IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION

ARBITRATION APPLICATION NO. 4 OF 2022

Derivados Consulting Pvt.Ltd. …Applicant

vs.

Pramara Promotions Pvt.Ltd. ...Respondent

Ms. Aneesa Cheema i/b. DSK Legal for Applicant.
Mr. Yash Kataria i/b. Divekar & Co. for Respondent.

CORAM : G. S. KULKARNI, J.

DATED : 8 JUNE 2022

ORDER:

1. An interesting issue on the existence of an arbitration agreement arises in this application filed under Section 11 of the Arbitration and Conciliation Act, 1996 (for short, '**the Act**'). By this application the Applicant has prayed for appointment of an arbitral tribunal to adjudicate the disputes and differences which have arisen between the parties under the engagement letter/mandate dated 7 November 2019 issued by the Respondent in favour of the Applicant.

2. **Applicant's case**:- The Applicant is *inter alia* engaged in the business of financial advisory services, including providing debt-syndication services, enabling companies to raise funds from banks and financial institutions. The Respondent approached the Applicant for availing its services. Accordingly, on 7 November 2019, a mandate was executed between the parties under which the Respondent appointed the Applicant and the Applicant agreed to be appointed as the Respondent's executive financial adviser for securing financial facilities for a period of twelve months.

3. On 28 January 2020, ICICI Bank sanctioned a working capital facility of Rs.23.24 crores to the Respondent which is stated to be a consequence of the Applicant providing its services to the Respondent. On March 3, 2020, the Applicant issued an invoice on the Respondent calling upon the Respondent to pay an amount of Rs.22,56,750/- towards the professional services rendered by it in terms of the engagement letter/mandate. The Respondent, however, by its letter dated 9 March 2020, denied its liability towards the outstanding dues, as also raised certain disputes refusing to discharge the said liability towards the applicant. Such issues generated correspondence between the parties, ultimately, the Applicant through its Advocates' notice dated 28 October 2020, as addressed to the Respondent invoked the arbitration agreement as contained in the mandate/engagement letter, calling upon the Respondent to appoint an arbitral tribunal to adjudicate disputes and differences which had arisen between the parties on such non payment of the applicant's dues. In the invocation letter, the Applicant also suggested the names of the proposed arbitrators who could be appointed. The invocation letter was replied by respondents advocate's letter dated 17 November 2020 denying the respondent's liability, as also denying the disputes which the applicant had stated to have arisen between the parties, so as to be referred to arbitration. The Respondent also recorded that a reference to arbitration was optional to the parties which according to the respondent was clear from a reading of the alleged arbitration agreement.

4. As the Respondent did not agree for the reference of the disputes to arbitration, the present application was filed invoking the Court's jurisdiction under Section 11(6) of the Act praying for appointment of an arbitral tribunal.

5. The Respondent has appeared. A reply affidavit is also placed on record categorically contending in para 2 that there does not exist any arbitration agreement between the parties, more so, within the meaning of Section 7 of the Act. It is contended that the alleged arbitration agreement is a clause which merely gives an option to the parties to take a decision whether to agree to enter into an arbitration agreement and refer the disputes to arbitration. It is, thus, contended that the clause in question as relied by the applicant is merely an agreement to enter into an arbitration agreement, hence, such clause cannot be treated as a binding arbitration agreement, as required under the Act.

Submissions:

6. Learned Counsel for the Applicant, referring to Clause 12 of the mandate/engagement letter, has strenuously contended that there is an arbitration agreement between the parties. It is submitted that such clause needs to be interpreted to mean that there exists an arbitration agreement between the parties. She submits that although the clause uses the word "may" and is succeeded by the words "*but is not required to submit the dispute to binding arbitration in accordance with the Arbitration and Conciliation Act, 1996*", it would nonetheless mean that once an option to take the disputes to arbitration is exercised by one party, the disputes are necessarily required to be referred to arbitration. She would also submit that there is a lawful invocation. She would next submit that the Respondent, in the reply to the invocation, has incorrectly contended that the clause in question, which according to the applicant is an arbitration clause, is an option to either party to refer disputes to arbitration and there is no binding arbitration agreement between the parties.

7. On the other hand, learned Counsel for the Respondent contesting

the contentions as urged by the applicant would submit that Clause 12 in no manner is an arbitration agreement. It is his submissions that when the clause uses the word 'may' which is further succeeded by the words "*but is not required to submit the dispute to binding arbitration in accordance with the Arbitration and Conciliation Act, 1996*" (supra), it is clear that the clause only enables one of the parties to request the other party to agree to enter into an arbitration agreement. It is his submission that such clause is hence an agreement to enter to an agreement so that the parties can bring about an arbitration agreement. He refers to the reply affidavit in support of his contentions. Learned Counsel in supporting his submissions has placed reliance on a decision of the learned Single Judge of Delhi High Court in **Ashwani Kumar vs. Scraft Products Pvt.Ltd.**[1] to contend that in a similar clause when there was no clear intention of the parties to refer the disputes to arbitration the court had held that there was no arbitration agreement between the parties.

