
IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

ARBITRATION PETITION NO. 75 OF 2023

M/s. Tapadia Construction Company Through Sole
Prop. Jugalkishor Tapadia

...Petitioner

Versus

The Municipal Commissioner, Kolhapur Municipal
Corporation

...Respondent

Mr. V.S. Khanavkar, *for the Petitioner.*

Ms. Ketaki Patil, *i/b Abhijit Adagule, for Respondent.*

CORAM: SOMASEKHAR SUNDARESAN, J.

RESERVED ON: MARCH 19, 2025

PRONOUNCED ON: APRIL 23, 2025

JUDGEMENT:

1. This is a Petition under Section 11 of the Arbitration and Conciliation Act, 1996 (“*the Act*”) seeking to refer disputes and differences between the parties in connection with a Concession Agreement dated February 24, 2014 (“*Agreement*”) to arbitration.

2. The arbitration agreement asserted by the Petitioner to be in existence is contained in Clauses 7 and 8 of the Agreement. This is strongly refuted by the Respondent. Therefore, it would be useful to extract the two provisions below:-

7. This Concession Agreement shall be governed by and construed in accordance with laws of the Republic of India.

8. Jurisdiction for all kinds of disputes as well as Arbitration about this agreement will be at Kolhapur (Maharashtra)

[Emphasis Supplied]

3. A plain reading of the foregoing would show that Clause 7 is a provision that deals with governing law and therefore need not detain my attention. Clause 8 is the provision that has come in for varied interpretation by the parties. The Petitioner would submit that it is an arbitration agreement that could have been drafted better, but is nevertheless demonstrative of the intent to arbitrate. The Respondent would contend that Clause 8 cannot by any stretch be regarded as an arbitration agreement and it merely provides for territorial jurisdiction in Kolhapur.

4. Having heard the parties and having perused the material on record, in my opinion, it would be in the fitness of things to refer the parties to arbitration, leaving it open to the Arbitral Tribunal appointed hereby to rule

on its own jurisdiction under Section 16 of the Act. I am not satisfied that *ex facie* one could conclude that it is implausible to infer an arbitration agreement. I have set out my reasons in the paragraphs below.

5. *First*, the provision in question is a final product of a process of having invited bids pursuant to a tender to construct an office, bus terminus and commercial complex in Kolhapur under the aegis of the Respondent, which is a statutory undertaking providing transport in that district. The Agreement refers to various documents that were in existence before the execution of the Agreement – such as the tender, the bid documents and various correspondence between the parties. Put differently, the Agreement is not an instrument that is an “entire agreement” between the parties on the subject matter covered. One would need to examine the other documents to examine how to interpret the relationship between the parties. At this stage for me to non-suit the Petitioner out of any potential arbitration whatsoever, I would need to be satisfied that the reference to arbitration in Clause 8 is worthy of being totally ignored, and that proposition does not commend itself for acceptance. None of the other contract-forming documentation has been brought on record by either party, and the Arbitral Tribunal would be best placed to examine the contract in its entirety to answer if there was an intent to arbitrate.

6. *Second*, the reason I do not consider the Clause as being *ex facie* demonstrative of an absence of arbitration is that the provision does refer to arbitration. The provision states that the “jurisdiction for all kinds of disputes” as well as “Arbitration about this agreement” will be at Kolhapur. While the subject matter of the provision may be territorial jurisdiction, embedded in it is the reference to arbitration, which arbitration is about the Agreement. Put differently, *prima facie*, it would be reasonable to infer that the parties decided that disputes among them including disputes about the Agreement would be amenable to arbitration and such arbitration would be conducted in Kolhapur. It is a general principle of interpreting instruments of law that every word used in a contract must be given meaning and no word must be regarded as being superfluous or redundant. That the parties chose to use the phrase “Arbitration about this agreement” and that too in the context of disputes “of all kinds” would indicate that *prima facie*, the parties intended to resort to arbitration in connection with disputes relating to the Agreement. There would have been no relevance to the word “arbitration” in the context and in the manner of its usage if the parties never intended to resort to arbitration in connection with their disputes about the Agreement. Therefore, I am not convinced that at this stage of review, one could come to

any reasonable conclusion that a desire to resort to arbitration was ruled out by the parties.

7. *Third*, it is trite law that the scope of judicial review under Section 11 of the Act is confined to examination of whether an arbitration agreement is in existence. Particular regard may be had to the decisions of a seven-judge Bench in the *Interplay Judgement*¹ followed by multiple others, including *SBI General*² and *Patel*³ that the Section 11 Court ought not to venture beyond examining the existence of a validly existing arbitration agreement that has been formally executed. Even questions of existential substance is a matter that falls squarely in the domain of the arbitral tribunal, in view of Section 16 of the Act. Therefore, for the very reasons articulated above, the examination of the Agreement and its provisions would indicate to me that the formal existence of an arbitration agreement is discernible. The other elements of the contract-forming documentation over and above the Agreement (as the Agreement itself provides for the prior correspondence as forming part of it) would contain evidence and pointers to discerning the contracting minds of the parties. Therefore, one may need to examine such prior correspondence

¹ *In Re: Interplay Between Arbitration Agreements Under Arbitration and Conciliation Act, 1996 & Stamp Act, 1899 – (2024) 6 SCC 1*

² *SBI General Insurance Co. Ltd. v. Krish Spinning – 2024 SCC OnLine SC 1754*

³ *Ajay Madhusudan Patel v. Jyotrindra S. Patel – 2024 SCC OnLine SC 2597*

to answer any existential question about the arbitration agreement, and that falls in the domain of the arbitral tribunal and not the Section 11 Court.

