

Pdp

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
COMMERCIAL ARBITRATION APPEAL NO. 16 OF 2024
WITH
INTERIM APPLICATION NO. 10855 OF 2024**

**M/s. T. R. Trehan Construction
Pvt. Ltd. & Ors. .. Appellants**

Versus

**M/s. Shreekaviraj Infratech
Pvt. Ltd. .. Respondent**

Digitally
signed by
PRAVIN
DASHARATH
PANDIT
Date:
2025.04.01
23:10:34
+0530

**COMMERCIAL ARBITRATION APPEAL NO. 17 OF 2024
WITH
INTERIM APPLICATION NO. 10895 OF 2024**

**M/s. T. R. Trehan Construction
Pvt. Ltd. & Ors. .. Appellants**

Versus

M/s. Vishwashakti Construction .. Respondent

Mr. Ramprakash Pandey a/w Udaybhan Tiwari for appellants in both the appeals.

Mr. V. K. Gupta for respondent in both the appeals.

**CORAM: ALOK ARADHE, CJ. &
M. S. KARNIK, J.**

DATE: 1st APRIL, 2025

P.C.:

1. Admit. With the consent of the learned counsel for the parties, appeals are heard finally.

2. These appeals under Section 37 of the Arbitration and Conciliation Act, 1996 (the Act of 1996) have been filed against the orders dated 7th May, 2022 by which Notices of

Motion filed by the appellants to refer the parties to arbitration have been rejected on the ground that Clause 16 of the Sub-Contract Agreement dated 19th March, 2016 is not an arbitration clause.

3. Facts giving rise to filing of these appeals briefly stated are that on 6th June, 2015 a work order was awarded to the appellants by the Municipal Corporation of Greater Mumbai for building repairs, petty road repair works, petty storm water drain works in Western Suburbs and Eastern Suburbs of Mumbai. The appellants and respondent on 19th March, 2016 entered into a Sub-Contract Agreement whereby the respondent was allotted the work under the work order. The appellants on 1st December, 2018 issued cheques for Rs.81,25,000 and Rs.44,85,000/- respectively to the respondent. However the same were dishonoured. Thereupon the respondent filed Summary Suits, namely, Commercial Summary Suit Nos.44 of 2022 and 45 of 2022 in City Civil Court at Mazgaon, Mumbai seeking recovery of an amount of Rs.99,99,999/- and Rs.60,09,900/- respectively along with interest.

4. In the aforesaid Civil Suits, the appellants filed Notices of Motion in which a prayer was made to the Court to refer the parties to arbitration in view of Clause 16 of the Sub-Contract Agreement dated 19th March, 2016. The respondent opposed the aforesaid prayer.

5. The trial court by two separate orders dated 7th May, 2022 rejected the Notices of Motion on the ground that Clause 16 of the Sub-Contract Agreement is not a valid arbitration clause. Hence, these appeals.

6. Learned counsel for the appellants submitted that the learned trial court ought to have appreciated that the Clause 16 of the Sub-Contract Agreement dated 19th March, 2016 is a valid arbitration agreement as the same fulfills the requirements under Section 8 of the Act of 1996.

7. On the other hand, learned counsel for the respondent has supported the orders passed by the learned trial court.

8. The principles as to what constitutes an arbitration agreement has been dealt with by the Supreme Court in **Jagdish Chander vs. Ramesh Chander, (2007) 5 SCC 719**. Paragraph 8 of the said decision reads as under: -

“8. This Court had occasion to refer to the attributes or essential elements of an arbitration agreement in *K.K. Modi v. K.N. Modi* [(1998) 3 SCC 573] , *Bharat Bhushan Bansal v. U.P. Small Industries Corpn. Ltd.* [(1999) 2 SCC 166] and *Bihar State Mineral Development Corpn. v. Encon Builders (I) (P) Ltd.* [(2003) 7 SCC 418] In *State of Orissa v. Damodar Das* [(1996) 2 SCC 216] 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) 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 a 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 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.”

9. In the backdrop of aforesaid well settled legal principles, we now advert to Clause 16 of the Sub-Contract Agreement dated 19th March, 2016, which is extracted below for the facility of reference:

“ The disputes arising out of the contract either during the execution of the work or on completion which could not be amicably solved by the Engineer shall be

referred to the director of main Contractor for his decision which will be binding on both the parties. The Contract shall be subject to the loss of Government of India and any dispute under the Contract shall be subject to the jurisdiction of the courts in Mumbai.”

10. Thus, it is evident that Clause 16 mandates that the disputes arising out of the contract either during the execution of the work or on completion which could not be amicably solved by the Engineer shall be referred to the director of main Contractor for his decision which shall be binding on the parties. The aforesaid clause constitutes a valid arbitration clause. In view of the mandate contained in Section 8 of the Act of 1996, in case of an arbitration agreement, the parties are required to be referred to arbitration. The impugned orders passed by the trial court cannot be sustained in the eye of law. Therefore, the same are quashed and set aside. The parties are referred to the arbitration under Clause 16 of the Sub-Contract Agreement.

11. Accordingly, the appeals are allowed.

12. Pending interim applications, if any, stand disposed of.

(M. S. KARNIK, J.)

(CHIEF JUSTICE)