted in accordance with the provisions of the Arbitration and Conciliation Act, 1996 in the GCC, envisaged and contemplated that the dispute would be resolved by arbitration, upon reference by the parties. The jurisdiction clause follows the arbitration clause, being clause 76.1.
6. Mr. Basu, learned senior advocate for the respondents submits that the claim is barred by limitation. The notice invoking arbitration was not proper and the clause relied upon by the petitioner, was not a valid arbitration clause.
7. Mr. Basu, learned advocate for the respondent relies on the following decisions:
 - i. ***B And T AG vs. Ministry of Defence***, reported in ***(2024) 5 SCC 358***.
 - ii. ***BGM and M-RPL-JMCT (JV)***, reported in ***2024 SCC OnLine Cal 486***.
 - iii. ***Jagdish Chander vs. Ramesh Chander & Ors.***, reported in ***(2007) 5 SCC 719***.
 - iv. ***Solaris Chem Tech Industries Ltd. vs. Assistant Executive Engineer, Karnataka Urban Water Supply and Drainage Board and Anr.***, reported in ***2023 SCC OnLine SC 1335***, and
 - v. ***Babnrao Rajaram Pund vs. Samarth Builders & Developers and Anr.***, reported in ***(2022) 9 SCC 691***.
8. Having considered the rival contentions of the parties and the documents on record as also the GCC, this Court finds that clause

76 has been incorporated just after clause 75. Clause 75 is the Force Majeure clause. Clauses 76.0 and 76.1 are quoted below:

“76.0 ARBITRATION

The arbitration shall be conducted in accordance with the provisions of the Arbitration and Conciliation Act 1996 (26 of 1996) or any statutory modifications or re-enactment thereof and the rules made there under and for the time being in force shall apply under this clause.

76.1 JURISDICTION

The agreement shall be executed at Kolkata on non-judicial stamp paper and the Courts at Kolkata alone will have jurisdiction to deal with matters arising there from, to the exclusion of all other courts.”

9. Clause 76 of the said agreement is not an arbitration clause as defined under Section 7 of the Arbitration and Conciliation Act, 1996.

10. Section 7 of the Arbitration and Conciliation Act, 1996 is quoted below:-

“ 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) 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 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.”*

11. Thus, the first ingredients of a valid arbitration agreement, is a meeting of minds of the parties who are in a definite commercial relationship, to refer all or certain disputes which may arise between them in discharge of the legal business relationship, to arbitration. It is not in doubt that the parties hereto had entered into a business relationship and a contract had been awarded to the petitioner. An agreement contained the GCC was made applicable. However, clause 76 of the GCC, which is quoted above and which is interpreted by the petitioner to be an arbitration clause, does not indicate that the parties had agreed to refer all present and future disputes arising during or after the execution of the subject contract, to arbitration.
12. The law is well-settled. The arbitration agreement does not have to be in any particular form. It is also well-settled that, words like “arbitrator or arbitration” were not required to be mentioned for a clause to be an arbitration clause. What is most important is that, either from the contract or from any other written document, telex or telecommunications or email, it should be evident that the parties were ad idem that, in case there was any difference or dispute amongst them in the discharge of their contractual obligation, they shall refer such dispute for settlement by an arbitrator or by a private tribunal. In the present case, although the clause provides that the arbitration shall be conducted in accordance with the Arbitration and Conciliation Act, 1996 with all modifications, amendments and re-enactments, I hold that, a mere heading in a clause, will not make the said clause an arbitration. I do not find

from a comprehensive reading of the entire contract that, there is any clause which deals with dispute resolution. What the parties had agreed to do, in case disputes and differences arose, has not been stated either the GCC or in the letter of intent. There is nothing on record to show that the parties had either agreed or decided that any dispute or difference which may arise during the execution of the said contract or thereafter, shall be referred to arbitration. Even if the other requirements, i.e., the Tribunal to be an independent Tribunal and that the parties had undertaken to be bound by the award etc. were missing, at least, there should have been a clause which indicated that the parties were in agreement to refer any dispute arising out of the said contract, to arbitration. Even if the GCC does not specifically contain an arbitration agreement, but an agreement could have been entered into later, by a signed document or by exchange of letters, via telex or telecommunications or email. This is not the case here.

