

(2014) 05 DEL CK 0310

In the Delhi High Court

Case No : Arb. P. 496/2013

Avant Garde Clean Room and Engg. Solutions Pvt. Ltd.

APPELLANT

Vs

Ind Swift Limited

RESPONDENT

Date of Decision : 23-05-2014

Acts Referred:

Arbitration and Conciliation Act, 1996 — Section 11, 7, 8

Citation : (2014) 210 DLT 714

Hon'ble Judges : Vipin Sanghi, J

Bench : Single Bench

Advocate : Chandni Goyal, Advocate for the Appellant; Praveen Mahajan, Advocate for the Respondent

Final Decision : Dismissed

Judgement

Vipin Sanghi, J.—This petition has been preferred u/s 11 of the Arbitration & Conciliation Act, 1996 (the Act) to seek the appointment of an Arbitrator.

2. The case of the petitioner is that the petitioner and the respondent-IND Swift Ltd., had entered into a contract as contained in the purchase order dated 10.12.2013 which contains an arbitration clause 11, which reads as under:

Arbitration-Dispute if any arising out of this Agreement shall be subject to the exclusive jurisdiction of the courts in city of Delhi.

3. One of the objections earlier raised by the respondent was that even the terms and conditions, inter alia, containing the aforesaid clause did not form part of the work order placed by the petitioner on the respondent. However, since the petitioner has filed additional documents, counsel for the respondent does not press the said objection. The only other objection pressed by the respondent is that on a perusal of the aforesaid clause, the same does not constitute an arbitration agreement.

4. The submission of learned counsel for the respondent is that a reading of the

said clause does not evince a clear intention of the parties to refer their disputes arising out of the agreement to arbitration. He submits that the clause, in fact, provides that the disputes, if any, arising out of the agreement shall be subject to the exclusive jurisdiction of the courts in the city of New Delhi. In support of his submission, he has placed reliance on the judgment of the Supreme Court in Wellington Associates Ltd. Vs. Mr. Kirit Mehta, , the judgment of the Madras High Court in Sankar Sealing Systems P. Ltd. Vs. Jain Motor Trading Co. and Another, , the judgment of the Supreme Court in Jagdish Chander Vs. Ramesh Chander and Others and Bernhard Consultancy Private Limited Vs. Ind Agro Synergy Limited, Nagpur, .

5. On the other hand, learned counsel for the petitioner has contended that the agreement between the parties evinces the intention of the parties to refer their disputes to arbitration, that is why, at serial No. 11 of the terms and conditions, the expression, "arbitration" was used in relation to resolution of disputes arising out of the agreement.

6. Counsel for the petitioner has also sought to place reliance on the judgment of the Supreme Court in Trimex International FZE Ltd. Dubai Vs. Vedanta Aluminium Ltd., India, in support of her submission. The clause in the agreement in the contract read as follows:

6.....This contract is covered by Indian Law and arbitration in Mumbai Court.

7. The Supreme Court rejected the submission of the respondent that the aforesaid clause was unclear and ambiguous by observing that it was clear that the intention of the parties was to arbitrate any dispute which arises in relation to the contract.

8. Having heard learned counsels for the parties and perused the clause in question as well as the decisions relied upon by the parties, I am of the view that there is merit in the respondent's objection that the aforesaid clause does not constitute an arbitration agreement to refer the disputes arising between the parties under the work order/contract in question to arbitration. In Wellington Associates Ltd. (supra), a similar defence was raised by the respondent, wherein the Supreme Court considered the following clauses of the contract between the parties:

Clause 4. It is hereby agreed that, if any dispute arises in connection with these presents, only courts in Bombay would have jurisdiction to try and determine the suit and the parties hereto submit themselves to the exclusive jurisdiction of the courts in Bombay.

Clause 5. It is also agreed by and between the parties that any dispute or differences arising in connection with these presents may be referred to arbitration in pursuance of the Arbitration Act, 1940 by each party appointing one arbitrator and the arbitrators so appointed selecting an umpire. The venue of arbitration shall be at Bombay.

