

(2000) 02 KAR CK 0078

In the Karnataka High Court

Case No : Civil Miscellaneous Petition No. 101 of 1999

Tata Elxsi Limited, Bangalore

APPELLANT

Vs

Anand Joshi

RESPONDENT

Date of Decision : 11-02-2000

Acts Referred:

Arbitration and Conciliation Act, 1996 — Section 11 (5), 7 (4) (c)

Citation : (2000) 3 KarLJ 517 : (2000) 2 KCCR 45 SN

Hon'ble Judges : V.K. Singhal, J

Bench : Single Bench

Advocate : M/s. P.M. Vasudev and Company, for the Appellant; Sri V.R. Datar, for the Respondent

Judgement

1. This petition u/s 11(5) of the Arbitration and Conciliation Act, 1996 has been filed with the prayer to appoint an arbitrator. There is no stipulation for the appointment of the arbitrator in the agreement and it is only by the virtue of provisions of Section 7(4)(c) it is contended that the condition for appointment of arbitrator in the agreement should be construed "in writing". A notice dated 21-7-1999 was sent by the petitioner alleging that "you have also agreed with our client that the issues can be referred to arbitration in Bangalore". It is also mentioned that if the respondents failed to settle the matter within 21 days from the receipt of notice legal action would be initiated. No reply was sent within the stipulated time. On 12-8-1999, it was replied that the "averments in the notice are refuted". Petitioner thereafter sent another letter dated 22-9-1999 that a valid arbitration agreement has come into existence. Reply of this letter was sent on 28-9-1999 refuting that the respondents have ever agreed to refer the dispute to the arbitration.

2. On behalf of the respondent it is submitted that in accordance with the notification dated 13-11-1996, the scheme which has been framed by the Hon'ble Chief Justice of High Court of Karnataka has stipulated that original arbitration agreement or a duly certified copy thereof has to be given. The

question where there is an oral agreement for arbitration is always a disputed question and therefore the Arbitration Act has contemplated the arbitration agreement in writing and the circumstances under which it could be considered to be in writing are given u/s 7(4)(c).

3. I have considered over the matter.

Section 7(4) of the Act reads as under:

"7(4) An arbitration agreement shall be in writing.

(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".

4. From the perusal of Section 7(4) it is evident that the arbitration agreement has to be in writing. How the agreement could be considered to be in writing has been explained u/s 7(4) of the Arbitration Act. According to that even if there is an exchange of statement of claims and defence in which the existence of agreement is alleged by one party and not denied by the other an arbitration agreement in writing could be presumed. The notice which has been sent could be considered to be statement of the claim. The other thing which has been required by the section is that in response to the statement of claim there must be a defence, then only an agreement could be inferred. It is not necessary in all cases that the agreement must contain a clause in writing for appointment of an arbitrator. It may be inferred from the subsequent correspondence or other document by which the parties may agree for appointment of arbitrator. If there is nothing of the sort in writing then in the statement of claim it has to be specifically stated that there is an arbitration agreement. If in the defence nothing is stated on this point, then, arbitration agreement could be presumed. But if there is no defence then there is no exchange. Exchange of statement of claim and defence only would make the existence of agreement. The opposite party may not reply but keeping silent would not amount to any defence nor it could be considered to be an exchange of the statement of the claim with the defence. If in the reply all other matters such as claim, objections etc., are replied but if the reply is silent about the arbitration agreement then such an agreement could be inferred. In a case where the reply is not given, or defence is not taken, or the other side consider it proper to ignore the notice, i.e., statement of claim, then, it cannot be considered that "there is an exchange of the statement of the claim and the defence". Raising the plea for arbitration in the statement of claim is only one sided activity. Keeping silence by the other side or refuting the allegation of the arbitration clause would not make it an agreement, for which both the parties must agree. An agreement is valid when it is, by the two parties. It is only to obliterate the necessity of written clause in

