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IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION

ARBITRATION APPLICATION NO.168 OF 2022

Nagreeka Indcon Products Pvt. Ltd.] .. Applicant

vs.

Cargocare Logistics (India) Pvt. Ltd.] .. Respondent

Mr.Amit Singh a/w Shivani Deshmukh and Kabeer Pansare i/b Abhay Nevagi & Associates for the Applicant.

Mr.Dhruva Gandhi a/w Sneha Pandey i/b Motiwalla & Co. for the Respondent.

CORAM : BHARATI DANGRE, J

DATE : 23rd February, 2023

JUDGMENT :

1] The Applicant is seeking appointment of a Sole Arbitrator for resolving the disputes that have arisen with the Respondent, in terms of Clause 25 of the Multimodal Transport Bill of Lading dated 12.09.2020 read with Section 11(5) of the Arbitration and Conciliation Act, 1996.

2] I have heard the learned counsel Mr.Amit Singh alongwith Shivani Deshmukh i/b Abhay Nevagi & Associates for the Applicant and Mr.Dhruva Gandhi a/w Sneha Pandey i/b Motiwalla & Co. for the Respondent.

3] The brief background in which the relief is sought in the present Application can be summarised to the effect that the Applicant who is engaged in the business of manufacturing aluminium foil containers/ plastic containers and kitchen rolls is the Company incorporated on 08.05.2002, having its registered office in Mumbai, whereas, the Respondent who is engaged in transportation and shipping business, is freight forwarder/non vessel owning common carrier.

The Applicant was approached by M/s.American Alupack Industries LLC (AAI) located in California, USA, for purchase of corrugated boxes of aluminium foil and accordingly placed orders via email, pursuant thereto the Applicant issued proforma invoice to AAI and agreed to deliver the goods in six containers at the price agreed between themselves.

The carriage of consignment was to be delivered to Charleston, South Caroline, USA and for this purpose the Applicant entered into Agreement with the Respondent, who agreed to transfer six containers of aluminium foil and the Applicant agreed to pay freight charges of Rs.2,23,550/- and raised invoice, pursuant to which the Applicant paid freight charges, which include ocean freight, prepaid, ACD charges, container maintenance charges, bill of lading charges and terminal handling charges. Out of the six containers of the consignment, four were successfully delivered and the dispute arose between the parties

as regards delivery of the fifth container.

Pursuant to the acceptance of AAI's goods by the Respondent, it issued bill of lading in three original sets and this contained a clause under the caption "Arbitration" in form of Clause 25 which read thus :

> 25. **Arbitration**
> The contract evaluated hereby or contained herein shall be governed by and construed according to Indian laws. Any difference of opinion or dispute thereunder can be settled by arbitration in India or place mutually agreed with each party appointing an arbitrator for.

4] As per the Applicant, there is practice prevailing in respect of contract for carriage of goods by sea, where, the delivery of the consignment is to be made at the discharge port, by the carrier to the consignee, only upon production or surrender by the consignee of the original bill of lading, and hence the Multimodal transport operator is discharged from its liability, only when the goods are delivered against surrender of original bill of lading and according to the applicant since AAI failed to pay the consignment for fifth container, it retained the original bill of lading.

It is in this scenario, dispute arose between the parties and several emails were exchanged between the Applicant and the Respondent and ultimately the Applicant was informed that the container is released and as per the tracking details, the container was handed over to the consignee on 21.10.2020. The applicant allege that

the respondent wrongly and illegally delivered the goods belatedly despite instructions and that too without original bill of lading being produced. The Applicant, therefore, claim that this resulted into huge financial loss and damage to it as it did not receive payment for supply of the goods.

5] On 10.12.2020, the Applicant issued a letter to the Respondent pointing out the flaw on its part and sought a relief of remitting the outstanding invoice amount of USD 28064.86. The Respondent addressed a legal notice to the Applicant denying its legitimate claim and foisted a false and fabricated stand of oral agreement existing between the Applicant and the Respondent and the past practice of releasing the consignment without production of original bill of lading.

