2023:BHC-OS:14919

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION
COMMERCIAL ARBITRATION APPLICATION (L) NO.38198 OF 2022

Shailesh Ranka and others … Applicants
Vs.
Windsor Machines Limited and another … Respondents

Ms. Rima Desai a/w. Mr. Rudra Deosthali i/b. Parinam Law Associates for Applicants.
Mr. Nausher Kohli a/w. Ms. Shruti Maniar, Ms. Sannaya Gandhy and Mr. Aniket Worlikar i/b. Solomon & Co. for Respondent No.1.
Mr. S. S. Panchpor for Respondent No.2.

CORAM : MANISH PITALE, J.
Reserved on : 18TH OCTOBER, 2023
Pronounced on: 19TH DECEMBER, 2023

ORDER :

In this application filed under Section 11 of the Arbitration and Conciliation Act, 1996 (Arbitration Act), respondent No.1 has raised two objections, claiming that if the two or any one of the objections is sustained, the application would have to be dismissed. The first objection raised on behalf of respondent No.1 is that, the procedure under the dispute resolution mechanism agreed between the parties, as part of an investment agreement, was not properly followed, inasmuch as the process of amicable resolution of disputes before neutral persons was not exhausted before arbitration was invoked by the applicants. The second objection is on the ground that, although the applicants and respondent No.2 formed a partnership in order to enter into the investment agreement with respondent No.1, the notice invoking arbitration was issued only on behalf of the applicants and that respondent No.2, despite being a partner, did not join in issuing the invocation notice. Even before this Court, respondent No.2 clearly expressed its intention of not supporting the applicants. By referring to

Section 19(2)(a) of the Indian Partnership Act, 1932 (Partnership Act) and certain judgements, the respondent No.1 has asserted that the invocation itself is defective and hence, the present application filed under Section 11 of the Arbitration Act cannot be entertained.

2. Before dealing with specific objections raised on behalf of respondent No.1, a brief reference to facts would be appropriate. The applicants and respondent No.2, collectively the partners of R-Cube Energy Storage Systems LLP (R-Cube Energy), entered into an investment agreement dated 02.02.2018 with respondent No.1 company. As per the agreement, the respondent No.1 was to invest a sum of Rs.16.5 crores towards development of technology obtained by R-Cube Energy from Fraunhofer Institute for Ceramic Technologies and Systems (Fraunhofer Institute).

3. It is the case of the applicants that although initial amount was invested by respondent No.1 in terms of the agreement, subsequently, the respondent No.1 defaulted. As a consequence, the applicants not only faced embarrassment in the market, but they also faced threats of legal action from the said Fraunhofer Institute for non-payment of certain amounts. In the application, copious reference has been made to the number of communications exchanged between the applicants and respondent No.1 in the backdrop of the disputes that arose between the parties. In this context, clause 24 of the investment agreement pertaining to dispute resolution assumed significance. It provided for an initial procedure for resolution of disputes before two neutral persons to be appointed by the parties and if the disputes were not resolved, arbitration could be invoked at the request of any of the parties to the dispute, by issuing written notice.

4. According to the applicants, the initial process of dispute resolution was put into motion by notice dated 20.05.2022. Thereafter,

the applicants appointed a neutral person as contemplated in clause 24.2.3 of the investment agreement and requested respondent No.1 company to appoint its neutral person for conducting dispute resolution meetings. On 29.06.2022, the applicant No.1 received an e-mail from a director of respondent No.1, accepting the nomination of the neutral person suggested by the applicants. But, according to the applicants, on one pretext or the other, respondent No.1 failed to take forward the aforesaid dispute resolution mechanism contemplated in the investment agreement.

5. According to the applicants, in this backdrop, they had no option but to issue a notice invoking arbitration as per clause 24.2.4 of the investment agreement. The said notice was issued on 20.08.2022.

6. On 19.09.2022, the respondent No.1 sent reply to the said notice and, *inter alia*, stated that since the notice invoking the arbitration was issued only on behalf of the applicants, to the exclusion of the other partner i.e. respondent No.2, it could not be said that the dispute resolution mechanism had been properly activated, and that therefore, the process of arbitration could certainly not go ahead. It was specifically stated that the initial procedure of dispute resolution before neutral persons ought to have been properly activated before seeking to invoke arbitration.

7. In this backdrop, the applicants filed the present application under Section 11(6) of the Arbitration Act, wherein the other partner i.e. KrishnaArya Tech Corp LLP was added as respondent No.2.

