

OCD 7

ORDER SHEET
IA NO.GA-COM/2/2024
In
AP-COM/17/2023
IN THE HIGH COURT AT CALCUTTA
ORDINARY ORIGINAL CIVIL JURISDICTION
COMMERCIAL DIVISION

BANKAT GARODIA
VS
ADITYO PODDAR

BEFORE:

The Hon'ble JUSTICE SABYASACHI BHATTACHARYYA

Date: 6th December, 2024.

Appearance:
Mr. Sayantan Basu, Sr. Adv.
Ms. Saptamita Pramanick, Adv.
Mr. A. Mukherjee, Adv.
...for the recalling appellant

Mr. Shashwat Nayak, Adv.
Mr. K.N. Jana, Adv.
...for the respondent in recalling application

The Court: The present application is one for recall of an order dated August 30, 2024 passed by this Court in AP-COM/17/2023, which was an application filed under Section 11 of the Arbitration and Conciliation Act, 1996.

Learned senior counsel appearing for the petitioner urges three points on which the petitioner assails the said order in the present recall application:

- i) That the agreement-in-question did not contain a valid arbitration clause in the eye of law and as such, the reference under Section 11 of the 1996 Act could not have been made in the first place;
- ii) That there was a material suppression in the application under Section 11 inasmuch as the respondent herein (applicant in the Section 11 application) had averred that the present petitioner did not give any reply to the notice served by the applicant under Section 21 of the 1996 Act whereas a reply was actually given, which is annexed to the recall application itself; and
- iii) That the present petitioner was unrepresented on the date of passing of the order under recall and as such, the version of the present petitioner was never presented before the Court.

Learned senior counsel appearing for the petitioner cites, in support of his arguments, *Bihar State Mineral Development Corporation and Another vs. Encon Builders (I)(P) Ltd.* reported at (2003) 7 SCC 418, where the Supreme Court laid down the essential ingredients of an arbitration agreement. It is pointed out that, inter alia, such an agreement must contain reference to a present or a future difference in connection with some contemplated affair, an intention of the parties to settle such difference by a private tribunal and an agreement in writing by the parties to be bound by the decision tribunal. It was further held by the Supreme Court that although the term “arbitration” is not required to be specifically mentioned therein, a broad consensus between the parties that the

disputes and differences should be referred to a domestic tribunal must appear in the arbitration clause/agreement.

Learned senior counsel next cites a coordinate Bench judgment of this Court in the matter of *Blue Star Limited vs. Rahul Saraf* reported at 2023 SCC OnLine Cal 1406. In the said judgment, the learned Single Judge had held, inter alia, that mere mentioning of the terms 'arbitration' or 'arbitrator' in a heading or existence of these terms in a scattered manner in clauses of the agreement between the parties do not aggregate to being an arbitration agreement. There must exist a clear intention of the parties and a meeting of their minds to mandatorily submit any future dispute that may arise to arbitration. It was also held that such an intention should illuminate itself in the form of an explicit obligation that is binding between the parties and not merely a possibility that may materialize if the parties so decide after a fresh application of mind, post-facto occurrence of disputes.

It is, thus, contended that in the present case, in the absence of any valid arbitration clause, the reference to arbitration by the order under recall was bad in law and without jurisdiction.

Learned counsel appearing for the respondent herein (the applicant in the Section 11 application) contends that the present application is not maintainable in law and in its present form. It is argued that no recall application lies on the basis of the grounds taken in the present application. At best, the present petitioner might have filed a review application which having not been done, the present application is not maintainable in law.

Learned counsel next argues that while adjudicating an application under Section 11 of the 1996 Act, the limited charter of the Court is to ascertain whether there is a valid arbitration clause. However, a prima facie satisfaction on such count is sufficient.

It is next contended that insofar as the allegation that a reply was given to the Section 21 notice, no proof of service has been annexed to the recall application, thus belying the allegation that any such reply was given and suppressed. It is reiterated that no such reply was received by the applicant in the Section 11 application at any point of time.

It is also contended that even if it is assumed without admitting that there was such a reply, the reply annexed to the recall application does not indicate any denial to the existence of the arbitration clause but merely contains denials on the merits of the allegations. Hence, it is argued that the existence of the arbitration clause was never denied by the present petitioner in the first place.

Learned counsel for the respondent in the present recalling application cites *Asit Kumar Kar vs. State of West Bengal and Others* reported at (2009) 2 SCC 703 where the elements of a recall application were discussed by the Supreme Court. Drawing a distinction between a review petition and a recall petition, the Supreme Court observed that in the latter, the Court does not go into the merits but simply recalls an order which was passed without giving an opportunity of hearing to an affected party, whereas in a review petition the Court considers on merits whether there is an error apparent on the face of the record.

