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

COMM. ARBITRATION APPLICATION NO. 166 OF 2022

Kalpataru Projects International Ltd. having its registered office at 101, Part-III, G.I.D.C. Estate, Sector 28, Gandhinagar 382 028, Gujarat, India and its corporate office at 7th floor, Kalpataru Synergy, Opp: Grant Hyatt, Santacruz (E), Mumbai 400 055. .. Applicant.

v/s.

1 Municipal Corporation of Greater Mumbai, Municipal Head Office, Annex Building, Mahapalika Marg No.1, Fort, Mumbai 400 001.

2 Director (E.S & P.), Municipal Head Office, Annex Building, Mahapalika Marg No.1, Fort, Mumbai 400 001.

Mr. Naresh Thacker with Ms. Tvisha Desai i/b. Economic Laws Practice, for the Applicant.
Mr. P. G. Lad with Ms. Aparna Kalathi and Ms. Sheetal Metkari i/b. Adv. Sunil Sonawane, for the Respondent-BMC.

CORAM :FIRDOSH P. POONIWALLA, J.J.
RESERVED ON : 12th DECEMBER, 2023.
PRONOUNCED ON : 10th JANUARY, 2024.

JUDGEMENT:-

This Application has been filed under the provisions of Section 11 of the Arbitration and Conciliation Act, 1996 ("the said Act").

2 Respondent No.1 issued an E-Tender Notice dated 25th January, 2016, inviting bids for the construction of the Ghatkopar- Mankhurd Link Road Flyover ("GMLR flyover") for the tender amount of Rs.313,85,05,635.80/-. The scope of work as described in the Tender Documents included the construction of (a) the GMLR flyover (b) three

foot over bridges at Indian Oil Nagar, Rising City and Baiganwadi junction respectively and (c) a vehicular underpass at Mohite Patil Nagar Junction.

3 The Applicant submitted its bid in response to the said Tender, which was accepted by Respondent No.1 vide Resolution No. 1275 dated 21st December, 2016 passed by Respondent No.1's Standing Committee. Respondent No.1 awarded the contract to the Applicant by a Letter of Acceptance dated 26th December, 2016.

4 Respondent No.1, thereafter, issued a Work Order No.7803 dated 28th December, 2016. Since the Tender Documents prescribed a time period of 30 months for the completion of the works, the project was slated to be completed by 3rd July, 2019.

5 Although the Applicant commenced work immediately post the issuance of the work order, the parties formally signed the Contract only on 14th May, 2018.

6 It is the case of the Applicant that the planned progress of work was disrupted by various delay events caused by the Respondents or unforeseen circumstances, and additional works instructed by the Respondents which constituted a change in the scope of work envisaged under the Tender Documents. The Applicant was, therefore, constrained to seek extensions of time of the contract period, which were granted on various occasions.

7 The project was substantially completed on 25th July, 2021 and inaugurated on 1st August, 2021. It is, however, the case of the Applicant that Respondent No.1, thereafter, instructed the Applicant to carry out additional variation works and extended the contract period to 30th September, 2021 to complete the said additional variation works. The understanding between the parties with respect to the additional variation works carried out post inauguration of the project and the consequent

extension of time granted is recorded in Respondent No.1's letter dated 8th April, 2022.

8 It is the case of the Applicant that it duly completed all the balance work and variation works by 30th September, 2021 and a Certificate of Completion was issued by the Respondents.

9 During the course of the works, and post the completion of the project, the Applicant raised various claims in accordance with the Contract.

10 In this regard, in September 2021, the Applicant addressed various letters to the Respondents. The Chief Engineer of Respondent No.1 rejected / declined to award certain claims of the Applicant. It is the case of the Applicant that the Chief Engineer's decisions were unsubstantiated by the Contract and in law. It is the case of the Applicant that, therefore, disputes pertaining to the Contract arose and the Applicant initiated the pre-arbitral steps as provided in Clause 96 of the General Conditions of Contract ("GCC") to ensure strict compliance with the provisions of the Contract.

