

(2011) 04 MP CK 0064

In the Madhya Pradesh High Court

Case No : Arbitration Case No. 8 of 2007

M/s Goyolene Fibres (India) Private Ltd.

APPELLANT

Vs

M.P. State Electricity Board and Another

RESPONDENT

Date of Decision : 18-04-2011

Acts Referred:

Arbitration and Conciliation Act, 1996 — Section 11, 11(6), 7

Citation : (2011) ILR (MP) 1755 : (2011) 5 MPHT 84

Hon'ble Judges : Rajendra Menon, J

Bench : Single Bench

Final Decision : Dismissed

Judgement

Hon"ble Mr. Rajendra Menon, J.—This application u/s 11(6) of the Arbitration and Conciliation Act, 1996 has been filed by the applicant seeking reference of the dispute between the parties for adjudication by constitution of an Arbitral Tribunal.

2. Petitioner is a Private Limited Company having its plant in Daman and Registered Office in Mumbai. Petitioner's establishment carries out manufacturing activities of all types of cables which are generally used for the purpose of power transmission. The respondent M.P. State Electricity Board invited offers for supply of copper control cables of length 675 kms and Aluminum power cable of 15 km length. The petitioner's company submitted its bid and after the petitioner's bid was accepted an agreement was entered into between the parties. The agreement in question is filed as Annexure P-I. According to the petitioner as there is certain dispute in the matter of execution of the work as contemplated in the agreement and as the claim made by the petitioner for constitution of an Arbitral Tribunal for adjudication of the dispute is rejected, this application has been filed for referring the dispute for arbitration. Inter alia contending that Clause 10 of the agreement (Annexure P-1) and Clause GCC 10.2 of the Special Conditions of Contract contemplates and arbitration agreement for resolution of the dispute, this application has been filed.

3. Respondents have filed a preliminary objection and it is their case that there is no arbitration agreement existing between the parties as contemplated u/s 7 of the Arbitration and Conciliation Act, 1996, and therefore, the application is not maintainable.

4. Shri S.K. Rao, learned Senior Counsel appearing for the petitioner inviting my attention to Clause 10 of the agreement (Annexure P-1) points out that this clause contemplates : "if the parties fail to resolve the dispute between them by mutual consultation within 28 days then the dispute has to be resolved for resolution as per formal mechanisms prescribed in SCC (Special Condition of Contract)". Thereafter inviting my attention to the Special Conditions of Contract, i.e., Clause GCC 10.2 Shri Rao argues that the mechanism provided in this clause is an arbitration agreement, and therefore, the application is maintainable.

5. Shri M.L. Jaiswal, learned Senior Counsel appearing for the respondents refutes the aforesaid and by taking the through the provisions of agreement argues that clause is not an arbitration agreement, and therefore, application is not maintainable. Placing reliance on a judgment rendered by the Supreme Court in the case of Jagdish Chander Vs. Ramesh Chander and Others, followed by the Bombay High Court in the case of Reshamsingh & Co. Pvt. Ltd. Vs. Dharti Dredging & Infrastruction Ltd., 2011 Arb.W.L.J. 41 (Bom), Shri Jaiswal, learned Senior Counsel argues that there is no arbitration clause between the parties as contemplated u/s 7 of Arbitration and Conciliation Act, 1996, and therefore, the application is not maintainable.

6. Having heard learned Counsel for the parties and on perusal of the record, it is clear that the only question for the present warranting consideration is as to whether there is an arbitration agreement between the parties as contemplated u/s 7 of the Arbitration and Conciliation Act, 1996, and therefore, jurisdiction is conferred on this Court to exercise powers u/s 11 of the said Act. That being so it would be appropriate to refer to various provisions in the agreement. Clause 10 of the agreement (Annexure P-1) pertaining to "Settlement of disputes" reads as under :--

10. Settlement of disputes :--

10.1. The purchaser and the supplier shall make every effort to resolve amicably by direct informal negotiation any disagreement or dispute arising between them under or in connection with the Contract.

10.2. If the parties fail to resolve such a dispute or difference by mutual consultation within twenty-eight (28) days from the commencement of such consultation, either party may require that the dispute be referred for resolution to the formal mechanisms specified in the SCC.

Thereafter, Clause GCC 10.2 of the Special Conditions of Contract contained in Section VIII of the agreement reads as under :--

GCC 10.2:-- If the parties fail to resolve such a dispute or difference by mutual

consultation within twenty-eight (28) days from the commencement of such dispute and difference, either party may require that the dispute be referred for resolution to the formal mechanisms.

(a) The mechanism for resolution of disputes for Indian bidders shall be in accordance with the laws of India.

(b) The formal mechanism for the resolution of disputes for foreign bidders shall be settled by arbitration in accordance with the provisions of the United Nations Commission on International Trade Law (UNCITRAL) Arbitration Rules by one or more arbitrators selected in accordance with the said rules.

(c) However, the place for arbitration shall be Jabalpur or New Delhi, which ever may be preferred by appointed panel or arbitrators both for Indian bidders and for foreign bidders.