9. The Supreme Court held that the aforesaid two clauses read together do not evince intention of the parties to refer their disputes to arbitration. The Court held that the use of the expression, "may be referred to arbitration" as opposed to the expression, "shall be referred to arbitration" shows that the intention of the parties was not that parties are bound to refer their disputes for arbitration. The submission of the petitioner that the word, "may" used in clause 5 aforesaid has to be construed as "shall" was rejected by the Court by observing that the parties had used "shall" and "may" at different places in clause 5. The parties used the word, "may" not without any reason. On a conjoint reading of clauses 4 and 5 aforesaid, the Supreme Court held that clause 5 was merely an enabling provision. The Supreme Court further observed that in cases where there is a sole arbitration clause couched in mandatory language, it is not preceded by a clause like clause 4, which discloses a general intention of the parties to go before a civil court by way of a suit. The Supreme Court also considered another instance dealt with in *B. Gopal Das Vs. Kota Straw Board*. In that case, the relevant clause in the contract read as follows:

That in case of any dispute arising between us, the matter may be referred to arbitrator mutually agreed upon and acceptable to you and us.

10. In *B. Gopal Das (supra)*, the Court held that fresh consent for arbitration was necessary.

11. In *Sankar Sealing Systems P. Ltd. (supra)*, the Madras High Court while dealing with an application u/s 8 of the Act considered the following clauses in the agreement relied upon by the defendant to contend that it constitutes an arbitration agreement:

23-A Any disputes arising in relation to this Agreement will be settled by the arbitration of a neutral person agreed to by both.

23-B Courts in Chennai will have exclusive jurisdiction in the event of any legal/ judicial proceedings.

12. The question arose whether the aforesaid clause is a mandatory arbitration agreement clause. The Madras High Court applied the principle laid down in *Wellington Associates Ltd. (supra)*. The Madras High Court held that clause 23-A was neither a mandatory arbitration clause, nor was it incumbent upon the plaintiff to refer the disputes to arbitration. The Madras High Court held that clause 23-A appears to be vague and uncertain, since it provided settlement by the arbitration of a neutral person agreed to by both parties. It was held that the expression, "neutral person agreed to by both" is uncertain. Who is to be the neutral person and how the consensus is to be arrived at between the parties, was not clear.

13. In *Jagdish Chander (supra)*, the clause considered by the Supreme Court read as follows:

16. If during the continuance of the partnership or at any time afterwards any

dispute touching the partnership arises between the partners, the same shall be mutually decided by the partners or shall be referred for arbitration if the parties so determine.

The learned Judge of the High Court had allowed the respondent's petition u/s 11 of the Act by holding that if the intention of the parties was not to refer their disputes to arbitration, there was no need to incorporate clause 16 making a specific mention of arbitration and that such a provision should be liberally interpreted so as to encourage arbitration.

14. While setting aside the said decision of the learned Judge of the High Court, the Supreme Court observed as follows:

7. Sub-section (1) of Section 7 of the Act defines "arbitration agreement" as 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. Sub-section (2) provides that an arbitration agreement may be in the form of an arbitration clause in a contract or in the form of a separate agreement. Sub-section (3) requires an arbitration agreement to be in writing. Sub-section (4) provides that an arbitration agreement is in writing, if it is contained in--(a) document signed by the parties; or (b) in an exchange of letters, telex, telegrams or other means of telecommunication which provide a record of the agreement; or (c) an exchange of statements of claim and defence in which the existence of the agreement is alleged by one party and not denied by the other.

8. This Court had occasion to refer to the attributes or essential elements of an arbitration agreement in *K.K. Modi Vs. K.N. Modi and Others*, *Bharat Bhushan Bansal Vs. U.P. Small Industries Corporation Ltd., Kanpur*, and *Bihar State Mineral Dev. Corpn. and Another Vs. Encon Builders (I) Pvt. Ltd., In State of Orissa and another etc. Vs. Sri Damodar Das*, 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.

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 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 u/s 7 of the Act. In the absence of an arbitration agreement, the question of exercising power u/s 11 of the Act to appoint an arbitrator does not arise.

(Emphasis supplied)

15. In Bernhard Consultancy Private Ltd. (supra), the term which was set up as an arbitration agreement contained in clause 14 read as follows:

Arbitration--The parties agree that the jurisdiction in relation to all matters arising under and/or in any way connected with this MoU shall be subject to the jurisdiction of Courts at Hyderabad. Arbitration if any shall also be at Hyderabad. The parties have confined the jurisdiction to Hyderabad Courts also have jurisdiction in the matter, the parties hereto shall be prevented from moving a Court other than the Court at Hyderabad.

