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\* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

**Date of Decision: 28<sup>th</sup> September, 2021**

+ **ARB.P. 558/2020**

M/S UNIVERSAL DESIGN BUILD

..... Petitioner

Through: Mr. Aditya Singh Deshwal, Advocate.

versus

DEALSKART ONLINE SERVICES PRIVATE LIMITED & ORS.

..... Respondents

Through: Mr. Amit Bajaj, Advocate.

**CORAM:**

**HON'BLE MR. JUSTICE SANJEEV NARULA**

**JUDGMENT**

**SANJEEV NARULA (Oral):**

1. The present petition under Section 11 of the Arbitration and Conciliation Act, 1996 [*hereinafter referred to as 'the Act'*] seeks appointment of a Sole Arbitrator for adjudication of disputes arising from a Service Agreement dated 26<sup>th</sup> February, 2019 [*hereinafter referred to as 'the Agreement'*].

2. The arbitration clause thereunder reads as follows:

***"19. Venue: Jurisdiction and Choice of Law***

*This Agreement and all rights, duties and obligations arising hereunder shall be governed in accordance with the laws of India. Subject to Section 20 sub-section (b) (Arbitration), any dispute, disagreement or proceeding arising under or related to this Agreement shall be subject to the exclusive jurisdiction of the courts at New Delhi, India."*

3. The existence of the Agreement is not in dispute. However, the primary, and in fact the only contention of the Respondents, is that clause 19

above is being misconstrued by the Petitioner to maintain this petition; there is, in fact, no arbitration agreement between the parties.

4. The Petitioner, controverting the objection of the Respondents, contends that the intent of the parties to resort to arbitration can be gathered from the language of clause 19. Stress is laid on the term “(Arbitration)” contained in the afore-noted clause, to argue that this is sufficient for the court to assume that there is an understanding between the parties to refer their disputes to arbitration, as the Act does not prescribe a particular format in which an arbitration agreement should be worded.

5. The court has heard the contentions of the parties. It is no longer *res integra* that if this court, upon examining the arbitration agreement, finds it to be invalid, it can decline entertaining a petition under Section 11(6) of the Act for appointing an Arbitrator, as the existence of an arbitration agreement is a pre-condition to make a reference. This question, has to be decided in the proceedings under Section 11 of the Act as held by the Supreme Court in *Wellington Associates Ltd. v. Kirit Mehta*.<sup>1</sup> The relevant portion of the said judgment reads as under:

*“18. Thus, unless the document filed by the party before the Chief Justice of India or his designate is an 'arbitration agreement' as defined in Section 7 as explained above, requiring a reference in a mandatory sense, no reference, in my view, can be made to the arbitral tribunal. It is, as already stated, indeed implicit - if an objection is raised by the respondent before the Chief Justice of India or his designate that the so called arbitration clause is not an arbitration clause at all falling within Section 7 - that such a question will have to be decided in the proceedings under Section 11 of the Act. Therefore the contention raised by the learned Counsel for the petitioner that the question - whether Clause 5 of the agreement amounts to*

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<sup>1</sup> (2000) 4 SCC 272.

*an arbitration clause - is to be decided only by the arbitral tribunal is liable to be rejected.”*

6. Although the word ‘*Arbitration*’ indeed finds a mention in clause 19, but upon a reading of the clause as a whole, it is clear that it lacks the necessary ingredients to constitute a valid arbitration agreement under Section 7 of the Act. The intention to arbitrate has to be manifest from the arbitration agreement itself, which is not discernible in the instant case. When we carefully look at the clause under the heading “*Venue: Jurisdiction and Choice of Law*”, we can easily notice that it is separated into two parts. The first part deals with choice of law – it provides that all rights, duties and obligations of the parties arising under the Agreement shall be governed in accordance with the laws of India. Thereafter, it stipulates that exclusive jurisdiction in respect of any dispute, disagreement or proceedings arising under or related to this Agreement shall, “*subject to Section 20 sub-section (b) (Arbitration)*” be conferred upon the courts at New Delhi. This part of the clause finds mention of the word ‘*Arbitration*’, which creates the present ambiguity.