8. *Fourth*, the most authoritative passage on the subject and about the interpretation of Section 7 of the Act, which regulates the ingredients of an arbitration agreement is ***Jagdish Chander***⁴ (incidentally, both parties would press this judgement in service), which would indicate that one should also look for any feature in the agreement that negates the inference of the parties having intended to arbitrate. In my assessment, the Agreement does not contain anything to indicate a negative inference of keeping parties out of arbitration. On the other hand, I have already expressed my view on the rule against superfluosity in interpreting a contract.

9. *Finally*, the Respondent would contend that Clause 8 would indicate that jurisdiction of all kinds of disputes including arbitration about the Agreement would be in Kolhapur, and therefore, the provision is nothing but a jurisdictional clause. According to the Respondent, even courts could have jurisdiction and that would relate to courts in Kolhapur. However, this is not an argument that displaces the phrase “Arbitration about this agreement” in a manner that there could be no arbitration. In fact, disputes of all kinds between the parties would have to be dealt with in Kolhapur and such

⁴ *Jagdish Chander vs. Ramesh Chander* - (2007) 5 SCC 719 – See Paragraph 8 in particular

disputes include arbitration about the Agreement, which could only presuppose that the parties intended to have arbitration about the Agreement. If anything, it would indicate that arbitration about the Agreement would have to be in Kolhapur. In any case, it would be open to the Respondent to show from other contract-forming documentation, any negative features that would rule out arbitration when it argues its case under Section 16 of the Act.

10. The Respondent has cited a range of case law on the ingredients of an arbitration agreement including *KK Modi*⁵ and *Encon Builders*⁶ to make submissions on the essential features of an arbitration agreement. These include the need for the parties to contemplate a present or future dispute. That element is indicated in the reference to “*all kinds of disputes as well as Arbitration about this agreement*” in Clause 8 of the Agreement. The need to discern an intention to settle such difference by a private tribunal is an element discernible and justifiable on the basis of the reasons already set out above. That the parties must be *ad idem* and must agree to be bound by it is a facet that only a dispute resolution forum such as this Court and the Arbitral Tribunal can decide when the parties are at loggerheads about what they had agreed on. The substance of the inference being drawn at this stage

⁵ *K.K. Modi vs. K.N. Modi & Ors* – (1998) 3 SCC 573

⁶ *Bihar State Mineral Development Corporation and Anr. Vs. Encon Builders (I) Pvt. Ltd.* – (2003) 7 SCC 418

is that the formally executed Agreement does indicate that disputes between the parties would include arbitration about the Agreement and that it would be held in Kolhapur. As stated above, the Respondent would be at liberty to agitate the issue of jurisdiction under Section 16 of the Act before the Arbitral Tribunal.

11. In these circumstances, to avoid prolixity, I do not intend to deal with every single case law cited in the note on submissions filed by the Respondent on what constitutes an arbitration agreement. Suffice it to say, the note tendered refers to the case law to underline general principles of arbitration law that one cannot have any quarrel with. The issue involved in the matter at hand is to indicate what is a discernible and reasonable inference to be drawn from the Agreement, bearing in mind the scope of jurisdiction under Section 11 of the Act.

12. Therefore, in my opinion, the Petition deserves to be *finally disposed of* in terms of the following order:

A] Mr. Santosh Shah, is hereby appointed as the Sole Arbitrator to adjudicate upon the disputes and differences between the parties arising out of and in connection with the Agreement referred to above;

Email ID: advdrshah@gmail.com

B] A copy of this Order will be communicated to the Learned Sole Arbitrator by the Advocates for the Petitioner within a period of one week from the date on which this order is uploaded on the website of this Court. The Petitioner shall provide the contact and communication particulars of the parties to the Arbitral Tribunal along with a copy of this Order;

C] The Learned Sole Arbitrator is requested to forward the statutory Statement of Disclosure under Section 11(8) read with Section 12(1) of the Act to the parties within a period of two weeks from receipt of a copy of this Order;

D] The parties shall appear before the Learned Sole Arbitrator on such date and at such place as indicated, to obtain appropriate directions with regard to conduct of the arbitration including fixing a schedule for pleadings, examination of witnesses, if any, schedule of hearings etc. At such meeting, the parties shall provide a valid and functional email address along with mobile and landline numbers of the respective Advocates of the parties to the Arbitral Tribunal. Communications to such

email addresses shall constitute valid service of correspondence in connection with the arbitration;

E] All arbitral costs and fees of the Arbitral Tribunal shall be borne by the parties equally in the first instance, and shall be subject to any final Award that may be passed by the Tribunal in relation to costs.

13. Needless to say, nothing contained in this order is an expression of an opinion on merits of the matter or the relative strength of the parties. All issues on merits are expressly kept open to be agitated before the arbitral tribunal appointed hereby.

14. All actions required to be taken pursuant to this order shall be taken upon receipt of a downloaded copy as available on this Court's website.

[SOMASEKHAR SUNDARESAN, J.]