11 The Applicant addressed a letter dated 24th September, 2021 to the Additional Municipal Commissioner, placing on record all its objections to the Chief Engineer's decisions in respect of the claims and reiterating its entitlement thereto. The Applicant, further, notified the Additional Municipal Commissioner to proceed with the constitution of a committee comprising of three officers of Respondent No.1 as envisaged in the first paragraph of Clause 96 of the GCC to settle the disputes.

12 The Committee was appointed on 12th October, 2021 and the appointment was communicated to the Applicant by way of an Office Order of even date. The first meeting was held before the Committee on 10th December, 2021. Subsequent to the first meeting, the Applicant submitted

additional clarifications with respect to its claims before the Committee by its letter dated 13th December, 2021.

13 The second meeting before the Committee was held on 17th December, 2021 with the Applicant submitting additional clarifications post the meeting by way of its letter dated 23rd December, 2021. It is the case of the Applicant that it reiterated its desire to have the matter amicably settled before the Committee.

14 Further, the Applicant submitted some more claims before the Committee by its letter dated 25th January, 2022.

15 It is the case of the Applicant that the pre-arbitral procedure, wherein both the parties participated, did not result in a favourable outcome for the Applicant as conveyed by the Committee by its letter dated 26th April, 2022.

16 It is the case of the Applicant that, aggrieved by the failure of the pre-arbitral steps to amicably settle the disputes, the Applicant was constrained to issue a Notice dated 7th May, 2022, under Clause 96 of the GCC invoking Arbitration. Since the Applicant did not receive any response from the Respondents to the said Notice, the Applicant was constrained to file the present Arbitration Application.

17 Mr. Thacker, the learned Counsel appearing on behalf of the Applicant in support of the Application, referred to clause 96 of the GCC, which was modified by a Circular dated 29th May, 2002, and which reads as under:-

Condition No.		Existing	Modified
96	Finality of Decision and non arbitrability	If any dispute, difference or claim is raised by the contract, relating to any matter arising under the contract, the Contractor may	If any dispute, difference or claim is raised by either party relating to any matter arising out of the contract, the aggrieved party within a period of 7 days to the concerned Addl.

		refer such matter of the Engineer or his Superior other than Municipal Commissioner or Additional Municipal Commissioner who on examining the dispute, difference or claim, shall give decision in writing. Such decision will be final and binding upon all parties. This decision will not be arbitratable at 11.	Municipal Commissioner who shall constitute a committee comprising of three officers i.e. concerned D.M.C. or Director (E.S. & P.) Chief Engineer other than the Engineer of the Contract and concerned Chief Accountant. The Committee shall give its decision in writing within 60 days. Appeal from the order of the Committee may be referred to Municipal Commissioner within seven days. Thereafter the Municipal Commissioner shall constitute the Committee comprising of 3 Addl. Municipal Commissioners in charge of Finance Department. The decision given by this Committee shall be final and binding upon the parties.

18 Mr. Thacker submitted that clause 96 of the GCC constituted the Arbitration Agreement between the parties. Mr. Thacker referred to paragraph 13 of the judgement of the Hon'ble Supreme Court in the case of ***Bihar State Mineral Development Corporation and Another v/s. Encon Builders (I)(P) Ltd.,*** [1] which lays down the essential elements of an Arbitration Agreement.

19 Mr. Thacker submitted that Clause 96 of the GCC satisfied all the requirements of essential elements of an Arbitration Agreement, as set out by the said judgement.

20 Mr. Thacker also referred to a judgement of a Single Judge of this Court in the case of ***Tatva Global Environment (Deonar) Ltd., v/s. The Municipal Corporation of Greater Mumbai*** [2] and submitted that, in that case, a clause, which was nearly identical to modified clause 96 of the GCC, was held to be an Arbitration Agreement by this Court. Mr. Thacker submitted that this clearly shows that Clause 96 of the GCC contained the Arbitration Agreement between the parties.

1 (2003) 7 SCC 418
2 (2015) SCC Online Bom.4144

21 Mr. Thacker further submitted that clause 96 of the GCC, prior to modification, stated that the decision of the Commissioner was not arbitrable at all. However, modified Clause 96 of the GCC deleted the same, thereby intending that the decision of the Committee is subject to Arbitration.

