IN THE HIGH COURT AT CALCUTTA
ORDINARY ORIGINAL CIVIL JURISDICTION
ORIGINAL SIDE

Present:

The Hon'ble Justice Shekhar B. Saraf

A.P. No. 852 of 2022

Blue Star Limited

Versus

Rahul Saraf

With

A.P. No. 853 of 2022

Blue Star Limited

Versus

Multiplex Equipments and Services Private Limited

With

A.P. 854 of 2022

Blue Star Limited

Versus

Forum Projects Holdings Private Limited

For the Petitioner	:	Mr. Avishek Guha, Adv Mr. Sourajit Dasgupta, Adv Ms. Akansha Chopra, Adv. Mrs. Debarati Das, Adv.
For the Respondent in A.P. 852 of 2022	:	Mr. Pranit Bag, Adv. Ms. Riti Basu, Adv. Ms. Piyali Pan, Adv Mr. Sayan Banerjee, Adv.
For the Respondent in A.P. 853 of 2022	:	Mr. Ishan Saha, Adv. Mr. Sayan Banerjee, Adv.
For the Respondent in A.P. 854 of 2022	:	Mr. Saunak Sengupta, Adv. Mr. Sayan Banerjee

Last heard on: May 18, 2023
Judgement on: June 8, 2023

Shekhar B. Saraf J:

1. An interesting issue has fallen before this court with respect to the three petitions before me, which are A.P. 854 of 2022, A.P. 853 of 2022 and A.P. 852 of 2022. Since, the issue is identical in these petitions they are being decided together in this judgement. The petitions are applications under Section 11 of the Arbitration and Conciliation Act,

1996 (hereinafter referred to as 'the Act') for appointment of an arbitrator on the basis of clauses, which are identical in the three agreements.

2. The issue would require venturing into an endeavour to ascertain the ingredients/requirements of a binding arbitration clause and later to decide whether these ingredients are present or found wanting in the identical agreements in the instant petitions.

Relevant Facts

3. Since the issue and the clauses are identical, only the pertinent facts and clauses of A.P. 852 of 2022 are produced herein below :-

a) The petitioner, Blue Star Limited, entered into a Memorandum of Understanding (hereinafter referred to as the 'MoU') with the respondent, Rahul Saraf, as per which, the petitioner was to render its operation and maintenance services from January 1, 2019 to December 31, 2021.

b) Services were provided by the petitioner, in lieu of which invoices were raised and even paid by the respondent. However, disputes arose between the parties with respect to non-payment of a few invoices. The petitioner raised requests for payments vide letters dated November 3, 2020 and March 26, 2022.

c) On the respondent's failure to pay the amount demanded, the petitioner invoked the alleged arbitration clause and nominated an arbitrator vide notice dated August 29, 2022, which was received by the petitioner on September 1, 2022.

d) After expiry of a period of thirty days, the respondent issued a letter dated November 4, 2022, refusing to accept the appointment of the arbitration appointed by the petitioner and disputed the existence of any valid arbitration clause. Consequently, the petitioner filed the application, being A.P. 852 of 2022, requesting for appointment of an arbitrator.

Rival Submissions

4. Mr. Avishek Guha, learned counsel appearing on behalf of the petitioner submitted the following argument :-

a) The dispute is arbitrable in nature and there exists a binding arbitration agreement between the parties which can be easily deduced from the provisions of the MoU, specifically, clause 7 and 13. These clauses firmly indicate the resolve and intent of the parties to refer to arbitration, in case any dispute or differences arose. Reliance was placed on ***Jagdish Chander v. Ramesh Chander and Others*** reported in ***(2007) 5 SCC 719*** to bring

home the point that intent of the parties has to be analysed, which in the present situation was to determinatively refer disputes to arbitration.

5. The counsels appearing on behalf of the respondents in A.P. 854 of 2022, A.P. 853 of 2022 and A.P. 852 of 2022 made the following submissions :-

a) A perusal of the dispute resolution clauses would indicate that the ingredients of a valid arbitration clause, as understood on a co-joint reading of Section 2(b) and Section 7 of the Act, are not met. There is no consensus between the parties in the MoU to submit to arbitration.

b) Mere use of the word 'arbitration' or 'arbitrator' in a heading or clause would not aggregate to an arbitration agreement. Similarly, the mere possibility of parties agreeing to arbitrate in the future, as contrasted from an obligation to refer disputes to arbitration, would not surmount to an arbitration agreement. The terms should be univocal in displaying an intention on the part of the parties to mandatorily refer their disputes to arbitration and a willingness to be bound by the decision of such tribunal. In the factual matrix of the petitioner before us, the clauses do not mandate the parties to refer the disputes to be resolved through arbitration. Reliance was placed on ***Foomill Pvt. Ltd. v. Affle***

(India) Ltd. reported in ***2022 SCC OnLine Del 843***, ***Jagdish Chander (supra)***, ***Niwas Enterprise v. Rabindra Pandorang Ratnaparkhi & Anr.*** reported in ***2022 SCC OnLine Bom 6472***, ***Nagreeka Indcon Products (P) Ltd. v. Cargocare Logistics (India) (P) Ltd.*** reported in ***2023 SCC OnLine Bom 498*** and ***Wellington Associates Ltd. v. Kirti Mehta*** reported in ***(2000) 4 SCC 272*** to substantiate this argument.

