IN THE HIGH COURT AT CALCUTTA
Ordinary Original Civil Jurisdiction
ORIGINAL SIDE
(Commercial Division)

Present :-

THE HON'BLE JUSTICE MOUSHUMI BHATTACHARYA

AP 745 of 2023

BGM and M-RPL-JMCT (JV)

Vs.

Eastern Coalfields Limited

For the petitioner	:	Mr. Debajyoti Basu, Adv. Mr. Diptomoy Talukdar, Adv. Mr. Dibyendu Ghosh, Adv. Ms. C. Chatterjee, Adv.
For the respondent	:	Mr. Debnath Ghosh, Adv. Mr. Sayed Nurul Arefin, Adv. Mr. Sayed M. Arefin, Adv. Ms. Rashmi Binayak, Adv.
Last Heard on	:	16.01.2024
Delivered on	:	19.01.2024

Moushumi Bhattacharya, J.

1. The petitioner prays for appointment of an arbitrator under section 11 of The Arbitration and Conciliation Act, 1996. The petitioner relies on clause 13 under the General Terms and Conditions of an e-tender notice dated 8.5.2019

issued by the respondent, Eastern Coalfields Limited (ECL) for removal and transportation of material for a project at Nakrakonda – Kumardih. Clause 13 of the General Terms and Conditions, appended to the e-tender notice, provides for settlement of disputes and contains, according to learned counsel appearing for the petitioner, the arbitration clause.

2. Counsel submits that disputes have arisen between the parties pursuant to the petitioner being engaged as the contractor for the work described in the e-tender notice. The dispute allegedly revolves around the parties disagreeing to changes made to the price component of the contract.

3. Learned counsel appearing for the respondent takes a point of maintainability of the present application on the ground that there is no arbitration agreement between the parties.

4. The argument on maintainability is required to be answered first.

5. Clause 13 of the General Terms and Conditions which forms part of the e-tender notice – and the crux of the dispute - is set out below :

> "*13. SETTLEMENT OF DISPUTES*
> *It is incumbent upon the contractor to avoid litigation and disputes during the course of execution. However, if such disputes take place between the contractor and the department, effort shall be made first to settle the disputes at the company level.*
>
> *The contractor should make request in writing to the Engineer-in-charge for settlement of such disputes/claims within 30 (thirty) days of arising of the cause of dispute/ claim failing which no disputes/ claims of the contractor shall be entertained by the company.*

Effort shall be made to resolve the dispute in two stages.

In first stage dispute shall be referred to Area CGM, GM. If difference still persist the dispute shall be referred to a committee constituted by the owner. The Committee shall have one member of the rank of Director of the company who shall be chairman of the company.

If differences till persist, the settlement of the dispute shall be resolved in the following manner:

In the event of any dispute or difference relating to the interpretation and application of the provisions of commercial contract(s) between Central Public Sector Enterprises (CPSEs)/Port Trusts inter se and also between CPSEs and Government Departments/Organizations (excluding disputes concerning railways, Income Tax, Customs & Excise Departments), such dispute or difference shall be taken up by either party for resolution through AMRCD as mentioned in DPE OM No. 4(1)/2013-DPE (GM)/FTS-1835 dated 22-05-2018.

In case of parties other than Govt. Agencies, the redressal of the dispute may be sought through ARBITRATION AND CONCILIATION ACT, 1996 as amended by AMENDMENT ACT OF 2015"

6. It is evident from the above clause that the parties to the contract were under an obligation to resolve the dispute in 2 stages if the parties were unable to settle the disputes at the company level of ECL. The 2 stages are enumerated in the clause itself and is not being repeated. The second part of the clause begins with *"In case of parties other than Govt. Agencies..."* and is relevant for the present application. The petitioner is a non-government entity.

7. The point which arises for consideration is whether the part of the clause containing the word "may" can be construed to be an arbitration agreement as contemplated under section 7 of the 1996 Act.