This resulted in exchanging notices between the parties and the Applicant ultimately invoking arbitration, through a notice dated 10.03.2022 by invoking clause 25 of the bill of lading, which contemplated reference of the disputes and differences arising between the parties for adjudication by a sole Arbitrator. The name of the sole Arbitrator was also suggested for adjudication of the claim amount of USD 13230.86.

The notice was replied and apart from merits, the efficacy of the arbitration as a mode of settlement of dispute was contested by

suggesting that the clause sought to be projected as Arbitration clause do not provide arbitration as a mandatory mode, but in the wake of wordings used “can be settled”, it leaves an option open to resolve the disputes through arbitration.

6] In the aforesaid background the question that arise for consideration before me is, whether the clause contained in the bill of lading borrowed from the standing condition governing Multimodal transport document issued in accordance with Multimodal Transportation of Goods Act, 1993, contemplate, Arbitration as a mandatory forum, for dispute resolution.

7] The learned counsel for the parties have advanced rival arguments on the interpretation of the word “can”, the learned counsel for the Applicant argue that it has to be construed as an imperative mandate, whereas the learned counsel for Respondent vehemently submit that it is only an option, that is made available to settle the dispute by arbitration and the said clause in no way indicate the consensus between the parties for being referred to arbitration.

The counsel for the Applicant has placed reliance upon the decision of the Apex Court in case of ***INDTEL TECHNICAL SERVICES PRIVATE LIMITED VS. W.S. ATKINS RAIL LIMITED, (2008) 10 SCC***

308 and the decision of the Delhi High Court in case of ***Panasonic India Private Ltd. vs. Shah Aircon through its Proprietor Shadab Raza, 2022 SCC OnLine Del 3288***.

It is also an argument of the learned counsel by the Applicant that as laid down by the Hon'ble Apex court in case of ***Vidya Drolia vs. Durga Trading Corporation & Ors., (2021) 2 SCC 1***, the governing principle is "*when in doubt do refer*".

8] In terms of Section 7 of the Arbitration and Conciliation Act 1996, an arbitration agreement means an agreement by the parties to submit to arbitration all or certain disputes which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not. Such an arbitration agreement may be in form of an arbitration clause in a contract or in the form of a separate agreement, which necessarily shall be in writing. An arbitration agreement can also be in form of exchange of letters, telex, telegrams etc. if they provide record of the Agreement through exchange of statements of claim and defence in which the existence of an agreement is alleged by one party and not denied by the other.

Sub section (1) of Section 7 make it manifestly clear that there must be an agreement by the parties to submit the dispute to arbitration which necessarily presupposes an agreement which mandatorily

contemplate appointment of an Arbitrator.

The attributes of an arbitration agreement necessarily is a consensus or an arrangement between the parties to refer the disputes or differences to arbitration and the parties must expressly or impliedly spell out their intention to do so. This intention, of the parties to enter into an arbitration agreement can be ascertained from the terms of the Agreement and if the terms contained therein is clearly indicative of the intention on part of the parties to refer their disputes for adjudication to a Tribunal and the willingness to be bound by the decision of the Tribunal, it would certainly amount to an 'Arbitration Agreement'.

Though there is no specific form in which the arbitration agreement must be clothed in, the words used, should disclose a determination and obligation on part of the parties to go for arbitration and it should not be indicative of a mere contemplation or possibility of being referred for arbitration. Where there is merely a possibility of the parties agreeing to arbitration in future in contrast to an obligation indicating the intention of the parties to refer the dispute to arbitration, there is no valid and binding arbitration agreement.