16. The Chief Justice of the Andhra Pradesh High Court rejected the petition by observing as follows:

8. Although the heading of clause (14) aforementioned is "arbitration" the same is not an arbitration agreement within the meaning of the Act. It merely provides that the Courts at Hyderabad shall have jurisdiction to entertain any suit. It merely adds that arbitration if any shall also be at Hyderabad but by reason thereof only, it cannot be said that any arbitration agreement has been entered into which was enforceable in terms of Section 11 of the Act.

17. In Trimex International FZE Limited, Dubai (supra), though the respondent contended that the clause extracted above suffered from the vice of being unclear and ambiguous and, therefore, not capable of being enforced, the Supreme Court rejected the said submission by observing that it was clear that the intention of the parties was to arbitrate any dispute which arose in relation to the offer and acceptance. In this decision, one does not find any discussion of the

applicable principles-as found in the other decisions cited by the respondent, which could apply for determination of the issue whether a clause in a contract tantamounts to an arbitration agreement, or not.

18. In the light of the aforesaid decisions relied upon by the parties, it appears to me that clause 11 contained in the work order dated 10.12.2013 does not tantamount to an arbitration agreement. The said clause merely uses "arbitration" in the heading of clause 11. However, the main body of the said clause completely contra-indicates the existence of any arbitration agreement since it provides that disputes, if any, arising out of the agreement "shall be subject to the exclusive jurisdiction of the courts in city of Delhi". In my view, the present is much a clearer case than even those considered by the Courts in Wellington Associates Ltd. (supra), Jagdish Chander (supra), Sankar Sealing Systems Pvt. Ltd. (supra) and Bernhard Consultancy Private Limited (supra). In fact, like in Bernhard Consultancy Private Limited (supra), the expression, "arbitration" has been used in the heading of the clause 11 in the present case. The expression "arbitration" or "arbitrator" has not been used at all in the main body of the clause. Clause 11 does not contain any term or condition to even remotely show that parties agreed to constitute a private tribunal to adjudicate their disputes under the agreement finally. In Bernhard Consultancy Private Limited (supra), the clause, inter alia, provided arbitration, if any, shall also be at Hyderabad. Even this clause was not accepted by the Court as a binding arbitration agreement on account of the use of the expression, "if any".

19. In the present case, the mere use of the expression, "arbitration" in the heading of clause 11 would not militate against the substance of the said clause which, in unequivocal terms, states that disputes arising under the agreement shall be subject to the "exclusive jurisdiction of the courts.....".

20. The Supreme Court rejected the argument that if the intention of the parties was not to refer their disputes to arbitration, there was no need to incorporate a clause which uses the expression, "arbitration" in Jagdish Chander (supra). Even in that case, the main body of the clause provided that the disputes touching the partnership between the partners, in the alternative, "shall be referred for arbitration". However, the said clause further provided, "if the parties so determined". Therefore, the Supreme Court held that there was no binding agreement between the parties. The settled principle culled out by the Supreme Court in Jagdish Chander (supra) leave no doubt in my mind that the clause in question cannot be construed in arbitration agreement. The intention of the parties to enter into an arbitration agreement has to be gathered from the terms of the agreement. It cannot be said that 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 willingness to be bound by the decision of such tribunal. The words used in clause 11 in the present case do not disclose any obligation to go to arbitration. In fact, in the present case, the clause relating to settlement of disputes contains words which specifically

excludes any of the attributes of an arbitration agreement, and contains words which detract from an arbitration agreement-since the clause provides that disputes arising in the agreement, "shall be subject to the exclusive jurisdiction of the courts in the city of Delhi."

21. In Jagdish Chander (supra), the Supreme Court has observed that 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. Pertinently, in the present case, the main body of the clause does not even contemplate that the parties may agree to arbitration in future.

22. For the aforesaid reasons, I find no merit in this petition and dismiss the same leaving it open to the petitioner to invoke such other remedy as may be available to it in law. The parties are left to bear their respective costs.