
(1998) 12 BOM CK 0022

In the Bombay High Court

Case No : Arbitration Application No. 4 of 1998

Jayant N. Sheth, Proprietor Struct Mast Engineers

APPELLANT

Vs

Gyneshwar Apartment Co-operative Housing Society Ltd.

RESPONDENT

Date of Decision : 04-12-1998

Acts Referred:

Arbitration and Conciliation Act, 1996 — Section 11(4), 2(1), 7

Citation : (1999) 1 BomCR 774

Hon'ble Judges : B.P. Saraf, J

Bench : Single Bench

Advocate : G.J. Makhija and Ms. P. Shah, for the Appellant; Y.V. Divekar, for the Respondent

Judgement

Dr. B.P. Saraf, J.—This is an application under sub-section (4) of section 11 of the Arbitration and Conciliation Act, 1996 ("Act") for appointment of an arbitrator to settle the disputes between the petitioner and the respondent society.

2. I have heard Mr. G. J. Makhija, learned Counsel for the petitioner. I have also heard Mr. Y.V. Divekar, learned Counsel for the respondent society. The contention of Mr. Divekar is that there is no arbitration agreement in this case between the petitioner and the respondent society within the meaning of section 2(1)(b) of the Act and hence no arbitrator can be appointed u/s 11(4) of the Act to decide the disputes arising out of the work executed by the petitioner. When the learned Counsel for the petitioner was asked to show the arbitration agreement, he could not show any arbitration agreement between the parties in writing. He stated that there was an understanding between the parties to enter into an agreement and on that basis he seeks appointment of an arbitrator.

3. "Arbitration agreement " has been defined in Clause(b) of sub- section(1) of section 2 of the Act to mean an agreement referred to in section 7 of the Act. Section 7 reads as follows:

"7 Arbitration agreement.

(1) In this Part, "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.

(2) The arbitration agreement may be in the form of an arbitration clause in a contract or in the form of a separate agreement.

(3) An arbitration agreement shall be in writing.

(4) An arbitration agreement is in writing if it is contained in-

(a) a document signed by the parties;

(b) 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.

(5) The reference in a contract to a document containing an arbitration clause constitutes an arbitration agreement if the contract is in writing and the reference is such as to make that arbitration clause part of the contract."

From a reading of the provision, it is clear that the essential ingredients of an arbitration agreement, as defined by Clause(b) of section 2(1) read with section 7, are as follows:

(i) There is a valid and binding agreement between the parties,

(ii) Such agreement may be contained as a clause in a contract or in the form of a separate agreement,

(iii) Such agreement is in writing

Such an agreement is in writing if it is contained in a document signed by the parties or in an exchange of letters, telex, telegrams or other means of telecommunication which provide a record of the agreement or 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. Reference in a contract to a document containing an arbitration clause also constitutes an arbitration agreement provided the contract is in writing and the reference is such as to make that arbitration clause part of the contract.

(iv) Parties intend to refer present or future disputes to arbitration.

(v) The dispute to be referred to arbitrator is in respect of a defined legal relationship, whether contractual or not.

Under sub-section (5) of section 7 reference in a contract to a document containing an arbitration clause constitutes an arbitration agreement if the contract is in writing and the reference is such as to make that arbitration clause

part of the contract.

4. In this case, admittedly, there is no arbitration agreement in the form of an arbitration clause in a contract or in the form of separate agreement in writing. Nor is it the case of the petitioner that there is an exchange of letters, telex, telegrams or other means of telecommunication or 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 party. What is claimed by the petitioner is that there was an understanding between the parties to enter into an arbitration agreement. Obviously, such an understanding, even if there be any, cannot be construed as an arbitration agreement within the meaning of section 2(1)(b) read with section 7 of the Act.

5. From the above discussion, it is clear that in this case there is no arbitration agreement between the parties. This petition u/s 11(4) of the Act for appointment of an arbitrator is, therefore, not maintainable. Hence dismissed.

C.C. expedited.

6. Petition dismissed.