Learned counsel next cites *Budhia Swain and Others vs. Gopinath Deb and Others* reported at (1999) 4 SCC 396. In the said judgment, the contours of a recall application were discussed. The Supreme Court observed, inter alia, that Courts have inherent power to recall and set aside an order obtained by fraud practised upon the court, when the court is misled by a party or when the court itself commits a mistake which prejudices a party. A judgment rendered in ignorance of the fact that a necessary party had not been served at all and was shown as served or in ignorance of the fact that a necessary party had died and the estate was not represented would also be a sufficient ground for recall.

Learned counsel for the respondent in the recall application thereafter places reliance on *Aslam Ismail Khan Deshmukh vs. ASAP Fluids Pvt. Ltd. and Another* reported at 2024 SCC OnLine SC 3191. It was held by the Supreme Court in the said judgment that the referral court (under Section 11 of the 1996 Act) shall only examine the existence of a prima facie arbitration agreement and not other issues.

It is, thus, contended that in the present case, a sufficient prima facie case of existence of a valid arbitration clause was disclosed. It is the prima facie satisfaction of the Section 11 Court which matters, learned counsel for the respondent argues, and if there is any issue as to the existence of the arbitration clause, the same has to be urged before the arbitral tribunal itself within the scope of Section 16 of the 1996 Act.

In fine, it is argued that the present recall application is not maintainable and the Court, while taking up the said application, cannot review its own order since no such grounds have been made out justifying either a recall or a review.

Upon hearing learned counsel for the parties, a scrutiny of the relevant clauses of the agreement-in-question is deemed relevant.

Clause 21 of the agreement between the parties has the caption “Dispute Resolution and Arbitration”. Thereunder it is written “Subject to Kolkata Jurisdiction”.

Clause 22 is captioned as “Jurisdiction” and provides that “The jurisdiction of the Contract shall be exclusively at Kolkata and under courts of Kolkata.”

Learned senior counsel for the petitioner herein has placed much reliance on the said clauses to argue that those do not disclose a valid arbitration clause.

However, before going into the merits of such arguments, the contention as to maintainability of the present application is required to be decided.

The Supreme Court, in *Asit Kumar Kar* (supra) as well as *Budhia Swain and others* (supra), has set out the grounds available to a court to recall its order.

Although, if a strict view is taken, none of such grounds have been made out in the present case, yet a liberal approach is required to be taken to ascertain as to whether the court committed any mistake in the facts of the case. Two of the grounds which are available for recall are broadly touched in the present recall application. The first of such grounds is that the court was misled by a party and the second that hearing was not given to one of the parties. Hence, although the present application is not couched as such as a review application, I

decide to entertain the application instead of shutting out the arguments made by the petitioner at the outset.

Taking first things first, I find from the annexures to the recall application that the purported reply which was given by the present petitioner to the Section 21 notice did not dispute the very existence of the arbitration agreement. That apart, even if it is assumed that the same was actually served on the applicant in the Section 11 application, it is obvious that the very issuance of such reply and denial of reference to arbitration, on whatever grounds, is a refusal to the appointment of arbitrator, bringing the present case within the ambit of Section 11(4) and Section 11(6) of the 1996 Act which empowers the Section 11 court to take up an application under Section 11.

Insofar as the argument of Section 16 of the 1996 Act being the appropriate remedy and not a recall application is concerned, although the applicant in the application under Section 11 has made out a strong point there, yet the grounds taken in the present recall application touch even the prima facie satisfaction of the court sitting in jurisdiction under Section 11 of the 1996 Act since, if there was no valid arbitration clause patently disclosed in the agreement, there could not even be a prima facie satisfaction of the Section 11 Court.

In such context, the judgments cited by the present petitioner are required to be looked into. In *Blue Star Limited* (supra), the learned Single Judge proceeded on the premise that for a reference under Section 11, there has to be an intention or understanding between the parties which can be gleaned from the

agreement/clause which specifically and mandatorily requires a reference of future disputes to arbitration.

Although in the cited paragraphs, the learned Single Judge observed that mere mentioning of the terms 'arbitration' or 'arbitrator' in a heading or existence of these terms in a scattered manner in other clauses of the agreement do not aggregate to being an arbitration agreement, the context and perspective in which the said judgment was rendered has to be looked into for a proper appreciation of the proposition laid down therein.

The backdrop of the said case was that in Clause 7 and Clause 13 of the agreement in the said case, it was merely recorded that in case of any dispute or difference or pendency of any litigation or arbitration proceedings between the parties to the agreement relating to the terms and conditions of the agreement, the modalities as stated therein would follow. In such context, the learned Single Judge observed that the said clauses merely envisaged a situation where there had already been a reference of a dispute or difference to arbitration but did not contain any specific clause which mandated the parties to refer the disputes to arbitration.