9] In ***Jagdish Chander vs. Ramesh Chander & Ors. (2007) SCC 719***, the Apex Court highlighted the attributes or essential elements of arbitration agreement in the following words :

> *"9. Para 16 of the Partnership deed provides that if there is any dispute touching the partnership arising between the partners, the same shall be mutually decided by the parties or shall be referred to arbitration if the parties so determine. If the clause had merely said that in the event of disputes arising between the parties, they "shall be referred to arbitration", it would have been an arbitration agreement. But the use of the words "shall be referred for arbitration if the parties so determine" completely changes the complexion of the provision. The expression "determine" indicates that the parties are required to reach a decision by application of mind. Therefore, when clause 16 uses the words "the dispute shall be referred for arbitration if the parties so determine", it means that it is not an arbitration agreement but a provision which enables arbitration only if the parties mutually decide after due consideration as to whether the disputes should be referred to arbitration or not. In effect, the clause requires the consent of the parties before the disputes can be referred to arbitration. The main attribute of an arbitration agreement, namely, consensus ad idem to refer the disputes to arbitration is missing in clause 16 relating to settlement of disputes. Therefore, it is not an arbitration agreement, as defined under Section 7 of the Act. In the absence of an arbitration agreement, the question of exercising power under Section 11 of the Act to appoint an Arbitrator does not arise."*

10] In a subsequent decision, the Apex Court on confronted with a clause which used the wording "may be referred to arbitration" in ***Wellington Associates Ltd. vs. Kirit Mehta (2000)4 SCC 272***, recorded that the clause is not couched in a mandatory language and do not disclose general intention on part of the parties. The law report specifically record as under :

> "I am of the view that it is not the intention of parties that arbitration is to be the sole remedy. It appears that the parties agreed that they can "also" go to arbitration also in

> case the aggrieved party does not wish to go to Civil Court by way of a suit. But in that event, obviously, fresh consent to go to arbitration is necessary."

11] In ***GTL Infrastructure Ltd. vs. Vodafone India Ltd. (VIL) , Commercial Arbitration Application No.52 of 2022 and Commercial Arbitration Petition No.323 of 2021***, I had an opportunity to deal with a clause in "Master Services Agreement" and a similar argument was advanced to the effect, that it amounted to a mandatory resolution of disputes through arbitration. The arbitration clause in question specifically applied at the following terminology " …….. , then the matter may, if mutually agreed upon by the parties, be submitted for arbitration in accordance with Arbitration and Conciliation Act, before an Arbitral Panel comprising of three arbitrators one appointed by each of the parties and the third appointed by two arbitrators so appointed by the parties."

By following the dictum as laid down by the Apex Court in ***Jagdish Chander vs. Ramesh Chander & Ors.****(supra) and* by this Court in case of Quick Heal Technologies Ltd. vs. NCS Computech Pvt. Ltd. & Anr. , I have recorded as under :

> "22. ……..Ultimately, the position of law which could be discerned from the authoritative pronouncements, is that the word 'may' however conclusive and mandatory affirmation between the parties to be certain, to refer to disputes to arbitration and the very use of the word 'may' by the parties does not bring about an arbitration agreement, but it

> contemplate a future possibility, which would encompass a choice or discretion available to the parties. It thus provides an option whether to agree for resolution of dispute through arbitration or not, removing the element of compulsion for being referred for arbitration. This would necessarily contemplate future consent, for being referred for arbitration. Since the intention of the parties to enter into an arbitration agreement has to be gathered from the terms of the agreement and though Mr. Kamath has submitted that by the reply to the notice of invocation of arbitration by the respondent, they have indicated that the parties are referrable for arbitration, I am unable to persuade myself to accept the said argument. If the terms of the agreement clearly indicate an intention on part of the parties, the material in form of the correspondence exchanged, shall not overrule or surpass the intention. Where there is a possibility of the parties agreeing to arbitration in future as contrasting from an application to refer disputes to arbitration, there can be no valid and binding arbitration agreement. It is only when there is a specific and direct expression of intent to have the disputes settled by arbitration, it may not be necessary to set out the attributes of an arbitration agreement to make it so, but where the clause relating to settlement of disputes, contain words which specifically exclude any of the attributes of an arbitration agreement, it will not be amounting so."

12] In the present case the word used "can" is indicative of the possibility or the ability to do something. It indicate that one can and will do something. In contrast of use of the word "shall" which is indicative of certainty that is it must happen or that 'you are determined that something will happen'. The relevant clause has used the term "can be settled", which leave an option for settlement of disputes by a mode of arbitration either in India or a place mutually agreed by the parties, with each party appointing one arbitrator. The word 'can' has

qualified, Arbitration as a mode of settlement and it has been further qualified by an option of having the arbitration either in India or a place mutually agreed between the parties.