22 Mr. Thacker also submitted that, although the title of the modified Clause 96 of the GCC continued to read as "*Finality of decision and non-arbitrability*", Clause 2 of the GCC provided that headings and marginal notes to the GCC shall not be deemed to form a part thereof or be taken into consideration in the interpretation or construction thereof or of the contract. He submitted that, therefore, the omission to amend the heading of Clause 96 of the GCC would not make any difference to the interpretation of the modified Clause 96 as placed by the Applicant.

23 Mr. Thacker also submitted that the modified Clause 96 stated that the decision of the Committee shall be final and binding upon the parties. He submitted that this also clearly showed that the modified Clause 96 of the GCC constituted an Arbitration Agreement between the parties.

24 On the other hand, Mr. Lad, the learned Counsel appearing on behalf of the Respondents, vehemently submitted that modified Clause 96 of the GCC was not an arbitration clause. He submitted that, by the said clause, the parties have not intended to go to the arbitration and, therefore, on this ground, the Application deserves to be dismissed.

25 In support of his submission, Mr. Lad relied upon the judgements of the Hon'ble Supreme Court in ***P. Dasaratharama Reddy Complex v/s. Government of Karnataka and Another***[3] and ***Food Corporation of India v/s. National Collateral Management Services Ltd.***,[4].

3 (2014) 2 SCC 201
4 (2020) 19 SCC 464

Findings:-

26 Paragraph 13 of the judgement of the Hon'ble Supreme Court in the case of ***Bihar State Mineral Development Corpn. (supra)*** reads as under:-

> *"13:- The essential elements of an arbitration agreement are as follows:-*
> *(1) There must be a present or a future difference in connection with some contemplated affair.*
> *(2) There must be the intention of the parties to settle such difference by a private tribunal.*
> *(3) The parties must agree in writing to be bound by the decision of such tribunal.*
> *(4) The parties must ad idem."*

27 In the said judgement, the Hon'ble Supreme Court has laid down the essential elements of an Arbitration Agreement. One of the essential elements is that the parties should have intended to have their disputes settled by arbitration.

28 Whether the parties intended to have their disputes settled by arbitration is naturally to be gathered from the terms of the written agreement between the parties.

29 The Applicant has relied upon the modified Clause 96 of the GCC. The question is whether the modified Clause 96 of the GCC contains an Arbitration Agreement between the parties. In my view, it is not possible to accept the said submission of the Applicant for various reasons. The modified Clause 96 of the GCC does not make any reference to arbitration or appointment of an arbitrator. If the parties intended to go to arbitration, that is the least it should have done. This is especially so as Clause 96 of the GCC, prior to modification, clearly stated that the decision shall not be arbitrable at all. This clearly shows that it was not the intention of the parties to have their disputes resolved by arbitration.

30 On the contrary, a different intention is manifested by Clause 96 which bears the title *" Finality of Decision and non-arbitrablity."* Although, Mr. Thacker is right in submitting that, as per clause 2 of the GCC, the heading and marginal notes have not to be taken into consideration for construction of the contract, the fact that, even when Clause 96 of the GCC was modified, the said title was not changed, shows that the parties did not intend Clause 96 to constitute an arbitration agreement.

31 Mr. Thacker has relied upon the judgement of the learned Single Judge of this Court in ***Tatva Global Environment (supra)*** and submitted that, in this judgement, a clause very similar to Clause 96 of the GCC has been interpreted as constituting an Arbitration Agreement.