In such perspective, it was observed by the Court that a mere possibility of there being a reference to arbitration, if left open, left the matter to the choice of the parties, to be exercised post-facto after the disputes having arisen. Thus, it could not be said that the parties had agreed to mandatorily refer the matter to arbitration.

The context of the present case, however, is different. Here it is not a case of distinction between a clause which keeps open an option to the parties to refer the disputes to arbitration as opposed to a mandatory clause to refer such disputes to arbitration.

Rather, Clauses 21 and 22 of the agreement between the parties in the instant *lis* clearly denote that those contemplate “Dispute Resolution and Arbitration” which would be subject to Kolkata jurisdiction. Thus, the dichotomy between an option being kept open to the parties to go to arbitration and a mandatory stipulation in that regard is not applicable in the present case at all. Hence, the backdrop in which the referred report was rendered is not available to the parties in the present case. Clause 21 envisages in clear terms “Dispute Resolution and Arbitration”, thereby indicating the intention of the parties, at least *prima facie*, to choose arbitration as the chosen mode of dispute resolution in respect of the agreement.

In *Bihar State Mineral Development Corporation* (supra), the Supreme Court was considering the elements of an arbitration agreement within the contemplation of Section 7 of the 1996 Act. It was observed, *inter alia*, that although the term ‘arbitration’ is not required to be specifically mentioned, the intention of the parties to refer a present or a future difference in connection with some contemplated affair and to settle such difference by a private tribunal have to be borne out by the arbitration agreement/clause.

A careful perusal of the relevant clauses in the present agreement shows that Clause 21 clearly stipulates that the same pertains to Dispute Resolution

and Arbitration. The use of the expression 'arbitration' clearly indicates that the parties intended to refer the disputes to arbitration as the chosen alternative dispute resolution mode. Immediately underneath the said caption, it is stated in Clause 21 that such Dispute Resolution and Arbitration shall be "Subject to Kolkata Jurisdiction." It may be noted that instead of restricting the scope of the referable disputes by using specific words such as disputes relating to particular components of the agreement, Clause 21 is of wide amplitude and threw the scope of reference wide open. The expression "dispute" is as wide as possible since it does not restrict the parties to differences arising out of particular facets of disputes arising out of the agreement but speaks about a blanket reference to arbitration in case of any dispute relating to or arising out of the agreement-in-question. Thus, Clause 21 amply caters to the "prima facie satisfaction" element which is the root of the jurisdiction of the Section 11 Court. Hence, on a bare perusal of Clause 21 and Clause 22 (which is the jurisdiction clause confining the jurisdiction exclusively to courts at Kolkata), it cannot be said that the prima facie satisfaction arrived at by the Section 11 Court was patently bad in law or an error apparent on the face of the record.

In fact, the respondent is justifying in arguing that in the event the present petitioner has a grievance regarding the arbitrability or regarding the validity of the arbitration clause, it is always open for it to approach the Arbitral Tribunal itself under Section 16 of the 1996 Act. However, the arguments on merits on the said subject do not afford opportunity to the parties or the court to recall or review the order passed under Section 11 of the said Act.

Regarding the absence of the present petitioner, which was the respondent in the Section 11 application, on the relevant date when the order under recall was passed, the same cannot be a good ground for recall of the order, since it is evident from the record that notice of the pendency of the application was given to the present petitioner. In fact, in the recall application, it is admitted that the present petitioner did have notice of the pendency of the Section 11 application. It has been pleaded that the learned advocate for the present petitioner could not, by reason of illness, attend the Court on the said date.

The proposition of Natural Justice that “hearing” has to be given to both parties, in effect, contemplates not necessarily an actual hearing but denotes an opportunity of hearing. In the present case, since sufficient opportunity of hearing was given to the petitioner and the petitioner was served with the notice of pendency of the Section 11 application, I do not find any reason to recall the order-in-question on such ground.

As to the alleged suppression of the reply given to the Section 21 notice, even if it is assumed that the said reply was received by the applicant in the Section 11 application, the same, even if disclose at the relevant juncture, would not change the outcome of the Section 11 application. In fact, it was observed by the Court in the order under recall that in the absence of any reply on the part of the present petitioner, it would be assumed that the present petitioner did not agree to a reference. The reply, as annexed to the recall application, further bolsters such stand, since from the reply it is evident that the present petitioner squarely denies such reference, on whatever grounds. As such, the said non-

disclosure, even if any, cannot be termed as a “suppression” sufficient to be elevated to the level of a fraud practised on the Court.

In view of the above discussions, I am of the opinion that no case of either recall or review of the order of this Court, appointing an Arbitrator and referring the dispute between the parties to arbitration, has been made out.

Accordingly, IA No.GA-COM/2/2024 is dismissed on contest without, however, any order as to costs.

(SABYASACHI BHATTACHARYYA, J.)