8. The respondents appeared through counsel. Respondent No.1 filed its reply to the present application and reiterated the aforementioned two objections to the prayer made in the present application. It was specifically stated that since respondent No.2,

although being a partner with the applicants, did not join in the appointment of neutral persons and even while invoking arbitration, the present application was premature in nature.

9. Ms. Rima Desai, learned counsel appearing for the applicants submitted that the communications exchanged between the parties in the backdrop of the disputes that arose between them, placed at exhibits C to BB, clearly indicate that arbitrable disputes had arisen and that the applicants had activated the dispute resolution mechanism before neutral persons, contemplated in the investment agreement. It was submitted that the applicants had even appointed their neutral person and they had called upon the respondent No.1 to appoint its neutral person to take the process forward. Yet, the respondent No.1 failed to take any steps in that regard, and therefore, it cannot be permitted to take benefit of its own wrong by claiming that the process of dispute resolution before neutral persons did not materialize. The first objection was refuted in this manner on behalf of the applicants.

10. The learned counsel for the applicants relied upon judgements of the Supreme Court in the case of *Visa International Limited Vs. Continental Resources (USA) Limited*, **(2009) 2 SCC 55**; *Demerara Distilleries Private Limited Vs. Demerara Distillers Limited*, **(2015) 13 SCC 610**; *Bharat Sanchar Nigam Limited Vs. Nortel Networks India Private Limited*, **(2021) 5 SCC 738**; and judgement of this Court in the case of *Rajiv Vyas Vs. Johnwin George Manavalan*, **2010 (6) Mh.L.J. 483**; as also the judgments of the Delhi High Court in the case of *Union of India Vs. Bharat Engineering Corporation*, **ILR (1977) II Delhi 57** and *M/s. Kuldeep Kumar Contractor Vs. Hindustan Prefab Limited*, **2023/DHC/001374**.

11. It was further submitted on behalf of the applicants that the second objection raised by the respondent No.1 also deserves to be

rejected, for the reason that the applicants had invoked arbitration, raising specific dispute with respondent No.1 and the invocation was on behalf of the entire partnership, which included respondent No.2 as a partner. It was submitted that arbitrable disputes had clearly arisen and the communications sent by respondent No.1 demonstrated admission on its part regarding its liability, thereby indicating that the parties ought to be sent to arbitration, in view of the specific arbitration clause existing in the investment agreement. It was submitted that the Courts are required to lean in favour of sending the parties to arbitration when a valid arbitration clause exists, arbitrable disputes have arisen and valid invocation of arbitration is clearly discernible from the documents on record. On this basis, it was submitted that the objections raised on behalf of respondent No.1 ought to be rejected and this Court may appoint a sole arbitrator for resolution of disputes between the parties.

12. On the other hand, Mr. Nausher Kohli, learned counsel appearing on behalf of respondent No.1 submitted that the aforesaid objections go to the very root of the matter and in the absence of a valid invocation of arbitration, the present application is premature and hence not maintainable. In support of the aforesaid proposition, the learned counsel appearing for respondent No.1 submitted that the elaborate procedure prescribed in clauses 24.2.1 to 24.2.3 was first required to be exhausted and only then, could the stage for invocation of arbitration arrive. He submitted that in the present case, amicable resolution of disputes between the parties before neutral persons had not taken place, as a consequence of which, the occasion to invoke arbitration had not arisen. He further emphasized that even the communication issued by the applicants appointing a neutral person was only on their behalf and that respondent No.2, despite being a partner of R-Cube Energy with the applicants, had not joined in issuing such a communication. Therefore, appointment of neutral person at the behest of only the applicants was a

stillborn exercise. He further submitted that in terms of such a dispute resolution clause indicating a two-tier mechanism, it was laid down that the agreed procedure is to be followed to the hilt. In support of the said proposition, learned counsel for respondent No.1 relied upon judgement of the Supreme Court in the case of *Iron & Steel Co. Ltd. Vs. Tiwari Road Lines*, **(2007) 5 SCC 703** and the judgment of this Court in the case of *Capacite Infraprojects Ltd. Vs. T. Bhimjyani Realty Pvt Ltd.*, **2023 SCC OnLine Bom 1657**, as also judgment of the Delhi High Court in the case of *National Highways Authority of India Vs. PATI-Bel (JV)*, **2019 SCC OnLine Del 6793**.