32 Paragraphs 3 and 15 of the said judgement are relevant and read as under:-

> *"3. Clauses 21 and 23 of the Agreement which are relevant for the purposes of deciding the present Application are reproduced hereunder:*
> *"21. DISPUTE RESOLUTION*
>
> *If any dispute, difference or claim arises by either party to any matter arising out of this agreement, the agreed party may refer such dispute within a period of 7 days to the concerned Additional Municipal Commissioner, who shall constitute a committee comprising of three officers i.e. concerned D.M.C or Dir. (E.S. & P.) Chief Engineer other than the Engineer of Contract and Concerned Chief Accountant. The Committee shall give its decision within 60 days.*
>
> *Appeal from the order of the Committee may be referred to Municipal Commissioner within 7 days. Thereafter, the Municipal Commissioner shall constitute the Committee comprising of three Additional Municipal Commissioners including Additional Municipal Commissioner Incharge of Finance Department. The decision given by this committee shall be final and binding upon the parties.*
>
> *23. JURISDICTION*

Subject to clause 21, only the Courts in Mumbai shall have jurisdiction to try all disputes and matters arising out of or under this agreement, after reference to Arbitration.

15. I have considered the submissions advanced on behalf of the Applicant as well as the Respondent. The main contention of the Respondent is that Clause 21 of the said Agreement does not amount to an arbitration clause/arbitration at all. Clause 21 of the Agreement only refers to an internal procedure for any dispute, difference or claim arising out of the Agreement. It does not contemplate referral of any such difference or claim etc. to any third party for adjudication. The contention raised for the first time before the Court that Clause 21 provides for reference of the dispute to a highly placed officer of the Respondent, who in turn is required to constitute a Committee of three experts, is nowhere mentioned in the Affidavit In Reply. The Hon'ble Supreme Court of India has in its judgment in the case of Bihar State Mineral Development Corporation v. Encon Builders (I) (P) Ltd. (supra) laid down the essential elements of an arbitration agreement. The Hon'ble Supreme Court has inter alia held that the essential elements of an arbitration agreement are that:

(i) there must be a present or a future difference in connection with some contemplated affair.

(ii) there must be an intention of the parties to settle such differences by a private tribunal.

(iii) the parties must agree in writing to be bound by the decision of such tribunal,

(iv) the parties must be ad idem.

In the case of Jagdish Chander v. Ramesh Chander (supra), it has been held that the intention of the parties to enter into an arbitration agreement must be gathered from the terms of the agreement and that it is not necessary that the words "arbitration" and "Arbitral Tribunal (or arbitrator)" are used in the agreement in order for it to constitute an arbitration agreement. In the facts of the present case, I am satisfied from a perusal of Clause 21 of the Agreement that it meets the test of an arbitration agreement as laid down in the aforesaid judgments of the Hon'ble Supreme Court and that the Parties intended that the disputes be decided and adjudicated upon by arbitration. The fact that Clause

21 provides that the decision given by the Committee "shall be final and binding upon the parties" establishes that Clause 21 has to be construed as an arbitration agreement and not a mere internal procedure. Even if there is an iota of doubt as to whether Clause 21 of the Agreement can be construed as an arbitration clause/agreement, the same is put to rest from a conjoint reading of Clauses 21 and 23 of the Agreement between the Parties which makes it clear that the Parties intended that their disputes be determined and adjudicated upon by arbitration. Clause 23, while making a reference to Clause 21 clearly "speaks of arbitration between the parties". Therefore the contention of the Respondent that Clause 21 of the said Agreement does not constitute an arbitration agreement and Clause 23 of the said Agreement lends no assistance in interpreting Clause 21, cannot be accepted and is hereby rejected."

33 In our view, the said judgement is clearly distinguishable on facts. In the said judgement, one of the reasons as to why this Court held that a clause, similar to the modified Clause 96 of the GCC, constituted an Arbitration Agreement, is because of the contract which was being considered by the Court. In that case, Clause 23, which referred to Clause 21 of the contract (which is similar to the modified Clause 96), specifically made a reference to arbitration. In the present case, there is no clause similar to Clause 23 in ***Tatva Global Environment (supra)*** which specifically refers to arbitration. Therefore, the facts in the present case are different from the facts in **Tatva Global Environment (supra).**

34 I find support for this view in another judgement of a Single Judge of this Court in ***Reliance Communications Ltd., v/s. Maharashtra State Road Development Corporation Ltd.,***[5]**.** Paragraphs 2, 9, 11 & 12 of the said judgement are relevant and read as under:-

