

(2007) 12 KAR CK 0047

In the Karnataka High Court

Case No : Civil Miscellaneous Petition No. 96 of 2007

Y.L. eServices Pvt. Ltd.

APPELLANT

Vs

Silverline Business and Tech Park Pvt. Ltd. and Mfar Holding
Pvt. Ltd.

RESPONDENT

Date of Decision : 04-12-2007

Acts Referred:

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

Citation : AIR 2008 Kar 127 : (2008) ILR (Kar) 549 : (2008) 4 KarLJ 259 :
(2008) 1 KCCR 363

Hon'ble Judges : N. Kumar, J

Bench : Single Bench

Advocate : Aditya Sondhi, for the Appellant; R.V.S. Naik, for King and Patridge,
for the Respondent

Final Decision : Dismissed

Judgement

N. Kumar, J.—The petitioner has preferred this petition u/s 11(5) of the Arbitration and Conciliation Act, 1996, for short hereinafter referred to as the "Act", seeking appointment of arbitrator to resolve the dispute that has arisen between the parties as per Clause 32 of the Deed of Sub-Lease dated 09.08,2006.

2. The petitioner is the company incorporated under the provisions of the Companies Act, 1956. It is carrying on business inter alia of IT enabled services. The respondents are also companies incorporated under the Companies Act, 1956. The first respondent entered into a registered Deed of Sub-Lease with the petitioner on 09.08.2006 in respect of a portion of the first floor of "Mfar Silverline Business Tech Park", claiming to be the allottee of the said property from the Karnataka Industrial Areas Development Board, as per Annexure-A.

3. Now disputes have arisen between the parties in working out the aforesaid contract According to the petitioner Clause 32 of the aforesaid agreement contains arbitration clause. Therefore, the petitioner issued legal notice dated

03.04.2007 and nominated his nominee as the arbitrator, calling upon the respondents to submit to arbitration, as per Annexure-D. Respondents after service of the said legal notice, sent reply denying the arbitration clause. Therefore, the petitioner is constrained to file this petition seeking appointment of arbitrator.

4. I have heard learned Counsel for the parties. Sri. Aditya Sondhi, learned Counsel appearing for the petitioner contended that in the head note of Clause 32, the word "arbitration" is mentioned. The head note also refers to the language of the proceedings and further the body of the clause states that the proceedings shall be held at Bangalore. A harmonious reading of the head note as well as the clause, makes it clear that parties agreed to resolve the dispute through arbitration. Therefore, he contends that as there is an arbitration agreement between the parties, admittedly when disputes have arisen under the said agreement, a case for referring the dispute to arbitration is made out.

5. Sri. R.V.S. Naik, learned Counsel appearing for the respondents contended that a reading of Clause 32 shows that parties never intended that, the dispute between them should be referred to arbitration. Merely because in the head note the word "arbitration" is used, that makes no difference. Ultimately, by reading the said clause one has to find out what really is the intention of the parties. Viewed from that angle, there is absolutely nothing to indicate that the parties ever intended to get the matters resolved through arbitration. Therefore, he submits that in the absence of an arbitration clause, the question of referring the matter to arbitration would not arise.

6. In the light of the aforesaid submissions and facts, the question that arise for consideration is, whether Clause 32 of the agreement constitutes an arbitration agreement. Clause 32 reads as under:

32. Language, Jurisdiction and Arbitration Venue:

The proceedings shall be held at Bangalore and conducted in the English language. The Courts in Bangalore shall alone have jurisdiction with regard to this Lease.

7. The Supreme Court had an occasion to consider the similar contention in the case of Smt. Rukmanibai Gupta Vs. Collector Jabalpur and Others, wherein it was held as under:

Arbitration agreement is not required to be in any particular form. What is required to be ascertained is whether the parties have agreed that if disputes arise between them in respect of the subject-matter of contract such dispute shall be referred to arbitration, then such an arrangement would spell out an arbitration agreement.

They approved in the aforesaid judgment, a passage from Russel on arbitration, 19th Edn., p. 59, wherein it is stated as under:

If it appears from, the terms of the agreement by which a matter is submitted to a person's decision that the intention of the parties was that he should hold an inquiry in the nature of a Judicial inquiry and. hear the respective cases of the parties and decide upon evidence laid before him, then the case is one of an arbitration.

8. The Punjab High Court in the case of Ram Lal Jagan Nath v. Punjab State though Collector, Hissar and Anr. reported in AIR 1986 P&H 436 held as under:

"An arbitration rests on mutual voluntary agreement of the parties to submit their matters of difference to selected persons whose determination is to be accepted as a substitute for the judgment of a Court. The object of arbitration is the final determination of differences between parties in a comparatively quicker, less expensive, more expeditious and perhaps less formal manner than is available in ordinary Court proceedings, Except therefore, when a compulsory arbitration is provided by a statute, the first step towards the settlement of dispute or difference by arbitration is the entry of the parties into a valid agreement to arbitrate; every arbitration by consent thus originates in a written agreement or reference. The relationship of the parties is accordingly considered contractual and the matter is controlled by the law of contract.