13. As regards the second objection, the learned counsel appearing for respondent No.1 submitted that the respondent No.2, being a partner of R-Cube Energy along with the applicants, at no stage, joined the applicants during the process of dispute resolution. Even before this Court, the respondent No.2 appeared through counsel and did not support the prayer made in the present application. In this backdrop, specific reliance was placed on Section 19(2)(a) of the Partnership Act to contend that the applicants alone could not have submitted the dispute relating to the business of the firm R-Cube Energy to arbitration, particularly when one of the partners i.e. respondent No.2 did not join them.

14. It was submitted that this constituted a statutory bar, which the applicants had not been able to surmount, while insisting on appointment of an arbitrator. Reliance was placed on judgment of this Court in the case of *Maharashtra State Electricity Distribution Company Limited (MSEDCL) Vs. Godrej and Boyce Manufacturing Company Limited*, **2019 SCC OnLine Bom 3920**, particularly paragraph 106 thereof. On this basis, the learned counsel for respondent No.1 submitted that the invocation notice itself was defective and hence

the present application ought not to be entertained by this Court.

15. Having heard the learned counsel for the rival parties, this Court is required to deliberate upon the rival submissions in the context of the aforesaid two objections raised on behalf of respondent No.1.

16. In the present case, in order to appreciate the rival submissions, it would be necessary to refer to the investment agreement dated 02.02.2018. A perusal of the same shows that the parties to the said agreement are R-Cube Energy, with the applicants and respondent No.2 being its partners on the one hand, and respondent No.1 on the other. The dispute resolution mechanism is specified in clause 24 of the said agreement, which reads as follows:-

> "**24. DISPUTE RESOLUTION**
>
> 24.1 All disputes and differences between the Parties arising out of or in connection with this Agreement or its performance shall, so far as it is possible, be settled amicably through consultation between representatives of the Parties.
>
> 24.2 In the event the dispute is not amicably resolved through consultation as set forth above, the following steps shall be adopted by the Parties:
>
> 24.2.1. The Managing Director of Investor (i.e. Mr. T S Rajan) and the representative of the Partners (i.e. Mr. Shailesh Ranka, Mr. Amarnath Chakradeo & Mr. Siddharth R Mayur) shall meet to resolve the dispute amicably within a period of 4 (four) weeks from the date of intimation of the dispute under Clause 23.2.
>
> 24.2.2. In the event the representatives of the Investor and Partners are unable to resolve the dispute within a period of 4 (four) weeks as stipulated above then there shall be a cooling period of 2 (two) weeks between the Parties.
>
> 24.2.3 In the event the Parties fail to resolve the dispute within the cooling period in the terms of the sub clause 23.2.2 above, then both the parties will appoint a neutral person each, and these two

persons will make a decision on the dispute, which will be final and binding on both the parties in the dispute.

24.2.4 In the event the persons appointed as per Clause 23.2.3 are unable to come to a reasonable settlement of the dispute, then the dispute shall be resolved through Arbitration in terms of Clause 23 of this Agreement.

24.3 If the Parties have failed to resolve the dispute under Clause 23.2, then such disputes or differences shall be submitted to final and binding arbitration at the request of any of the Parties to the dispute upon written notice to that effect to the other.

24.4 Such arbitration shall be in accordance with the provisions of the Arbitration and Conciliation Act, 1996, as amended from time to time and the seat and venue of the arbitration proceedings shall be Mumbai and all proceedings shall be conducted in English.

24.5 The arbitration panel shall consist of a sole arbitrator mutually appointed by the Parties within thirty (30) days of receipt of Arbitration Notice. In case of failure of the Parties to mutually appoint the sole arbitrator, then either Party shall be entitled to approach appropriate forum for appointment of sole Arbitrator.

24.6 Arbitration awards rendered shall be final and binding and shall not be appealable to the extent permitted by Applicable Law. Costs of the arbitrator shall be shared equally by the Parties unless otherwise awarded by the arbitrators. The arbitrator shall also have the power to award costs in relation to the matter being arbitrated. Until such award, each Party shall bear its own costs.

24.7 Nothing shall preclude any Party from seeking interim or permanent equitable or injunctive relief, or both from any court having jurisdiction to grant the same. The pursuit of equitable or injunctive relief shall not be a waiver of the duty of the Parties to pursue any remedy for monetary damages through the arbitration described in this Clause.

24.8 For all matters referable to a court pursuant to the provisions of the Arbitration and Conciliation Act, 1996, as amended from time to time, courts in Mumbai shall have exclusive jurisdiction."

