



IN THE HIGH COURT OF JUDICATURE OF BOMBAY
BENCH AT AURANGABAD

ARBITRATION APPLICATION NO. 9 OF 2024

Sri Sathe Infracon Private Limited .. Applicant

versus

M/s Rudranee Infrastructure Ltd. & another .. Respondents

Mr. Anshuman R. Asare, Advocate for the Applicant.

Mr. Amit A. Yadkikar, Advocate for Respondent No. 1.

Ms. Nikita N. Gore, Advocate for Respondent No. 2.

CORAM : R. M. JOSHI, J.

RESERVED ON : 17th JANUARY, 2025.

PRONOUNCED ON : 21st JANUARY, 2025.

PER COURT :

1. This application is filed under Section 11 of the Arbitration and Conciliation Act (for short 'the Act') for appointment of Arbitrator on behalf of Respondents since it is the case of the applicant that inspite of invocation of arbitration clause and appointment of Arbitrator by applicant, Respondent has failed to appoint co-arbitrator within stipulated time.

2. There is no dispute about the fact that there was sub-contract between Applicant and Respondents dated 9.10.2020. Clause No. 32 provides for settlement of dispute amicably and, on failure thereto to settle the dispute through Arbitrator. Parties do not dispute exchange of correspondence between them.

3. Learned counsel for the applicant submits that notices dated 28.03.2023 and 25.09.2023 are sufficient for recording due compliance of Section 21 of the Act. It is his submission that in the first notice dated 28.03.2023, it was clearly indicated that in case of failure on the part of the Respondent to appoint co-arbitrator in 30 days, further action under the provisions of the Act would be initiated. He also referred to letter dated 25.09.2023 by applicant to the Respondent giving final 15 days notice for appointment of Arbitrator. All this, according to him, is sufficient compliance for invocation of Section 11 of the Act.

4. Learned counsel for Respondent though did not dispute receipt of communication as referred by learned counsel for the applicant, however, according to him, letter dated 28.03.2023 is not unequivocal invocation of arbitration clause. He drew attention of

the Court to Paragraph Nos. 16 to 18 of the said letter which according to him, indicate that in case the date for amicable settlement is given by the Respondent, the said notice becomes infructuous. It is his submission that thus, consequent notice dated 25.09.2023 does not contemplate compliance of Section 21 of the Act. It is his submission that in this letter it is itself candidly stated by the applicant that there were settlement talks between the parties and as such first letter dated 28.03.2023 being made obsolete by the conduct of the parties. There cannot be a presumption of compliance of Section 21 of the Act which is mandatory for the purpose of invocation of Section 11 of the Act. In support of his submissions, he placed reliance on judgment of this Court in case of D. P. Construction vs. Vishvaraj Environment Pvt. Ltd., **MANU/MH/2206/2022.**

5. Admittedly, there is a contract between Applicant and Respondent No. 1 dated 09.11.2020. It contains arbitration clause. Said clause No. 32 is reproduced as under :-

Dispute Resolution: If any dispute, controversy arises between the parties as to the interpretation of this Agreement or any matter or thing in connection with

this Agreement, the parties shall exert to solve the - dispute or controversy or difference amicably. In case such dispute or controversy cannot be resolved by the parties by discussion in good faith; attempting to reach an amicable solution, the same shall be finally settled by arbitration in accordance with Arbitration & Conciliation Act 1996 having each party appointing one arbitrator & both the arbitrators appointing a Presiding Arbitrator. The costs towards arbitration shall be shared equally. The venue shall be Aurangabad. The arbitral award shall be final and conclusive and binding on both the sides.

6. This clause clearly indicates that the parties have to exert firstly to settle the dispute amicably and if the dispute is not settled, then to refer the dispute for decision to arbitration tribunal. Parties have also agreed for appointment of one Arbitrator each and these two Arbitrators were to appoint umpire/ third Arbitrator.

7. The correspondence filed along with application including letter dated 04.03.2023 issued by Respondent to Applicant alleging losses caused by the Applicant more than sufficiently indicates that there exist a dispute between the parties in respect of

the terms of contract. At this stage, it would be relevant to take into account provisions of Section 21, which read thus :-

Section 21: Commencement of arbitral proceedings.

Unless otherwise agreed by the parties, the arbitral proceedings in respect of a particular dispute commence on the date on which a request for that dispute to be referred to arbitration is received by the respondent.