Analysis

6. The Apex Court in ***NTPC Limited v. SPML Infra Limited*** reported in ***2023 SCC OnLine SC 389*** had elaborated on the jurisdiction of the pre-referral court under Section 11 of the Act. The relevant extracts are produced below :-

> '*25. Eye of the Needle: The above-referred precedents crystallise the position of law that the pre-referral jurisdiction of the courts under Section 11(6) of the Act is very narrow and inheres two inquiries. The primary inquiry is about the existence and the validity of an arbitration agreement, which also includes an inquiry as to the parties to the agreement and the applicant's privity to the said agreement. These are matters which require a thorough examination by the referral court. The secondary inquiry that may arise at the reference stage itself is with respect to the nonarbitrability of the dispute.'*
>
> *Emphasis Added*

Therefore, the instant petitions require me to determine if there exists a valid arbitration agreement.

7. In ***Jagdish Chander (supra)***, the Apex Court went into great detail to examine and deliberate upon the various kinds of clauses that may or may not surmount to being an arbitration agreement and expounded upon the ingredients of the same. The relevant portion is extracted below :-

'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.'

Emphasis Added

8. In ***Niwas Enterprise (supra)***, the Bombay High Court was deciding whether a particular clause can be legitimately considered as an arbitration agreement. The relevant portion is extracted below :-

'11. It has been held by the Supreme Court in Jagdish Chander (supra), that where there is a mere possibility of the parties agreeing to arbitration in future, there is no valid and binding arbitration agreement. The terms of the agreement should clearly indicate an intention on the part of the parties to the agreement to refer their disputes to a private arbitral tribunal for adjudication and a willingness to be bound by the decision of such tribunal on such disputes. It is only in that case that there is an Arbitration Agreement. Clauses such as these which require the parties to arrive at a further agreement to go to arbitration, as and when the disputes arise, is not an Arbitration Agreement. It is only an agreement to enter into an Arbitration Agreement in future.'

Emphasis Added

9. Similarly, the Bombay High Court in ***Nagreeka Indcon Products Pvt. Ltd. (supra)*** was also dealing with whether the concerned clauses therein could be reckoned as an arbitration agreement. The relevant extracts of the judgement are reproduced below :-

'25. 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.'

Emphasis Added

10. All the other judgements cited are repetitive in their pronouncement of the law. While they have been considered, they are not being

reproduced in this judgement as the law can be encapsulated without such repetition. Such encapsulation expounds that an arbitration agreement can be couched in various modes and forms. However, mere mentioning of the terms 'arbitration' or 'arbitrator' in a heading or existence of these terms in a scattered manner in clauses of agreements between parties do not aggregate to being an arbitration agreement. There must exist a clear intention of the parties and a meeting of their minds to mandatorily submit any future dispute, that may arise, to arbitration. Such an intention should illuminate itself in the form of an explicit obligation that is binding between the parties and not merely a possibility that may materialise if the parties so decide after a fresh application of mind, post-facto occurrence of disputes.

Conclusion

11. It is imperative now to quote the concerned clauses, which have been stressed upon by the counsel appearing for the petitioner to qualify as an arbitration agreement. They are produced herein below :-

> *'Clause 7: That in case of any dispute or differences or tendency of any Litigation or Arbitration Proceedings between the parties to this agreement relating to the terms and conditions of this agreement, the execution of the Maintenance & Operation Services shall not be stopped/prevented/obstruction in any manner, whatsoever, by the Second Party. In case of refusal by the Second Party to execute the Maintenance & Operation Services or failure to complete the tenure of this agreement due to any reasons whatsoever the Second Part will be liable to accept a penalty of 15% of the total value of the remaining contract period of the year. Second party shall continue to provide the services during the period of dispute or difference or tendency of any*

litigation or Arbitration proceedings between the parties. However periodical payment should not be held in any circumstances by the 1st Party as timely payment is essential requirement for the successful operation of the contract. Incase of any commercial imposition arises out of the disputes the same can be settled from the current or future bills of the second party.

Clause 13: That no party to this agreement shall be entitled to claim any kind/type of interest from the other party on any sum(s) or amount due and payable or on any claim or demand arising out of and/or in connection with this agreement. The Arbitrator shall also not entertain or award any claim of interest made by any party to this agreement in view of this specific provision/clause in this agreement.'

12. It appears that Clause 7 makes a reference to 'Arbitration Proceedings' and Clause 13 clarifies what the arbitrator shall not do. On an examination of Clause 7, no intention or understanding between the parties can be gleaned which specifically and mandatorily requires a reference of future disputes to arbitration. While there is a mention of 'Arbitration Proceedings', merely such mentioning does not sanctify the clause with the status of an arbitration agreement. Clause 7 indicates that the second party shall continue to provide services during the period of any litigation or arbitration proceedings. The plausible understanding is that a possibility of there being a reference to arbitration is left open, if the parties, in the future, opt for it. As seen in the law discussed before, such a possibility is not enough to consolidate an arbitration agreement.

13. In line with this understanding, in case the parties choose to go down the path of arbitration, a negative covenant in the form of Clause 13, proscribes the arbitrator from awarding interest. However, this also

does not amount to an arbitration agreement, even if read with Clause 7. In-fact, the understanding that emerges on reading of Clause 7 and 13 is that, if the parties opt for arbitration, then in that limited scenario, the arbitrator is precluded from granting interest. But, arbitration is a possibility which may unravel itself, if and only if the parties choose to opt for it, post occurrence of disputes. It is conditional, not a mandatory obligation between the parties to refer the dispute to arbitration.

14. In light of the discussion above, it can be said that there exists no arbitration agreement between the parties and therefore this court cannot appoint an arbitrator in exercise of its power under Section 11 of the Act. Accordingly, A.P. 852 of 2022 is dismissed without costs. Since the clauses in A.P. 853 and A.P. 854 are identical, they are also dismissed without costs.

15. Urgent Photostat certified copy of this order, if applied for, should be made available to the parties upon compliance with the requisite formalities.

(Shekhar B. Saraf, J.)