An agreement to arbitrate, apart from what the Arbitration Act (X of 1940) prescribes, is not required to be stated in any particular form, or wording and the use of technical or formal words is not required. A valid arbitration agreement may be contained in a clause quite collateral to the main purpose of an agreement. Such, an agreement may even arise by incorporation of one document containing an arbitration clause in another under which the dispute arises. The essential requirement is that the parties should intend to make a reference a submission to arbitration and should be ad idem in this respect.

Indeed, it seems indisputable that mere use of the terms "arbitrator" or "arbitration" in an agreement does not necessarily make it an agreement of arbitration; and, similarly, mere absence of the use of the terms like "arbitrator" or "arbitration" cannot in law necessarily have the effect of taking an agreement out of the category of arbitration agreement, if otherwise the intention of the parties to agree to arbitrate is clear. No particular form appears to me to have been laid down as universal for framing an arbitration agreement; the only certain thing being that the words used for the purpose must be words of choice and determination to go to arbitration and not problematic words of mere possibility. It is in this connection worth remembering that there is nothing peculiar or extraordinary about arbitration agreement and the same rules of construction and interpretation apply to such, agreements as apply to agreements generally. The Court has thus to seek to give effect to the intention of the parties as evidenced by the agreement itself, without being over technical in its interpretation. In endeavouring to collect the intention of the parties, the Court must consider the whole context, even though the immediate object of the enquiry be the meaning of an isolated clause. This basic legal position has not

been controverted at the bar before us.

9. The Supreme Court had an occasion to review the entire law on this aspect and after such review in the case of K.K. Modi v. K.N. Modi and Ors. reported in AIR 1988 SC 1297 held that among the attributes which must be present for an agreement to be considered as an arbitration agreement, the following must exist:

(1) The arbitration agreement must contemplate that the decision of the Tribunal will be binding on the parties to the agreement; (2) That the jurisdiction of the Tribunal to decide the rights of parties must derive either from, the consent of the parties or from an order of the Court or from a statute, the terms of which make it clear that the process is to be an arbitration; (3) The agreement must contemplate that substantive rights of parties will be determined by the agreed Tribunal;

(4) That the Tribunal will determine the rights of the parties in an impartial and judicial manner with the Tribunal owing an equal obligation of fairness towards both sides;

(5) That the agreement of the parties to refer their disputes to the decision of the Tribunal must be intended, to be enforceable in law and lastly;

(6) The agreement must contemplate that the Tribunal will make a decision upon a dispute which is already formulated at the time when a reference is made to the Tribunal.

Further it held that the other factors which are relevant include, whether the agreement contemplates that the Tribunal will receive evidence from both sides and hear their contentions or at least give the parties an opportunity to put them forward; whether the wording of the agreement is consistent or inconsistent with the view that the process was intended to be an arbitration, and whether the agreement requires the Tribunal to decide the dispute according to law.

10. The Supreme Court in the case of Bhinka and Others Vs. Charan Singh, dealing with the usefulness of a head note to a section it was held that:

If there is any ambiguity-we find none-it is dispelled by the heading given to the section and also the description of the nature of the suit given in the Schedule

They approved a passage from Maxwell on Interpretation of Statutes, 10th Edition, wherein it is stated as under:

The headings prefixed to sections or sets of sections in some modern statutes are regarded, as preambles to those sections. They cannot control the plain words of the statute but they may explain ambiguous words.

If there is any doubt in the interpretation of the words in the section, the heading certainly helps us to resolve that doubt.

11. The learned single Judge of this Court after noticing the word "arbitration" in

the heading which intention was not reflected in the Section held as under:

By no stretch of imagination, the above can be considered as an Arbitration Agreement. The Learned Counsel for the Petitioner pointed out that the heading of the said clause is "Arbitration" and therefore it should be held that it is a provision for arbitration. The Caption or heading of a clause does not decide the contents of a clause. Whether a particular term is a clause is an arbitration agreement or not, has to be decided by looking into the contents of the clause. There is nothing in Clause 22 extracted above to show that there is an agreement between the parties to refer any disputes to arbitration.

12. The Division Bench of this Court has affirmed the aforesaid judgment in W.P. No. 499/2004.

13. From the aforesaid discussion, it is clear that the law on the point is well settled. Heading of a Section is inserted by a Draftsman, and strictly speaking is not a law. It is only a guide to the contents of the part or sections which follow. It may be construed as preamble to the section. It cannot control the plain words of a section. It cannot also be referred to, for the purpose of construing the provision, when the words used in the provision are clear and unambiguous. It cannot be used for cutting down the plain meaning of the words used in the section. It is not meant to control the operation of the enacting words. When the Court is reading a section to construe it, if the language employed is ambiguous and not clear, a doubt arises in the mind of the Court, to dispel such doubt and understand the real meaning of the section, the heading of a section aids in resolving that doubt. It will always be a useful pointer as to the intention of the legislature in enacting the section. Beyond this, it serves no other purpose.

14. The same rule applies to heading of a clause in the agreement, if not with the same force. There is nothing peculiar or extra-ordinary about an arbitration agreement and the same rules of construction and interpretation apply to such agreements as apply to agreements generally.