The choice being left open to the parties to have the disputes settled through arbitration is not equivalent to the parties mutually agreeing that they "shall" refer themselves to arbitration. The mere caption of a particular clause "Arbitration" do not conclusively imply the mandatory nature of arbitration when the option is left to the parties to settle their disputes through arbitration. The definite and explicit intention of the parties unmistakenly and unequivocally agreeing that if the dispute arise between the parties, it shall be settled by arbitration, is not discerned from the concerned clause.

13] The reliance placed upon the INDTEL TECHNICAL SERVICES PRIVATE LIMTIED (*supra),* is distinguishable in the wake of the clause which was subject matter of the proceeding before Apex Court, as it specifically provided as under :

> " 13.2 Subject or clause 13.3 all disputes or differences arising out of, or in connection with, this agreement which cannot be settled amicably by the parties can be referred to adjudication. ;
>
> 13.3 If any dispute or difference under this agreement touches or concerns any dispute or difference under either of the sub-contract agreements, then the parties agree that such dispute or dispute hereunder will be referred to the adjudicator or the court as the case may be appointed to decide the dispute or difference."

The question that arose before the Supreme Court was whether the aforesaid two clauses would be construed to be an arbitration agreement since the expression used in the clauses was “adjudication” and it was held that the parties to the memorandum intended to have their disputes resolved by arbitration and hence the application to appoint Arbitrator was allowed.

14] The learned counsel for the Applicant has also relied upon the decision of Delhi High Court in Panasonic India Private Ltd. (*supra*) where on confronted with clause 25 in form of arbitration, despite the use of the word “can” , it was construed as an imperative mandate.

On perusal of the said decision it can be seen that the arbitration clause was widely worded as under :

> XXV Arbitration:
> The parties will attempt to settle any dispute, claim or controversy arising out of this Agreement through consultation and negotiation in good faith and in a spirit of mutual co-operation. If those attempts fail, then either Party can refer the disputes, issues or claims arising out of or relating to this Agreement for arbitration by a sole arbitrator who shall be appointed by the Managing Director of the Panasonic. The arbitration proceedings shall be held in New Delhi, conducted in English, and shall be subject to the provisions of the Arbitration and conciliation Act 1996. The Arbitrator shall give a reasoned award. In the event the Appoint Authority fails to act or appoint a sole arbitrator, then either Party can have the sole arbitrator appointed under the provisions of the Arbitration and Conciliation Act, 1996.

While dealing with the said clause, the learned Judge juxtaposed the word “can” with the words “either party” signifying the option to the Panasonic or Aircon to refer the disputes to arbitration. The learned Judge further reasoned as under :

> “If either of the parties can exercise such an option by referring the disputes under the Agreement to arbitration, it is for all practical purposes, binding upon the other party as well. The remainder of the clause, insofar as it refers to the venue of arbitration, the language of arbitration, the applicability of the Act, the requirement to give reasons and the procedure for appointment of an arbitrator by reference to Court, also supports the view that the parties intended a mandatory reference to arbitration, and incorporated the ancillary provisions into the Agreement for this purpose only. Clause XXIV of the Agreement strengthens this position, inasmuch as it confers exclusive jurisdiction on this Court in case of a dispute, with special reference to arbitration proceedings, and the appointment of an arbitrator.”

15] The conclusion to the above effect is drawn on reading clause 25 with 14 wherein, under the clause of governing law the intention of the parties was made clear as it contemplated that all issues relating to appointment of Arbitrator or any Petition or Application to be made to the Court under the applicable Arbitration law or any arbitration Award or any issue arising out of such arbitration posting shall be subject to the exclusive jurisdiction of the Court at New Delhi only.