A perusal of the aforesaid clause would indicate that the agreement between the parties with regard to resolution of dispute in the case of Indian bidders is in accordance with the Laws of India. The "Laws of India" is a vague and wide terms and would include various Acts applicable in India including the Arbitration and Conciliation Act of 1996 apart from the common laws and the special laws like the Indian Contract Act and various other statutory provisions applicable within the territory of India contemplates provisions of resolution of dispute of the nature involved in this case. Thereafter, Clause (c) speaks about holding of arbitration at labalpur or New Delhi. In the case of Jagdish Chander (supra), Hon"ble Supreme Court had occasion to consider somewhat similar question and in Para 8 the law in question has been crystallized in the following manner :--

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:--

(Emphasis supplied)

(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 the 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.

(Emphasis supplied)

(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 excludes 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.

Thereafter in Para 9, it has been observed by the learned Supreme Court that the agreement has to be an arbitration agreement within the purview of Section 7 of the Arbitration and Conciliation Act, 1996. This judgment of the Supreme Court in the case of Jagdish Chander (supra), was considered by the Bombay High Court in the case of Reshamsingh & Co. Pvt. Ltd. (supra), and after taking note of somewhat similar clause which pertains to settling of dispute to Mumbai Jurisdiction under the arbitration, similar arguments were rejected and it was held that the clause does not contemplate an arbitration agreement. In the Bombay case, the relevant clause relied upon for contending that there is an arbitration agreement between the parties was somewhat similar to Clause 10.2 (c) of the Special Conditions and in the Bombay case the same reads as under :--

All disputes subject to Mumbai Jurisdiction under Arbitration.

Taking note of the aforesaid, the learned Judge in the Bombay case has rejected similar contentions as was contended by Shri S.K. Rao, learned Senior Counsel.

7.. A perusal of the law laid down by the Supreme Court in Jagdish Chander (supra) and in Reshamsingh & Co. Pvt. Ltd. (supra), would clearly show that to constitute an arbitration agreement the intention of the parties entering into the agreement has to be clear and specific in terms. The agreement should indicate that the parties intend to resolve all their disputes by referring to an Arbitration Tribunal for adjudication and the willingness of the parties to be bound by such a decision of the Arbitral Tribunal. Even though Hon"ble Supreme Court has held that no specific form is prescribed for such an agreement but the existence of arbitration agreement has to be gathered from the intention of the parties and the correspondence, if any, between them. It is also observed by the Supreme Court that mere use of words "arbitration or arbitrator" in a particular clause of the agreement cannot be construed to mean that it is an arbitration agreement. If the case in hand is evaluated in the back drop of the aforesaid requirement of law as laid down by the Supreme Court in the case of Jagdish Chander (supra), it would be seen that under Clause 10 of the Special Conditions of Contract only contemplates that if there is any dispute between the Purchaser and Supplier efforts shall be made to resolve the same amicably by direct informal negotiation and if the parties fail to resolve such dispute within 28 days then the dispute shall be resolved through resolution to the formal mechanism as is specified in the SCC (Special Conditions of Contract). The word "formal mechanism" is not defined. Clause 10.2 of the Special Conditions of the Contract as reproduced herein above indicates that the mechanism for resolution of the dispute as far as Indian bidders are concerned is in accordance with the "Laws of India". The Laws of India is a wide and vague terms and it does not indicate the intention of the parties to resolve the dispute by resorting to the procedure as provided in the

Arbitration and Conciliation Act of 1996. The resolution of the dispute in accordance to the Laws of India would mean all laws applicable in the territory of India, which provides for resolution of such civil disputes between the parties. That being so, it has to be construed that the provisions of Clause 10.2 of Special Conditions of Contract does not provide for resolution of the dispute as per the Arbitration and Conciliation Act, 1996. That apart, the emphasis made by Shri S.K. Rao, learned Senior Counsel to the said clause by indicating that use of word "arbitration" indicates that intention of the parties was to get the dispute resolved by arbitration is also misconceived and cannot be accepted in view of the law laid down in this regard by the Supreme Court and by the Bombay High Court. Mere use of word "arbitration" or "arbitrator" will not be sufficient to hold that an arbitration agreement exists between the parties. That being so, in the present case there is no specific arbitration clause indicating intention of the parties for resolving the dispute through constitution of Arbitration Tribunal as can be gathered by the agreement in question. The relevant clauses as referred to herein above only indicates that the mechanism for resolution of dispute is in accordance to "Laws of India", this term is a vague and wide term and cannot be construed by this Court to mean as a reference for resolution of dispute by arbitration. Under such circumstances, the preliminary objection raised by the respondents has much force and has to be accepted. There is no arbitration clause in the agreement and in the absence of arbitration clause being available u/s 7 of the Arbitration and Conciliation Act, this Court is of the considered view that this application u/s 11 of the Arbitration and Conciliation Act, 1996 is not maintainable.

8. Accordingly, this application is dismissed.