15. An arbitration agreement is not required to be in any particular form. An agreement to arbitrate, apart from what the Arbitration Act prescribes, is not required to be stated in any particular form or wording and the use of technical or formal words is not required. Mere use of the terms "arbitrator" or "arbitration" in an agreement does not necessarily make it an agreement of arbitration; and similarly, mere absence of the use of the terms like "arbitrator" or "arbitration" cannot in law necessarily have the effect of taking an agreement out of the category of arbitration agreement, if otherwise the intention of the parties to agree to arbitrate is clear. An arbitration rests on mutual voluntary agreement of the parties to submit their matters of difference to selected persons whose determination is to be accepted as a substitute for the judgment of a Court. The essential requirement is that the parties should intend to make a reference, a submission to arbitration and should be ad idem in this respect.

16. The golden rule of construction is to ascertain the intention of the parties to

the instrument after considering all the words in their ordinary, natural sense. To ascertain his intention, a Court has to consider the relevant portion of the document as a whole and also to take into account the circumstances under which the particular words were used. Very often the status and the training of the parties using the words have to be taken into consideration. It has to be borne in mind that very many words are used in more than one sense and that sense differs in different circumstances. Again, even where a particular word has, to a trained conveyance a clear and definite significance and one can be sure about the sense in which such conveyance would use it, it may not be reasonable and proper to give the same strict interpretation of the word when used by one who is not so equally skilled in the art of conveyance. One of the cardinal principles in the construction of contracts is that the entire contract must be taken as constituting an organic synthesis, embodying provisions which balance in the sum of reciprocal rights and obligations. It is through the prism of the principle that the terms of the contract must be analysed.

17. In the background of the aforesaid legal position, if we look into the arbitration clause, it is clear that there is no agreement between the parties to submit their matter of differences to an arbitrator and to accept his decision as a substitute for the judgment of the Court. The first sentence in the clause refers to the place of proceedings and the language of the proceedings. It does not disclose the intention of the parties to resolve the dispute by way of arbitration. There is no indication that the parties intended to get their disputes resolved by way of arbitration in substitution to the judgment of the Court. There is no intention to exclude the jurisdiction of the Court to decide the dispute that may arise between the parties. It is clear from the words used that, on the question of reference to arbitration, the parties were not *ad idem*. The language employed is clear that there was no intention on the part of the parties to refer the matter of arbitration. In the absence of any ambiguity in the clause, the question of looking to the heading of that clause to dispel any doubt or understanding the real meaning of the said clause would not arise. Merely because the word "arbitration venue" is mentioned in the heading, in the absence of express intention of the parties to get the dispute resolved by arbitration, it cannot be inferred that the parties wanted their disputes to be resolved through arbitration. Except the heading where the word "arbitration" is used, there is nothing to indicate that the parties ever intended to have the dispute referred to arbitration. There is no reference to the dispute in the said clause at all. All that has been said in the clause is proceedings shall be at Bangalore and conducted in English language. Interestingly, in the very same clause, the words used are "the Courts in Bangalore shall alone have jurisdiction with regard to this lease". Thereby, they wanted to have the disputes resolved by Courts at Bangalore.

18. In fact, this Court had an occasion to consider the effect of such clause, In the case of *Dilip Bafna Vs. K.S. Vasudeva Rao*, wherein it was held as under:

An arbitration agreement means an agreement by the parties to submit to an 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" Therefore, we have to gather the intention of the parties from the said, arbitration clause to find out whether they intend arbitration to be the sole remedy and what are the disputes which they want to be resolved by arbitration, whether all disputes arising under the agreement is to be decided by the arbitration? Further it has to be found out whether they intended to oust the jurisdiction of the Civil Court completely or whether they reserved their right or liberty to approach the Civil Court also in respect of the disputes arising under the agreement It is only if the arbitration agreement makes it clear that the parties agree to oust the jurisdiction of the Civil Court and for all the disputes referred to arbitration and they did not want any of the disputes adjudicated by the civil Court, the parties agree for resolution of the disputes through arbitration mandatorily or necessarily. It is settled law that while construing the provisions which oust the jurisdiction of the Civil Court, those provisions have to be construed strictly. The exclusion of the civil Court's jurisdiction should not be readily inferred.

19. In the instant case, parties by agreement have conferred the jurisdiction on Courts in Bangalore alone and they never intended to get their dispute resolved through arbitration. Therefore the language employed in the clause is clear. There is no ambiguity. The parties never wanted the dispute to be resolved through arbitration. Therefore, the heading of the clause where the word "arbitration" is used is of no assistance in understanding the real intention of the parties. In that view of the matter, I am satisfied that the aforesaid clause do not constitute arbitration agreement as defined under the Arbitration and Conciliation Act, 1996. Existence of an arbitration agreement and a live dispute is a condition precedent for referring the matter to arbitration. In this case, though dispute exists, there is no arbitration agreement to refer the dispute to arbitration. In that view of the matter, the petition lacks merit and is accordingly dismissed.