13. In the decision of ***Enercon (India) Ltd. and Ors. (supra)***, the Hon'ble Apex Court held that the courts have to adopt a pragmatic approach and not a pedantic or technical approach while interpreting or construing an arbitration agreement or an arbitration clause. It is the duty of the Court to make the same workable within the permissible limits of law, without stretching it beyond the boundaries of recognition. A common sense approach has to be adopted to give effect to the attitude of a reasonable business person, having business common sense, as well as being equipped with the knowledge that may be peculiar to the business venture.

However, the said judgment also clarifies that the parties must express an intention to arbitrate. The intention to arbitrate can be expressed by the parties in the manner provided under Section 7, i.e., by exchange of letters, telex, telegrams or other means of telecommunications which can provide a record of such agreement. This has already been discussed above. No such record of an agreement is available. Mr. Roy has not referred to any such document, either. Thus, one thing is clear from the above judgment relied upon by Mr. Roy that, there has to be a meeting of minds between the parties to a contract on the issue that, in the event of any dispute or difference, the parties shall refer the dispute for settlement by a tribunal.

14. The law as laid down by judicial authorities is that, if a detailed semantic and syntactical analysis of words in a commercial contract leads to a conclusion that flouts business common sense, it must be made to yield to business common sense. In the instant case, when the GCC is devoid of any dispute resolution clause and the clauses do not indicate that the parties had decided to resolve their dispute by reference to arbitration, this Court will not be held guilty of taking a pedantic approach, contrary to the accepted norms of “business common sense”. In fact, the GCC does not speak of any method and mechanism for dispute resolution at all.
15. In *Visa International Ltd. Vs. Continental Resources (USA) Ltd.* (supra), it was held that no party can be allowed to take advantage of an inartistic drafting of the arbitration clause in any agreement, as long as, there is a clear intention of the parties to go for

arbitration in case of future dispute. In the instant case, there is no dispute resolution clause at all. What is required to be gathered is the intention of the parties from the surrounding circumstances, including the conduct of the parties. In the instant case, the surrounding circumstances and the conduct of the parties do not indicate that any such intention to refer the dispute to arbitration ever existed.

16. The intention of the parties, as has already been discussed hereinabove, can be gathered from the correspondence exchanged between them and/or from surrounding circumstances. In the present situation, the surrounding circumstances do not pursue this court to hold that the parties have intended to refer any dispute to arbitration.
17. In ***Tarun Dhameja (supra)***, a similar ratio was laid down by the Hon'ble Apex Court. In the said case, the dispute resolution clause clearly provided that if at any point of time, during the continuance of the partnership or after the retirement of any partner, any dispute or difference arose between the parties or their respective heirs or anyone claiming through them, the same shall be referred to arbitration. Therefore, even if the subsequent clause provided that reference to arbitration could be optional, the first clause in the deed was taken to be a binding agreement between the parties, to refer the dispute to arbitration.
18. In ***Babanrao Rajaram Pund (supra)***, the Hon'ble Apex Court held that the High Court fell in error in holding that the appellant's application under Section 11 was not maintainable for want of a

valid arbitration clause. According to the Hon'ble Apex Court, the development agreement luminously disclosed the intention and obligation of the parties to be bound by the decision of the Tribunal even though the words, "final and binding" were not referred to.