"2. *Petitioner and respondent had entered into an agreement as evidenced by the letter of intent dated*

5 2018 SCC Online Bom 15287

4.4.2008. Clause 20 of the Letter of Intent reads as under:—

> *"20. Any dispute between the parties hereto shall be resolved by mutual discussion. The unresolved disputes, if any, shall be referred to the Vice Chairman and Managing Director of the MSRDC for a decision and his decision shall be final and binding on the parties hereto."*

9. *Mr. Khairwar relied upon a judgment of a single Judge of this court (S.J. Kathawala, J) in Tatva Global Environment (Deonar) Ltd. v. Municipal Corporation of Gr. Mumbai, to submit that clause 20 has to be construed as an Arbitration agreement. Mr. Khairwar submitted that even in the case of Tatva Global (supra) arbitration clause which was clause 21 therein referred only to an internal procedure for any dispute, difference or claim arising out of the agreement and it did not contemplate referal of such difference or claim to any 3rd party for adjudication but still court came to a conclusion that clause 21 was an arbitration agreement.*

11. *I have heard the counsel and also considered the application and affidavit in reply. There can be no dispute that even if the words arbitration, arbitral Tribunal or arbitrator is not used, so long as the clause had the elements or attributes of an arbitration agreement, it would constitute an arbitration agreement. Clause 20 in the agreement which is the subject matter of this application, only states that any dispute between the parties hereto shall be resolved by mutual discussion and unresolved dispute shall be referred to the Vice Chairman and Managing Director of MSRDC for decision and this decision shall be final and binding on the parties. In Tatva Global (supra) the clause was referring to internal procedure but the reason why the court came to a conclusion that there was an intention to refer the dispute to arbitration is because in Tatva Global (supra) there was another clause viz.clause 23 in which clause-21 in that agreement was referred to and that clause spoke of arbitration between the parties. Clause-23 in Tatva Global (supra) reads as under:—*

> *"23. JURISDICTION*

Subject to clause 21, only the courts in Mumbai shall have jurisdiction to try all disputes and matters arising out of or under this agreement, after reference to Arbitration."

(emphasis supplied)

12. *In the present case there is no clause similar to clause 23. Therefore, the facts in the present case are different from the facts in Tatwa Global (supra) and I cannot accept that clause 20 has the attributes or elements of an arbitration agreement. It only refers to an internal procedure for resolution of any dispute, difference or claim arising out of an agreement. Just because clause the clause states "decision shall be final and binding on the parties hereto "won't convert that into an arbitration agreement".*

35 It is also not possible to accept the submissions of the Applicant that, just because modified Clause 96 of the GCC states that the decision given by the Committee shall be final and binding upon the parties, the modified clause 96 constitutes the Arbitration Agreement between the parties. This contention has been negated by the Hon'ble ***Supreme Court in the case of*** Food Corporation of India (supra). Paragraphs 3 to 8 of the said judgement are relevant and read as under:-

3. *Similarly the applicable clause in the agreement dated 4-1-2008 reads thus:*

"Any dispute between the parties arising out of this agreement or pertaining to any matter which is subject-matter of this agency agreement shall be referred to the Chairman and Managing Director of FCI/principal for settlement and whose decision shall be final and binding on the both FCI/principal and agent."

4. *The High Court construed these clauses to mean that the parties had intended to resort to arbitration, in case of any disagreement or dispute regarding the claims arising from the aforesaid agreements. While so interpreting, the High Court [National Collateral Management Services Ltd. v. Food Corpn. of India, 2017 SCC OnLine Del 10362] placed reliance on Clause 37 of the third agreement dated 29-9-2008, which reads thus:*

"Any dispute between the parties arising out of this agreement or pertaining to any matter which is the subject-matter of this agreement other than an issue to which finality has been ascribed in the present agreement shall be referred for decision to the Chairman and Managing Director of FCI for settlement whose decision shall be final and binding on the FCI and the agent. It is clearly understood by the parties that the present clause is not an arbitration clause. In case, the dispute still subsists, then the civil court shall have jurisdiction to adjudicate the same."