8. Section 7(1) defines an "arbitration agreement" to mean an agreement by the parties to submit disputes which have arisen between them in respect of a defined legal relationship to arbitration. The section includes non-contractual relationships. Section 7(2) envisages agreements which are embedded in the contract or in the form of a separate agreement and section 7(3) stipulates that the arbitration agreement must be in writing. Section 7(4) factors in 3 situations where the arbitration agreement will be accepted to be in writing and section 7(5) looks at arbitration agreements being incorporated by reference.

9. Section 7 underscores the unequivocal intent of the parties to go to arbitration by giving shape and form to the arbitration agreement and exit options to the parties under sub-sections (4) and (5) of section 7.

10. Presence of the word "may" in the arbitration clause in the matter at hand is required to be tested against mindset of the parties to the agreement. Parties consenting to arbitration including to the mode and mechanism of the procedure forms the mainstay of the 1996 Act.

Does "may" negate the existence of an arbitration agreement?

11. In *Jagdish Chander vs. Ramesh Chander; (2007) 5 SCC 719*, the Supreme Court set out 4 broad principles on what would constitute an arbitration agreement. These are :

i) The intent of the parties to enter into an arbitration agreement as discernible from the terms of the agreement;

ii) Absence of the words "arbitration" / "arbitral tribunal" would not be fatal to the existence of an arbitration clause if the clause has the attributes or the elements of an arbitration agreement;

iii) The clause must provide that the disputes shall be referred to arbitration in the event of disputes arising between the parties;

iv) Mere use of the words "arbitration" / "arbitrator" in a clause will not make it an arbitration agreement if the clause requires further consent of the parties for reference to arbitration.

12. *Jagdish Chander* masterfuly encapsulates the parameters of what constitutes an arbitration agreement and more important, the parties intention to arbitrate. The will to arbitrate must clearly be articulated in the arbitration clause. There is no room for any doubt or second-guessing. Parties must be clear in their minds that they wish to subject themselves to arbitration as the chosen mechanism of dispute resolution and ensure that the intention is expressed in writing in the form of the arbitration agreement.

13. The clarity of intention should hence be expressed through clear-cut words. Therefore, words such as

"the parties wish .....", or

"the parties will consider .....", or

"the parties will thereafter decide ...." and

"the parties may ....."

will be counter-productive to the unequivocality of the intention to arbitrate. The above instances are not exhaustive and may include other words which

give a sense of indecision, lack of purpose, prevarification or even saving the option for arbitration to a later date or as a last resort.

14. An arbitration agreement also does not sit comfortably with conditions attached for the parties to go to arbitration. The clause should not be subject to or conditional upon further or future events which may or may not occur.

15. In essence, there cannot be any *ifs* and *buts* or an undecided mumble; the parties must give a resounding "Yes" to arbitration. For a movement analogy; the arbitration agreement is not about a hesitant 1 step ahead – 2 steps backward / back-tracking but a confident 1–way stride forward to arbitration.

16. Section 11 of the 1996 Act is one of the earlier interventions by a Court on the presumption of the existence of an arbitration clause. The Court must hence ensure the existence of an arbitration agreement before flagging of the road to the award and beyond. The parties cannot set forth on the procedural journey if there is no arbitration agreement.

17. In the present case, the arbitration agreement muddies the waters with regard to the immediate and unequivocal reference of the dispute to arbitration. The word *"may"* in the relevant part of the clause gives an option to the parties to either refer the dispute to arbitration or hold back on the arbitration. The word *"may"* makes the clause conditional on a future event/s or to the other parts of the clause and gives the parties the option to resile from the clause. In other words, the clause creates a Hamlet-esque hand-on-the-

chin indecision and the Court is also left wondering as to what the parties actually intended in clause 13 of the agreement.

18. Besides, the absence of an arbitration agreement was urged by the respondent both before the Commercial Court at Asansol as well as before the Division Bench of this Court. In any event, absence of an arbitration clause is a fundamental threshold argument and should be made at the section 11 stage.

19. The Dispute Resolution Clause also makes it clear that the Clause is divided in 2 parts – The first part and the tiers thereof are relevant for government agencies and in any event does not refer to arbitration or have the trappings thereof. The second part applies to the petitioner as a non-government entity.