19. In ***Powertech World Wide Limited (supra)***, the Hon'ble Apex Court held that the clause which provided that any dispute arising out of the agreement which could not be settled amicably, shall be finally settled in accordance with the Arbitration and Conciliation Act, 1996, was a valid arbitration clause.
20. Similar view was taken by a learned Co-ordinate Bench in ***Bankat Garodia vs. Adityo Poddar*** (AP-COM/17/2023, IA No.GA-COM/2/2024).
21. Thus, all the decisions cited by Mr. Roy are distinguishable and in each of these decisions, the Hon'ble Apex Court and the learned Co-ordinate Bench found that the parties intended to refer either future or present disputes arising out of the commercial relationships to be settled by an arbitrator.
22. In ***Jagdish Chander (supra)***, the Hon'ble Apex Court held that, the intention of the parties to enter into an arbitration agreement must be gathered from the terms of the agreement. The terms of the agreement must clearly indicate an intention on the part of the parties to the agreement to refer their disputes to a private tribunal for adjudication and a willingness to be bound by the decision of the tribunal, on resolution of such disputes. Although, there is no specific form for an arbitration agreement, the words used should disclose a determination and/or obligation to go for arbitration and

not merely a possibility. In the case before this Court, there is neither a single term in the agreement nor are there subsequent exchange of letters, telex or telegrams which will indicate that the parties had at any point of time agreed to refer the disputes to a private tribunal for adjudication. All that has been mentioned is that the provisions of the Arbitration and Conciliation Act, 1996, will be applicable to the contract.

23. In **BGM and M-RPL-JMCT (JV) (supra)**, the learned coordinate Bench held that the use of the expression `may' would mean that the parties had the option to refer the disputes or differences to arbitration. This would not constitute an arbitration clause.
24. In **Solaris Chem Tech Industries Ltd. (supra)** it was held that even if the word `arbitration' and/or `arbitral tribunal' were not used with reference to the process of settlement of dispute, an arbitration agreement should have the following elements,
 - a) The agreement should be in writing;
 - b) Parties should have agreed to refer any dispute, present or future, between them to the decision of a private tribunal;
 - c) The private tribunal should be empowered to adjudicate upon a dispute in an impartial manner, giving due opportunity to the parties to put forward their case before it;
 - d) The parties should have agreed that the decision of the private tribunal in respect of disputes will be binding upon them.

25. Under these circumstances, this Court does not find Clause 76 to be a valid arbitration clause.
26. To answer Mr. Roy's query as to what would be the purpose behind incorporation of the said clause and that the clause could not have been incorporated without a particular purpose, this Court is of the view that, the parties may have kept an option to enter into an agreement on some further date open, to refer disputes to arbitration and in that event, the Arbitration Act would apply.
27. With regard to the further submission of Mr. Roy that Clause 73.3, which is quoted below, is an arbitration clause, this Court is of the view that the same cannot constitute a valid arbitration clause in view of the fact that the clause provides that in the event any money is retained or withheld by the Chief Engineer of NPCC, the same shall not be released until there is a mutual settlement or determination by an arbitration clause or by a decision of the competent court.

"73.3 Lien In Respect of Claims in Other Contracts

Any sum of money due and payable to the contractor (including the security deposit returnable to him) under the contract may be withheld or retained by way of lien by the Engineer-in-Charge or by NPCC against any claim of the Engineer-in-Charge or NPCC in respect of payment of a sum of money arising out of or under any other contract made by the contractor with the Engineer-in-Charge or the NPCC. It is an agreed term of the contract that the sum of money so withheld or retained under this clause by the Engineer-in-Charge or the NPCC will be kept withheld or retained as such by the Engineer-in-Charge or the NPCC or till his claim arising out of the same contract or any other contract is either mutually settled or determined by the arbitration clause or by the competent court, as the case may be, and that the contractor shall have no claim for interest or damages whatsoever on this account or on any other ground in respect of any sum of money

withheld or retained under this clause and duly notified as such to the contractor.”

28. These modes are all options available to the parties.
29. Under such circumstances, this application fails.
30. No order is passed as to costs.
31. In view of the above finding, the issue of limitation raised by Mr. Basu is not answered.
32. AP-COM/1081/2024 is, accordingly, disposed of.

(SHAMPA SARKAR, J.)

SM/S.Das/SN/JM.