Reasons:-

8. The crucial question which arises for consideration is as to whether Clause 12 as contained in the mandate/engagement letter dated 7 November 2019 can be considered to be an arbitration agreement between the parties. Clause 12 reads thus :

> "12. **Entire Agreement**
>
> This Engagement Letter sets out the entire agreement in its entirely and outstanding between the Company and DCPL in connection with the Transaction.
>
> This agreement shall be governed by and interpreted, constructed and enforced in accordance with the laws of India.
>
> **Any dispute, controversy, or claim relating to this Agreement, either Party may, but is not required to submit the Dispute to binding arbitration in**

1 **ARB. P. 488/2020 decided on 26.7.2021**

accordance with the Arbitration and Conciliation Act, 1996. The Parties Submit to the exclusive jurisdiction of the Courts in Mumbai, India."

9. The Court being called upon to exercise jurisdiction under Section 11 of the Act, it would be incumbent and necessary for the Court, to examine whether any arbitration agreement at all exists between the parties. This more particularly as sub-section (1) of Section 7 of the Act defines an arbitration agreement to mean "*an agreement by the parties to submit to arbitration*" which would ordain such agreement between the parties which would mandate adjudication of dispute in arbitration by appointing an arbitral tribunal. The scope of the jurisdiction of this Court under Section 11(6) read with Section 11(A) is to confine itself to examine the existence of an arbitration agreement which is to be understood in a narrow sense (**See Mayavati Trading Pvt. Ltd. vs. Pradyuat Deb Burman**[2]).

10. Further from a plain reading of sub-section (1) of Section 7 of the Act, there appears to be no scope to hold that when the parties to an arbitration agreement provide that they "*may*" refer the disputes to arbitration, the word "may" takes away a conclusive and a mandatory affirmation between the parties, to be certain, to refer the disputes to arbitration.

11. From the above perspective Clause 12 needs to be considered. It can be stated that such clause is quite novel and is peculiarly worded. However, as noted above, the concern of the Court would be to examine whether there is a clear, unfettered and an absolute intention of the parties as discerned from such clause to refer the disputes to arbitration. Thus, the first endeavour of the Court would be to discover the intention of the parties as revealed from a plain reading of Clause 12 as it stands. A bare reading of

2 (2019) 8 SCC 714

the clause 12 would indicate that the parties having agreed that if any dispute, controversy or claim relating to the agreement arises, either party, '**may**' and by further providing that "**but is not required to submit** the dispute to binding arbitration in accordance with the Arbitration and Conciliation Act, 1996" is discernible of the fact that the parties have not agreed to have an arbitration agreement. The reason being that the very use of the word "may" by the parties, does not bring about any arbitration agreement between the parties, when tested on the touchstone of what sub-section (1) of Section 7 provides, namely an "agreement by the parties" to submit to arbitration. The use of the word "may" cannot be without reason and needs to be given its due meaning, which is the intention of the parties, and more particularly in the light of the above noted succeeding words, the parties have incorporated, in the said clause.

12. It cannot be that the Court would not attribute any meaning to the specific words as contained in such clause as agreed between the parties. Once the parties have agreed to use the word 'may', it is clear that they agree to a future possibility, which would encompass a choice or a discretion available to a party to enter into an agreement. Certainly, the use of the word 'may' in such context cannot be construed to be mandatory for a party that it would be bound to submit or agree to refer the disputes to arbitration. Further the words succeeding the word 'may' completely highlight nay underscore such intention of the parties that there is no binding arbitration agreement, when the words used are categorical to say "***but is not required*** *to submit the Dispute to binding arbitration*".

13. The above discussion leads me to come to an inescapable conclusion and in the present case, the intention of the parties, is crystal clear not to bring about any binding arbitration agreement. The parties have left it to

their respective choice and discretion to call upon the other party, to take a decision whether to refer the disputes for arbitration. Thus, the obvious consequence would be once such choice is exercised by one party, the other party to the arbitration agreement needs to approve of such choice and/or not to agree to such request, to refer the disputes to arbitration. Thus to my mind, clause 12 is nothing but an enabling clause, which enables the parties to enter into a further agreement, namely, an arbitration agreement. It is hence a clause which does not create any binding arbitration agreement between the parties. It may also be observed that any agreement between the parties to refer disputes to arbitration needs to clearly satisfy the mandate of Section 7 of the Act. Such arbitration agreement/clause needs to be unambiguous reflecting a clear intention of the parties to refer the disputes to arbitration. The clause in question certainly does not qualify any of these basic requirements.

14. Reliance as placed on behalf of the Respondent on the decision of a learned Single Judge of the Delhi High Court in **Ashwani Kumar vs. Scraft Products Pvt.Ltd.** (supra) is well founded. In the said case, learned Single Judge had the occasion to consider a clause in the agreement and to interpret the same so as to hold that there was no arbitration agreement between the parties. The Court considering the use of the “may” in the clause has observed that such clause did not exhibit the parties intention to refer the disputes to arbitration.

15. As a sequel to the above discussion, as there is no arbitration agreement between the parties, this Court cannot exercise jurisdiction under Section 11(6) of the Act. The application accordingly stands rejected. No costs.

(G.S. KULKARNI, J.)