5. *It is common ground that Clause 37 of the agreement dated 29-9-2008 (third agreement) is not the subject-matter of the present arbitration petition but the High Court relied upon the said clause to interpret the clauses contained in agreements dated 13-4-2007 and 4-1-2008, referred to above, as being an arbitration agreement.*

6. *After hearing the counsel for the parties, we have no manner of doubt that the abovereferred clauses in agreements dated 13-4-2007 and 4-1-2008 respectively, merely predicate that the dispute shall be referred to the Chairman and Managing Director of FCI/principal for "settlement" whose decision shall be final and binding on both FCI/principal and the agent. Such agreement cannot be construed as an arbitration agreement, keeping in mind the exposition of the three-Judge Bench decision of this Court in P. Dasaratharama Reddy Complex v. State of Karnataka [P. Dasaratharama Reddy Complex v. State of Karnataka, (2014) 2 SCC 201 : (2014) 1 SCC (Civ) 754] . In para 27 of the said decision, this Court observed thus : (SCC p. 221)*

> *"27. To the aforesaid proposition, we may add that in terms of Clause 29(a) and similar other clauses, any dispute or difference irrespective of its nomenclature in matters relating to specifications, designs, drawings, quality of workmanship or material used or any question relating to claim, right in any way arising out of or relating to the contract designs, drawings, etc. or failure on the contractor's part to execute the work, whether arising during the progress of the work or after its completion, termination or abandonment has to be first referred to the Chief Engineer or the Designated Officer of the Department. The Chief Engineer or the Designated Officer is not an independent authority or*

person, who has no connection or control over the work. As a matter of fact, he is having over all supervision and charge of the execution of the work. He is not required to hear the parties or to take evidence, oral or documentary. He is not invested with the power to adjudicate upon the rights of the parties to the dispute or difference and his decision is subject to the right of the aggrieved party to seek relief in a court of law. The decision of the Chief Engineer or the Designated Officer is treated as binding on the contractor subject to his right to avail remedy before an appropriate court. The use of the expression "in the first place" unmistakably shows that non-adjudicatory decision of the Chief Engineer is subject to the right of the aggrieved party to seek remedy. Therefore, Clause 29 which is the subject-matter of consideration in most of the appeals and similar clauses cannot be treated as an arbitration clause."

(emphasis supplied)

7. *In the present case, the High Court has adverted to other decisions [State of Punjab v. Dina Nath, (2007) 5 SCC 28] ' [Bharat Bhushan Bansal v. U.P. Small Industries Corpn. Ltd., (1999) 2 SCC 166] ' [Rukmanibai Gupta v. Collector, (1980) 4 SCC 556] ' [K.K. Modi v. K.N. Modi, (1998) 3 SCC 573] which are already considered by the three-Judge Bench of this Court, referred to above.*

8. *Reverting to the interpretation given by the High Court in reference to Clause 37 of agreement dated 29-9-2008, in our opinion, the same is tenuous. It cannot be sustained in law. For, a bare reading of the said clause clearly indicates that it is merely declaratory and clarificatory in nature, to restate the position that reference made to the Chairman and Managing Director of FCI/principal for settlement of disputes cannot be construed as an arbitration clause. That is evident from the text that it is clearly understood by the parties that the present clause is not an arbitration clause.*

36 From the said judgement, it is very clear that a clause in a contract does not show that the parties intended to have their

disputes resolved through Arbitration merely because a particular decision is made final and binding by that clause. For these reasons also, in my view, the modified Clause 96 of the GCC does not constitute an Arbitration Agreement between the parties.

37 For all reasons given above, I hold that the modified Clause 96 of the GCC does not constitute an Arbitration Agreement between the parties.

38 In these circumstances, the parties have not agreed to have their disputes resolved by arbitration and, therefore, the present Application, seeking the appointment of an Arbitrator, is liable to be dismissed.

39 In the aforesaid circumstances, and for all the aforesaid reasons, the present Arbitration Application is dismissed.

40 In the facts and circumstance of the present case, there shall be no order as to costs.

(FIRDOSH P. POONIWALLA, J.)