This provision clearly shows that unless otherwise agreed between the parties, arbitration proceeding in respect of particular dispute commences on the date on which request for that dispute to be referred to arbitration is received by the respondent. Here in this case, parties have agreed that before reference of dispute to arbitration, amicable settlement must be attempted. In the light of agreement between parties it is necessary to see whether there is compliance of this provision.

8. Now question arises as to whether notice dated 28.03.2023 can be considered as compliance of Section 21 of the Act. Needless to say that no straight jacket formula can be adopted to hold that any notice as invocation of arbitration, as it would depend upon facts and circumstances of each case. In the instant case, it is

pertinent to take note of certain paragraphs of this notice which have bearing on the decision of this issue. For ready reference, paragraph nos. 15 to 18 are re-produced as under :-

15. That SSIPL has no intention to go in uncalled arbitration and therefore by way of this notice SSIPL is requesting RIL to confirm any suitable date for amicable settlement of dispute by joint discussion between the parties within a period of 15 days from date of receipt of this notice. Hence, SSIPL requests for kind consideration of RIL to confirm suitable date within 15 days.

16. That in case any suitable date for amicable settlement is not confirmed by RIL, it will be presumed that there is no possibility for amicable settlement between the parties due to reasons attributable to RIL. In such situation, SSIPL proposes the name of its Co-Arbitrator as per details given below :-

Name : Adv. D. V. Saralkar

Address : Flat No. 204, Gopalkrushn, Hotel Surabhi lane
opp. J. M. Road, Shivaji nagar

communication : 9822043484.

17. That RIL is requested to furnish the details its Co-Arbitrator within a period of 30 days from date receipt of this notice, so that both Co-Arbitrators may appoint

presiding arbitrator for the settlement of dispute between the parties.

18. That the above notice under Clause no. 32 of the sub contract agreement is given without any prejudice reserving right of SSIPL to approach the appropriate forum and take further action as per the provision of Arbitration and Conciliation Act for constitution of Arbitral Tribunal. If RIL fails to confirm any suitable date for amicable settlement within 15 days or fails to appoint its Co-Arbitrator within a period of 30 days from date of receipt of this notice.

9. In clause 15, it was a specific contention of the applicant that the applicant has no intention to go in uncalled arbitration and therefore a request was made for amicable settlement. Thereafter in clause No. 16, it is stated that in case a suitable date for amicable settlement is not provided/communicated, it will be presumed that there is no possibility of amicable settlement. With these conditions, name of Arbitrator is proposed.

10. These paragraphs of the notice clearly indicate that it was a conditional notice i.e. in case a date is communicated by Respondent for amicable settlement, the applicant had no intention

for proceeding with the arbitration. Admittedly, correspondence between the parties clearly indicate that attempts were made by the parties for amicable settlement between them. In the light of this notice and the clauses therein, it is relevant to take into account notice dated 25.09.2023. In this notice, it is candidly admitted that discussions were held on 15.03.2023 and 09.08.2023 for amicable settlement. This notice does not claim that the Respondent has not communicated the suitable date for amicable settlement as called upon by notice dated 28.03.2023. The notice dated 15.03.2023 therefore, stood lapsed once Respondent communicated the date for amicable settlement and in fact parties discussed settlement. Pertinently, there is a gap of about six months in these two notices.

11. It was specifically stated in the notice dated 28.03.2023 that the applicant has no intention to go in uncalled arbitration and had asked for amicable settlement and it was also stated that if the date for amicable settlement is not communicated in 15 days, it shall be presumed that there is no possibility of settlement and in this situation, Arbitrator came to be appointed. As recorded hereinabove, after this communication there was settlement talks between the parties for resolving dispute between them amicably. Having regard

to the specific wordings of notice dated 28.03.2023, said notice was conditional notice. The presumption of no possibility of settlement did not survive. Consequently, appointment of Arbitrator at that stage has become inconsequential.

12. As recorded above, in absence of any procedure agreed by parties, compliance of Section 21 is mandatory. Having regard to provisions of Section 11 of the Act, this Court cannot assume jurisdiction to appoint an Arbitrator unless request for reference of dispute is received by Respondent. Since the said requirement is not fulfilled in this case, this Court finds substance in the objection raised by Respondent to the maintainability of the application.

13. In view of above discussion, application stands dismissed.

(R. M. JOSHI)
JUDGE

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