
IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
COMMERCIAL ARBITRATION PETITION NO. 45 OF 2024

Garware Technical Fibres Ltd. ...Petitioner

Versus

M/s. Bigzen Developers Pvt. Ltd. ...Respondent

Mr. Malcolm Siganporia, a/w Malcolm Desai & Purvi Shrivastava, i/b J. Sagar Associates, for the Petitioner.

Mr. Mayank Arora, a/w Abhinav Agarwal, i/b Aditya Manjrekar, for Respondent.

CORAM : SOMASEKHAR SUNDARESAN, J.

DATE: MARCH 17, 2025

PC :

1. This Petition has been filed under Section 11 of the Arbitration and Conciliation Act, 1996 (***“the Act”***), seeking appointment of an arbitrator in connection with disputes and differences that are said to have arisen between the parties pursuant to the Letter of Intent dated December 8, 2023 (***“Agreement”***), which is annexed to the Petition. The arbitration agreement is contained in Clause 28 (found at Page 44 of the Petition). In the interest of brevity, the arbitration agreement is not being extracted here. Suffice it to say that this matter falls within the jurisdiction of this Court.

2. It is apparent from the record that the invocation of arbitration has been effected by the Petitioner by a notice dated

September 20, 2024, which is a part of the record. Reply to the said invocation is in the form of two holding letters which also form part of the record.

3. Learned Counsel for the Petitioner submits that Clause 9 of Agreement provides for a performance guarantee to be given by the Respondent, which has been provided and the same is also annexed to the Petition. Learned Counsel for the Petitioner draws my attention to a letter dated August 22, 2024 from the Respondent explicitly recording that the Respondent has entered into the Agreement. This letter, at sub-paragraph (b) on the first page, and paragraph 5 of the third page, explicitly records that the agreement had been executed by the Respondent. Therefore, Learned Counsel for the Petitioner submits that the absence of a signature in the copy of Agreement attached by the Petitioner to the Application should not hold any significance since it is evident that the parties had reached an agreement, which has an arbitration clause.

4. The Respondent has filed two affidavits seeking to resist the Petition. The affidavits essentially assert that the arbitration agreement does not exist. The basis of making such submission is that the LOI actually has not been signed, and the copy annexed to the Petition does not bear the signature of the Respondent to show that it has been executed.

5. In my opinion, the provision of the performance guarantee and the letter dated August 22, 2024, where the Respondent has twice stated that the LOI was executed and was entered into by the Respondent are corroborative of the Agreement having been executed

by the Respondent. Be that as it may, this should evidently be a question that falls in the domain of the arbitral tribunal. It is now trite law that existence of an agreement is what needs to be examined by the Section 11 Court, and I am satisfied that the formal existence of the Agreement is evident. Existential questions, if any, as raised, would need to be agitated before the Arbitral Tribunal.

6. There are other objections raised by the Respondent, which, in my opinion, undermines the approach of the Respondent in challenging the existence of the Agreement (which is the limited scope of my jurisdiction as a Section 11 Court). The Affidavits in Reply filed by the Respondent raise issues such as a Caveat filed by the Petitioner in the Gurugram Civil Court, not stating that it was an “LOI” that was signed (the caveat refers to the same instrument as an “agreement”). According to the Learned Counsel for the Respondent the Caveat ought to have claimed that the LOI containing the arbitration agreement clause has been signed – that not having been said it would point to the Petitioner not acknowledging that there is an arbitration agreement in existence.

7. Learned Counsel for the Respondent also takes me through other parts of the reply, specifically, an email dated January 1, 2024, which states that the LOI would be amended. Even these arguments do not carry the case of the Respondent any higher, since evidently an LOI executed in December 2023 was eminently capable of being amenable to amendment in January 2024. Yet another objection is that there is a fraud on the public played by the Petitioner, and even a Writ Petition to is pending in this regard. The moment fraud is pleaded, Learned Counsel submits, the Section 11 Court should refrain from referring the

parties to arbitration, because fraud is not arbitrable.

8. These are not contentions that are amenable to the Section 11 jurisdiction. They are not worthy of consideration in for purposes of rejecting the Section 11 Application. Whether fraud is arbitrable or not is in itself a mixed question of fact and law to be determined in each case, and that determination is to be made by the Arbitral Tribunal and not the Section 11 Court.

9. The existence of proceedings in the Civil Court, in which Applications have been taken out under Section 8 of the Act is also pressed into service to assail the present Petition. This contention is not meritorious since it is now very clear that existence of an arbitration agreement is the only matter to which the jurisdiction of this Court is confined. All other questions including existential questions of arbitrability are in the domain of the arbitral tribunal. The Respondent would be at liberty to take out Applications under Section 16 of the Act, if so advised. No useful purpose would be served keeping this proceeding any further.

10. The scope of review under Section 11 is explicitly set out in Section 11(6A) of the Act. It is now trite law, with particular regard 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.

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*

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.

11. Being satisfied that an arbitration agreement is validly in existence, and that arbitration has been duly invoked, it is in the fitness of things to refer the disputes and differences between the parties in connection with the aforesaid agreement to arbitration by a Sole Arbitrator. The arbitration agreement entailed the parties attempting to appoint a sole arbitrator, and if they disagree, for arbitration by a three-member arbitral tribunal. Since the Respondent rejects the very notion of the existence of an arbitration agreement, arguably the second stage would not arise. It is therefore appropriate to appoint a sole arbitrator in terms of this Order.

12. Consequently, this Petition is *finally disposed of* in the following terms:

- a) Mr. Jimmy Awasia, a learned advocate of this Court 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;

Office Address:-

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Keval Mahal, Marine Drive,

Mumbai – 400 020

Email ID: jimmy.avasia@gmail.com

avasiachambers@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. Considering the bulky nature of the pleadings and the copious time involved in dealing with the narrow question of jurisdiction of this Court under Section 11, I am inclined to consider the imposition of costs since the Court is required to have regard to costs in the case of commercial disputes. However, on reflection, I leave this to the Arbitral Tribunal to consider. The parties shall be entitled to present to the Arbitral Tribunal, their case for being awarded costs, including the costs incurred in the proceedings under Section 11 of the Act.

15. 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.]