(2024) 03 TEL CK 0013

High Court For The State Of Telangana:: At Hyderabad

Case No: Arbitration Application No. 132 Of 2023

Amara Raja Infra Pvt. Ltd		APPELLANT
	Vs	
Radiant Institution Of Technology (RTI)		RESPONDENT

Date of Decision: March 15, 2024

Acts Referred:

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

Hon'ble Judges: Alok Aradhe, CJ

Bench: Single Bench

Final Decision: Dismissed

Judgement

1. Mr. A.Venkatesh, learned Senior Counsel representing Mr. Srinivasa Rao Pachwa, learned counsel for the applicant. Mr. Avinash Desai, learned Senior Counsel representing Mr. Ch.Siddhartha Sarma, learned counsel for the respondent.

2. In this application under Section 11(6) of the Arbitration and Conciliation Act, 1996, the applicant seeks appointment of an arbitrator.

3. Facts giving rise to filing of this application briefly stated are that a Notice Inviting Tender (NIT) was issued on 07.01.2021 by the respondent for construction of building for charitable educational institution. The Notice Inviting Tender contained the general and special conditions of the contract. Letter of Intent was issued on 06.05.2021 by the respondent to the applicant awarding the contract. Thereafter, on 28.06.2021 an Addendum-01 was executed between the parties and final Articles of Agreement was also executed on the same day. A notice dated 10.01.2023 was issued by the applicant seeking appointment of an arbitrator to which the respondent submitted a reply on 31.03.2023. Thereafter, this application has been filed.

4. Learned Senior Counsel for the applicant submitted that the respondent has not disputed the execution of the agreement. While inviting the attention of this Court

to Clause 2/3.36 of the General Conditions of Contract and Clause 29 of Addendum-01 of the agreement, learned Senior Counsel contended that the intention of the parties to refer the dispute to arbitration is manifest. It is further submitted that at the first instance, the respondent had taken a stand that there was no addendum. It is, therefore, submitted that the dispute between the parties is required to be referred for arbitration. In support of his submissions, reference has been made to the decisions of the Supreme Court in Vidya Drolia v. Durga Trading Corporation (2021) 2 SCC 11 and NTPC Limited v. SPML Infra Limited (2023) 9 SCC 385.

5. On the other hand, learned Senior Counsel for the respondent submitted that Clause 29 of the arbitration agreement cannot be construed as an arbitration clause as reference to arbitration under the clause is not mandatory. In support of his submission, reference has been made to Jagdish Chander v. Ramesh Chander (2007) 5 SCC 719, Mahanadi Coalfields Limited v. IVRCL AMR Joint Venture 2022 SCC OnLine SC 960 and the decisions of the High Courts of Bombay and Calcutta in Quick Heal Technologies Limited v. NCS Computech Private Limited 2020 SCC OnLine Bom 687 and BGM and M-RPL-JMCT (JV) v. Eastern Coalfields Limited 2024 SCC OnLine Cal 486 respectively.

6. I have considered the rival submissions and perused the record.

7. Before proceeding further, it is apposite to take note of Clause 2/3.36 of the Notice Inviting Tender, which is an arbitration clause, and the same is extracted below for the facility of reference:

2/3.36 Arbitration

All disputes and differences of any kind whatsoever arising out of or in connection with the Contract or carrying out of the Works (whether during the progress of the works or after their completion and whether before or after the termination, abandonment or breach of the Contract), any claims relating to the meaning of specifications, design, drawings and instruction herein before mentioned and so as to the quality of materials on workmanship used in the Works or as to any other question, claims, right, matter whatsoever arising out of or relating to this Contract be referred to in writing as a notice to be given to the Contractor as per relevant tender clause and amicably settled by the Contractor through friendly negotiations and mutual agreement. A written notice specifying the decisions shall be issued within 30 (thirty) days as per the relevant tender clauses by the Project Manager.

In case the matters referred to above in the immediately preceding Clause cannot be settled amicably and the Contractor be dissatisfied with the decisions given is above, either party (the Project Manager and the Contractor) may within 28 (twenty eight) days after receiving the notice of such decisions, give a written notice to other party through the Project Manager, requesting that such matters in dispute be Arbitrated upon. Such written notice shall specify clearly the matters which are in

dispute and such dispute or differences of which such written notice has been given, no other matters shall be entertained upon for the Arbitration.

The Arbitration shall be conducted by a Sole Arbitrator who shall be appointed on mutually agreeable basis by both parties (The Client and the Contractor) within 15 (fifteen) days of giving written notice as aforesaid in immediately preceding paragraph. In case a mutual agreement on appointing such an Arbitrator cannot be reached, both the Client and the Contractor shall appoint an Arbitrator of their choice and the two appointed Arbitrators shall further appoint a third Arbitrator, who shall act as Presiding Arbitrator. The proceedings of the Arbitration shall be in accordance with Arbitration & Conciliation Act, 1996 and Amendment 2015 or any amendments earlier or later to the Amendment 2015, if any, then in force. The venue of the Arbitration proceedings shall be Hyderabad and such Arbitration shall be held in English. However, Contractor will not stop the work during the pendency of the proceedings and shall ensure that such work is preceded uninterruptedly.

8. Clause 29 of the Addendum-01 is extracted below for the facility of reference:

29. Arbitration: (Clause No. 2/3.36)

The place of Arbitration shall be Hyderabad Jurisdiction and the language shall be English.

9. The existence of an arbitration agreement is a sine qua non for exercise of powers under Section 11 of the Arbitration and Conciliation Act. The principles as to what constitutes an arbitration agreement, as referred to in Section 7 of the Arbitration and Conciliation Act, has been dealt with in Jagdish Chander (supra). The Supreme Court in paragraph 8 has held as under:

8. This Court had occasion to refer to the attributes or essential elements of an arbitration agreement in K.K. Modi v. K.N. Modi [(1998) 3 SCC 573] , Bharat Bhushan Bansal v. U.P. Small Industries Corpn. Ltd. [(1999) 2 SCC 166] and Bihar State Mineral Development Corpn. v. Encon Builders (I) (P) Ltd. [(2003) 7 SCC 418] In State of Orissa v. Damodar Das [(1996) 2 SCC 216] 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. Thus, in view of the aforesaid enunciation of law, it is evident that the arbitration clause should mandatorily require the parties to refer the dispute to the arbitration.

10. I may advert to the facts of the case in hand. In the instant case, from a careful perusal of Clause 2/3.36 of the Notice Inviting Tender, it is evident that the aforesaid clause mandatorily requires the parties to resolve the disputes or differences by amicable settlement. In the event, the parties fail to amicably settle their disputes or differences, the clause provides that either party may within twenty eight days give a written notice through the Project Manager requesting that such matters in dispute be arbitrated upon. Thus, in the same clause the words “shall” and “may” have been used. The first part of the clause mandatorily requires the parties to resolve the disputes by amicable settlement, failing which either party may within twenty eight days give a written notice requesting that the matter in dispute be arbitrated upon. Thus, the aforesaid clause does not constitute a binding arbitration agreement.

11. In view of the preceding analysis, the arbitration application fails and is hereby dismissed.

Miscellaneous applications pending, if any, shall stand closed. However, there shall be no order as to costs.