Distinguishing Jagdish Chander, the learned Single Judge, has specifically held as under :

> 20. The arbitration clause in Jagdish Chander provided that the disputes “shall be mutually decided by the parties or shall be referred to arbitration if the parties so determine”. It is on the interpretation of the phrase “if the parties so determine” that the Court came to the conclusion that the arbitration agreement lacked consensus ad idem to refer the parties to arbitration., and required fresh agreement for this purpose. In the present case, in contrast, for the reasons stated hereinabove, I have come to the conclusion that no fresh consent for arbitration is contemplated, and the Agreement adequately demonstrates consensus between the parties.”

16] Distinguishing Kolkata High Court decision in ***Jyoti Brothers vs. Sree Durga Mining Company 1956 SCC OnLine Cal 188*** which had distinguished the view in ***Kedarnath Atmaram vs. Kesoram Cotto Mills, ILR (1950) 1 CAL 550***, the learned Single Judge has specifically recorded as under :

> “21. With respect to the judgment of the Calcutta High Court in Jyoti Brothers, Mr. Hanief particularly emphasised the fact that the arbitration clause in that case also used the word "can", which the Court held indicates a mere possibility significant of a pious wish, or desire, but not an obligatory contract. The Court, therefore, held that the arbitration agreement in that case was not a present agreement, or a concluded agreement, to submit present or future disputes to arbitration.
>
> 22. The arbitration clause under consideration in Jyoti Brothers was in the following terms:-
> "In the event of any dispute arising out of this contract the same can be settled by Arbitration held by a Chamber of Commerce at Madras. Their decision shall be binding to the buyers and the sellers."
>
> 23. The Calcutta High Court distinguished the view of the Court of Appeal in Kedarnath Atmaram v. Kesoram Cotton

> Mills, inter alia on the ground that the arbitration clause in Jyoti Brothers does not express on whose option it was to call for arbitration. We are not faced with that difficulty in this case where the clause clearly holds that either of the parties can call for arbitration.
>
> 24. For the aforesaid reasons, I am of the view that, on a proper interpretation of the arbitration clause in the present case, the parties, in fact, arrived at a mandatory understanding that their disputes under the Agreement would be referred to arbitration."

17] The decision of Kolkata High Court as cited above in Panasonic India Ltd.(*supra*) reveal that the conclusion is derived on the basis of the surrounding circumstances being another clause in form of clause 14, in the agreement and and an inference was drawn that taking the clue from clause 14, it is apparent that the parties were at consensus that they shall be referred to arbitration, by keeping the option open to one of the party.

The above advantage, however, is not available in the present case.

The reliance upon the decision in case of Vidya Drolia (*supra*) and in particular in para 106, 144 to 146, in any way do not take the case of the Applicant further. At the stage of Section 11 Petition all that is required to examine is whether or not an arbitration agreement exist between the parties, which is relatable to the dispute in hand and since it has been categorically held that the existence of an "arbitration

agreement" in section 11 would include aspect of validity of arbitration agreement, albeit the Court at the reference state would apply prima facie case on the basis of the principles set out in Judgment and in case of debatable and disputable facts and reasonably arguable case etc. the Court would force the parties to abide by the arbitration agreement as the Arbitral Tribunal has primary jurisdiction and authority to decide the disputes including the question of jurisdiction and non arbitrability.

However, in the present case when it is manifestly and ex-facie certain that there is no agreement between the parties to mandatorily refer the disputes that have arisen between them for arbitration, I am unable to be persuade myself by the submission of the learned counsel for the Applicant that the clause involved make arbitration as a compulsory choice for the parties for resolution of disputes.

18] In the wake of above discussion, since I am of the view that Arbitration clause, which had used the word 'can', do not make it imperative for the parties to be referred for arbitration and specifically when the Respondent has refused to be referred for arbitration, in the wake of the choice being available, in terms of the clause contained in the agreement. The Arbitration Application deserve to be dismissed, as it cannot be construed as amounting to 'Arbitration' as the mode of

resolving disputes, in absence of affirmation at the end of the opposing party.

Hence, Arbitration Application No.168 of 2022 is dismissed.

[**BHARATI DANGRE, J**]