17. A perusal of the above-quoted clause pertaining to dispute resolution in the investment agreement shows an elaborate procedure for resolution of disputes by first referring them to neutral persons, one each to be appointed by the parties and in case of failure of such procedure, arbitration could be invoked at the behest of any of the parties to the dispute upon a written notice being issued. Thus, there is a two-tier procedure prescribed under the aforesaid clause pertaining to dispute resolution.

18. Admittedly, disputes arose between the parties as the applicants alleged that while respondent No.1 did invest amounts initially, but thereafter, the said respondent failed to abide by its obligations under the investment agreement. The applicants have placed on record a number of written communications exchanged between the parties. It is significant that such communications were exchanged between applicant No.1 on the one hand and one of the directors of respondent No.1 on the other. Eventually, on 21.06.2022, the applicant No.1 sent an e-mail to respondent No.1 nominating a neutral person as contemplated in clause 24.2.3 of the investment agreement and further called upon respondent No.1 to attend a meeting on a specific date. In response to the same, on 29.06.2022, the executive director of respondent No.1 sent an e-mail to applicant No.1 suggesting a neutral location for the meeting. In this e-mail, it was specifically stated on behalf of respondent No.1 that the said respondent was presuming that the neutral person was appointed on behalf of the partners of R-Cube Energy i.e. the applicants (Ranka family) and the other partner - KrishnaArya Tech Corp LLP. It is significant that in the response e-mail dated 02.07.2022 sent by applicant No.1, while calling upon respondent No.1 to nominate its neutral person as per clause 24.2.3 of the investment agreement, the applicant No.1 specifically stated that the neutral person, already appointed, was on behalf of the Ranka family. This clearly indicates that

the remaining partner i.e. KrishnaArya Tech Corp LLP, had not joined the applicants in appointing the neutral person.

19. In this backdrop, on 20.08.2022, a notice invoking arbitration was issued to respondent No.1. It is significant that the said notice was also issued only on behalf of the applicants (Ranka family). Respondent No.2, despite being a partner of the partnership firm i.e. R-Cube Energy, did not join and the said notice was clearly not issued on behalf of the said KrishnaArya Tech Corp LLP. By such a notice, clause 24.2.4 of the investment agreement was invoked and the applicants even suggested the name of the sole arbitrator at Mumbai. It is interesting that on the same date, another notice was issued on behalf of the applicants (Ranka family) to even respondent No.2, invoking the said arbitration clause.

20. On 19.09.2022, the respondent No.1 sent response to the invocation notice and apart from denying the claims made on behalf of the applicants, specifically raised an objection on the basis of the invocation notice having been issued only on behalf of the applicants i.e. Ranka family, to the exclusion of one of the partners of R-Cube Energy i.e. KrishnaArya Tech Corp LLP. It was specifically stated that since the appointment of the neutral person was also defective, for the same reason, there was no question of invoking the arbitration as per the agreed dispute resolution mechanism found in clause 24 of the investment agreement.

21. As regards the first objection pertaining to the first tier of the dispute resolution mechanism being exhausted, the judgements relied upon, on behalf of the applicants noted at paragraph 10 hereinabove, do indicate that if there is elaborate exchange of communications between the parties, indicating attempts at negotiating settlements for resolution of disputes, the stipulation in a dispute resolution clause requiring such negotiations for settlement before invoking arbitration, can be said to

have been complied with. Although, in the judgements relied upon by respondent No.1 at paragraph 12 hereinabove, there is emphasis placed on the necessity to follow the mutually agreed process, this Court is of the opinion that in the facts of each case, the Court would have to reach a conclusion as to whether the mechanism contemplated in the dispute resolution clause executed between the parties prior to invocation of arbitration, has been satisfied or not.

22. This Court is of the opinion that on their part, the applicants had indeed appointed a neutral person in terms of clause 24.2.3 and they had also called upon respondent No.1 to appoint its neutral person. In response to the same, while stating that respondent No.1 was presuming appointment of the neutral person on behalf of all the partners of R-Cube Energy, respondent No.1 in turn did not appoint its own neutral person. In such a situation, respondent No.1 cannot be permitted to claim that the requirement of the dispute resolution mechanism in clause 24, prior to invocation of arbitration, had not been exhausted. Nothing prevented respondent No.1 from appointing its neutral person in terms of clause 24.2.3 of the investment agreement, as disputes had clearly arisen between the parties and a large number of communications had already been exchanged between them. Thus, the first objection raised on behalf of respondent No.1 cannot be accepted.