arbitration agreement Section 7(4)(c) has come into existence. Keeping silence in the defence would result in an implied agreement. But if there is no defence taken or no reply given, then, such an agreement cannot be presumed. Prior to the enactment of Arbitration and Conciliation Act, 1940 even oral agreements were valid. This position has completely been changed by the Act of 1996 which has made it a condition precedent for referring the matter to arbitration if there is a clause in writing. Existence of valid arbitration clause would be spelt out even from subsequent correspondence or even by the conduct of the parties. Telex messages, telegrams and other means of telecommunication have also been considered sufficient to come to the conclusion that the agreement has contemplated arbitration clause in writing. Bombay High Court in *Jayanth N. Sheth v Gnaneshwar Apartment Co-operative Housing Limited*, has held that mere oral understanding between the parties to refer the dispute to arbitration will not make it a written agreement. The object of Section 7(4)(c) is only to cover such circumstances where the inference can be made from the subsequent correspondence or even by conduct of the parties. The original agreement may not contain the stipulation of arbitration but still it could be inferred that in given set of circumstances the clause is in writing. It is only for this reason that statement of claim and defence are relevant for that purpose. Under Contract Act, 1872 all agreements are considered as contract for they are made by the consent of the parties competent to contract for a lawful consideration and with a lawful object and are not expressly declared to be void. Thus for every contract there must be an act of two parties and it is not an unilateral act of one party alleging something which may or may not be correct. Russel on Arbitration (20th Edition, page 45) states:

"The agreement may arise by the incorporation of one document containing an arbitration clause in another under which the dispute arises. Where parties by an agreement import the terms of some other document as part of their agreement those terms must be imported in their entirety. but subject to this, if any of the imported terms in any way conflicts with the expressly agreed terms, the latter must prevail over what would otherwise be imported".

Lord Esher observed in *Hailton and Company v Mackie and Sons*;

"Where in a bill of lading there was such a condition as "all other conditions as per charterparty the conditions of the charterparty must be read verbatim into the bill of lading as though they were there printed in extenso... Then if it was found that any of the conditions of the charterparty on being so read were inconsistent with the bill of lading, they were insensible, and must be disregarded".

5. There could be a stipulation or incorporation by reference to some other rules or bye-laws of the trade associations etc., which may contain a clause of arbitration though the agreement entered into by the parties has not specifically mentioned about the arbitration. Russel on Arbitration (20th Edition, page 45) states:

"The key question is: does the reference in an agreement to a written form of arbitration clause or to a document containing an arbitration clause constitute an arbitration agreement? It does have that effect if the reference is such as to make that clause part of the agreement".

At page 46, it is stated-

"Construction projects frequently involve sub-contractors. A common problem is whether the terms of the main contract. The Courts have gone to some lengths to give effect to these arbitration clauses:

An order placed on sub-contractors specified that it should be in the "appropriate form for nominated sub-contractors (RIBA 1965 edition)". There was no such form. The Court held that the parties meant to refer to the "green form" commonly used for sub-contracts. Like the RIBA forms, the green form contained an arbitration clause, which was held to be binding on the parties".

Mustill and Boyd in the Law and Practice of Commercial Arbitration in England (2nd Edition, page 105) states:

". . . the parties need not set out the terms of their arbitration agreement in the contract itself. It is sufficient for the clause to be incorporated by reference either to a standard form of clause or to a set of trade terms which themselves include provisions requiring disputes to be submitted to arbitration".

6. There may be other circumstances also by which an agreement in writing could be considered even if the original agreement has no such stipulation. Merely asserting by one party is not enough nor this Court can act on such assertion which may or may not be correct. Law has contemplated exchange of statements of claim with defence. Unless there is "exchange" of such statement of claim with the defence taken by the other side, delay in replying or non-reply could not be construed as compliance of Section 7(4)(c) to treat it as an agreement in writing.

7. In these circumstances, I am of the view that raising the plea in the statement of claim is only one side act of the petitioner. There is no exchange of any defence with the statement of claim. Therefore an arbitration agreement cannot be presumed.

8. Petition having no force is accordingly dismissed.