20. Although arbitration clauses differ in every case, the Supreme Court has clarified certain uniform trappings of a valid arbitration agreement. In *Food Corporation of India v. National Collateral Management Services Limited (NCMSL); (2020) 19 SCC 464*, the Supreme Court found a lack of finality in the arbitration clauses which envisaged reference of the dispute to the CMD of Food Corporation of India for "settlement". The concerned clauses also specifically mentioned that the parties understood the clause not to be an arbitration clause. In *Mahanadi Coalfields Ltd. v. IVRCL AMR Joint Venture; 2022 SCC OnLine SC 960*, the Supreme Court relied on *Jagdish Chander* and construed the relevant clause in the agreement not to be an arbitration agreement. The concerned clause before the Supreme Court also contained the word *"may"*. A learned Single Judge of the Bombay High Court in *Quick Heal*

Technologies Limited v. NCS Computech Private Limited; 2020 SCC OnLine Bom 693 noted the difference between the words "shall" and "may" and concluded that there was no clear intention of the parties to refer the dispute between them to arbitration. The Court, in fact, construed the words "shall" and "may" in the same clause and came to the aforesaid view. Another learned Single Judge of the Bombay High Court in *GTL Infrastructure Limited v. Vodafone Idea Limited (VIL); 2023 SCC OnLine Bom 39* construed the word "may" to contemplate a future possibility which would also involve discretion on the part of the parties whether to refer dispute the arbitration or not.

21. On the other hand, the decisions shown by counsel for the petitioner are not on the point of negation or dilution of the arbitration agreement by use of the word "may". *Enercon (India) Limited v. Enercon GMBH; (2014) 5 SCC 1* was on the unworkability of the arbitration clause which is different from the absence/non-existence of an arbitration clause. *Powertech World Wide Limited v. Delvin International General Trading LLC; (2012) 1 SCC 361* involved ambiguity in the language of the arbitration clause. The Supreme Court considered the decision in *Jagdish Chander* and referred to the correspondence between the parties and the intention emanating therefrom to refer the dispute to arbitration. In *Babanrao Rajaram Pund v. Samarth Builders and Developers; (2022) 9 SCC 691*, a Single Bench of the Supreme Court also referred to *Jagdish Chander* and opined that the arbitration clause before the Court was substantially different from the arbitration clause in *Jagdish Chander*. The Court noted use of the words *"shall be referred to arbitration …"* and relied on the recitals to the agreement to conclude that there was an unambiguous

intention of the parties at the time of the formation of the contract to refer the disputes to arbitration. *Visa International Limited v. Continental Resources (USA) Limited; (2009) 2 SCC 55*, was on the point of existence of a live issue which was capable of being referred to arbitration under section 11 of the 1996 Act. The Court was also of the view that the attending facts and circumstances were conducive to the existence of a valid arbitration agreement.

22. None of these decisions assist the petitioner. Unlike the present case, the arbitration clauses in the cases were not diluted by use of the word "may". There are also no attending circumstances in the present case by way of correspondence or otherwise which would show that the parties intended to refer the dispute to arbitration even if the clause says otherwise.

23. Despite the Court's finding on the absence of an arbitration agreement between the parties, it is important to record that clause 32 of the Instructions to Bidders which forms part of the e-tender document gives the option to an aggrieved party to approach the jurisdictional Court. Hence, the petitioner will not be rendered remedy-less. It is also important that contractors / parties engaging with public sector undertakings / Government Companies be made aware of the words used in the arbitration clause which have the effect of negating the arbitration agreement altogether. In many cases, the contractor does not have a say in the drafting of these clauses and it is hence all the more necessary for the parties to be put on notice and guard themselves against vague or uncertain dispute resolution clauses.

24. In view of the above finding – that Clause 13 under the General Terms and Conditions of the e-tender document does not constitute or contain an arbitration agreement – AP 745 of 2023 is dismissed on the ground of maintainability. There shall be no orders as to costs.

Urgent photostat certified copies of this judgment, if applied for, be supplied to the parties upon fulfillment of requisite formalities.

(**Moushumi Bhattacharya, J.**)