23. But, the aspect emphasized on behalf of respondent No.1 while raising the second objection, also casts a shadow on the aforesaid first objection raised on behalf of respondent No.1. In fact, the second objection really goes to the very root of the matter. It is specifically objected on behalf of respondent No.1 that in the absence of respondent No.2 - KrishnaArya Tech Corp LLP, a partner of R-Cube Energy, joining the applicants i.e. the other partners of the firm, while invoking the arbitration clause, the invocation itself was rendered defective and hence

the present application cannot be entertained.

24. Specific reliance is placed on Section 19(2)(a) of the Partnership Act in this context. The said provision reads as follows:-

> "**19. Implied authority of partner as agent of the firm.**-
>
> (1) Subject to the provisions of section 22, the act of a partner which is done to carry on, in the usual way, business of the kind carried on by the firm, binds the firm.
>
> The authority of a partner to bind the firm conferred by this section is called his "implied authority".
>
> (2) In the absence of any usage or custom of trade to the contrary, the implied authority of a partner does not empower him to-
>
> (a) submit a dispute relating to the business of the firm to arbitration,
>
> …
>
> "

25. A bare reading of Section 19(2)(a) of the Partnership Act shows that implied authority of a partner in a partnership firm does not empower such a partner to submit a dispute relating to the business of the firm, to arbitration. In other words, one set of partners cannot submit a dispute relating to business of the partnership firm to arbitration, in the absence of the other partners joining them.

26. This aspect came up for consideration before this Court in the case of **Maharashtra State Electricity Distribution Company Limited (MSEDCL) Vs. Godrej and Boyce Manufacturing Company Limited** *(supra)*. In the said case, in a petition arising out of Section 34 of the Arbitration Act, this Court considered a contention raised on behalf of the respondent in the arbitration proceeding that the claim had been filed by a lead partner and that the other partner had not joined the claim, while the claims were raised on behalf of the joint venture. In the absence of any express authority given by the other partner, this Court held that an implied authority could not be read into

the circumstances to submit a dispute relating to the business of the firm to arbitration. In this context, specific reference was made to the above-quoted Section 19(2)(a) of the Partnership Act. In paragraph 106 of the said judgement, this Court held that invocation of the arbitration agreement, in the absence of any express authority by the other partner and also the filing of statement of claim, was not maintainable. On this basis, it was held that the learned arbitrator ought to have held that the statement of claim filed in the individual capacity was not maintainable, and the claims ought to have been dismissed.

27. In the present case, the material on record demonstrates that applicant No.1, only on behalf of the applicants (Ranka family) before this Court, raised the disputes, pursued the same and even appointed the neutral person, without the concurrence of the other partner i.e. respondent No.2 - KrishnaArya Tech Corp LLP. In response to the appointment of the neutral person at the behest of the applicants, respondent No.1 had specifically responded by stating that it was presuming that the neutral person was appointed on behalf of the applicants as well as the other partner i.e. KrishnaArya Tech Corp LLP.

28. It is thereafter that the notice purportedly invoking arbitration was issued. A perusal of the same shows that it was issued only on behalf of the applicants (Ranka family) and that it was not issued on behalf of the other partner i.e. respondent No.2 - KrishnaArya Tech Corp LLP. The disputes were raised clearly in respect of the business of the partnership firm and therefore, the bar under Section 19(2)(a) of the Partnership Act comes into operation in the facts of the present case. The material on record also shows that such a notice purportedly invoking arbitration was addressed on behalf of the applicants to respondent No.2 also. It is not as if the applicants on the one hand and respondent No.2 on the other, as also respondent No.1 could be said to be distinct parties to the

investment agreement. A perusal of the investment agreement shows that while the partnership of the applicants and respondent No.2 i.e. R-Cube Energy was a party on the one hand, the respondent No.1 was the other party. Therefore, the dispute resolution mechanism provided in clause 24 of the investment agreement, which included the option of arbitration, was to be put into operation for disputes between the firm R-Cube Energy and respondent No.1.

29. Applying the aforesaid statutory provision i.e. Section 19(2)(a) of the Partnership Act in the light of the position of law clarified by this Court in the case of **Maharashtra State Electricity Distribution Company Limited (MSEDCL) Vs. Godrej and Boyce Manufacturing Company Limited** *(supra)*, the irresistible conclusion is that, the notice invoking arbitration in the present case was itself defective and such a notice could not have given rise to cause of action for filing of the present application under Section 11 of the Arbitration Act.

30. Hence, the contentions raised on behalf of respondent No.1 in this regard deserve to be accepted and consequently, the present application deserves to be dismissed. Accordingly, the application is dismissed.

(MANISH PITALE, J.)

Minal Parab