7. It is noted that the word ‘*arbitration*’ is preceded with a reference to “*Section 20 sub-section (b)*”. Interestingly, there is no such Section 20 sub-section (b) in the Arbitration and Conciliation Act, 1996. One could postulate that, due to an inadvertent typographical error, reference is to sub-section 2 of Section 20 of the Act, which deals with the place of arbitration. This sub-section provides that the same may be determined by the arbitral tribunal. Thus, it’s mention in clause 19 does not make much of a difference. There is yet another hypothesis. On a closer perusal, it seems that since the

clause relates to jurisdiction, among others, the reference could also perhaps be to Section 20(b) of the Code of Civil Procedure, 1908 (CPC) which deals with the jurisdiction of the court. If read in that light, clause 19 would make more logical sense as it seeks to confer exclusive jurisdiction on the courts in Delhi.

8. Be that as it may, even if we were to ignore the phrase “*Section 20 sub-section (b)*’ and assume that ‘*subject to ...(Arbitration)*’ refers to the entire Arbitration and Conciliation Act, 1996; that would merely mean that the Agreement is governed, controlled, effected by, or subservient to the Act; which would still not indicate that the parties intended for their disputes to be referred to and adjudicated by an arbitral tribunal, as is sought to be canvassed by the Petitioner.

9. Further, even clause 19, in its entirety, does not render it to be an arbitration agreement between the parties. It merely confers exclusive jurisdiction to the courts of New Delhi for disputes arising out of the Agreement. However, for the Arbitration and Conciliation Act, 1996 to apply, the parties have to necessarily enter into an arbitration agreement, and such arbitration agreement has to be in terms of the criteria laid out in Section 7 of the Act. Section 7(1) defines an ‘arbitration agreement’ as “*an agreement by the parties to submit to 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.*” Unless such pre-requisites are met, there cannot be any binding reference to arbitration.

10. There is no dispute regarding the proposition advanced by the Petitioner that the Act does not prescribe a particular format of an arbitration agreement. There is also no doubt that a mere lack of the words ‘arbitrator’ or ‘arbitration’ cannot render a purported arbitration clause to be invalid, however, at the same time, a mere mention of the said words would not *ipso facto* lead to the conclusion that a given clause is a valid arbitration agreement. From the Agreement, as well as other circumstances or material shown to it, the court has to infer the understanding between the parties which would indicate an agreement to arbitrate.

11. The Petitioner has relied upon the judgment of this court in ***SMS Ltd. v. South Delhi Municipal Corporation***.<sup>2</sup> In the said case, while relying upon the earlier judgments of the Supreme Court in ***K.K. Modi v. K.N. Modi***,<sup>3</sup> and ***Bihar State Mineral Development Corporation v. Encon Builders (I.) (P.) Ltd.***,<sup>4</sup> this court observed as under:

“18. In ***K.K. Modi v. K.N. Modi***, (1998) 3 SCC 573, the Supreme Court explained what the attributes of an arbitration agreement were, as under:

"(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

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<sup>2</sup> Judgment dated 9<sup>th</sup> March, 2017 in Arb. P. 793/2016.

<sup>3</sup> (1998) 3 SCC 573.

<sup>4</sup> 2003 (7) SCC 418.

*dispute which is already formulated at the time when a reference is made to the tribunal."*

19. *In Bihar State Mineral Development Corporation v. Encon Builders (I) (P) Ltd., 2003 (7) SCC 418, the four essential elements for an arbitration agreement were identified as under:*

*"(i) There must be a present or a future difference in connection with some contemplated affair;*

*(ii) There must be the intention of the parties to settle such difference by a private tribunal;*

*(iii) The parties must agree in writing to be bound by the decision of such tribunal; and*

*(iv) The parties must be ad idem."*

12. This court is indeed guided by the principles enshrined in the above judgments. The essential elements noted above are materially absent from the wording of clause 19. Moreover, it is also noted that one of aspects highlighted by the Supreme Court in *Encon Builders (supra)* was that the intention of the parties to settle their difference by a private tribunal, whereas in the present case, a contrary intent of reference of disputes to courts of law is made instead.

13. In summation, this court is unable to affirm the existence of a valid arbitration agreement between the parties. In the absence of the same, the requirement under Section 7 is not fulfilled, and thus the Court does not find any merit in the present petition under Section 11(6). Accordingly, the same is dismissed.

**SANJEEV NARULA, J**

**SEPTEMBER 28, 2021/nd**

*(corrected and released on 3<sup>rd</sup> October, 2021)*