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

Date of Decision: 08.03.2021

\+ ARB.P. 550/2020

HOYA MEDICAL INDIA PVT. LTD. ..... Petitioner

Through: Mr. Tushar Agarwal, Advocate.

versus

EVEREST VISION ..... Respondent

Through: Mr. Arijit Bardhan with Mr. Siddharth Chowdhury, Advocates.

CORAM:
HON'BLE MR. JUSTICE SANJEEV NARULA

JUDGMENT

[VIA VIDEO CONFERENCING]

SANJEEV NARULA, J. (ORAL):

1. The present petition under Section 11(6) of the Arbitration and Conciliation Act, 1996 [*hereinafter*, "***the Act***"] seeks appointment of a Sole Arbitrator for adjudication of the disputes that have arisen between the parties.

2. Briefly put, the parties entered into a Distributorship Agreement dated 1st May, 2018, wherein the Respondent agreed to purchase various products relating to medical services. Subsequently, a fresh Distributorship Agreement was executed on 15th November, 2019, which was effective retrospectively from 1st April, 2019. Later, two addendums were also

executed, effective from 1st May, 2019 and 19th August, 2019 respectively. It is the case of the Petitioner that, in terms of the aforesaid agreements between the parties, several invoices raised by the Petitioner against supplies made, are outstanding. Petitioner also contends that besides the outstanding overdue amount of the invoices, the Respondent is also liable to pay interest thereon. The Petitioner invoked arbitration agreement *vide* letter dated 22nd July, 2020, in accordance with Clause/Article 14 of the Distributorship Agreement dated 15th November, 2019, and suggested the names of the Arbitrators, however, the Respondent disagreed with the said proposal. In this background, the Petitioner has sought appointment of a Sole Arbitrator.

3. The Court has heard the learned counsels for the parties. The Arbitration Agreement between the parties, contained in Clause 14 of the Distributorship Agreement dated 15th November, 2019, reads as under: -

> *"14.1 This Agreement and all acts and transactions pursuant hereto and the rights and obligations of the parties hereto shall be governed, construed and interpreted in accordance with the laws of Republic of India, without reference to conflict of laws principles and shall be subject to the jurisdiction of courts in Delhi. This Agreement shall not be governed by the United Nations Convention on Contracts for the International Sale of Goods.*
>
> *(a) In the event of any dispute or difference arising between the Parties in connection with this Agreement, representatives shall within thirty (30) days of a written request from either Party to the other, meet in good faith effort to resolve the dispute without recourse to legal proceedings. Failure to comply with this clause shall be deemed to be a breach of this Agreement.*
>
> *(b)* ***if the dispute or difference is not resolved as a result of such a meeting, either Party may at such meeting or within thirty (30) days from its conclusion propose to the other in writing that such a dispute or difference shall be referred to and finally***

resolved by arbitration *in accordance with the provisions of* ***Indian Arbitration and Conciliation Act, 1996*** *and the rules framed thereunder (the 'Arbitration Act') for the time being in force which rules shall be deemed to be incorporated by reference into this clause. The arbitration shall be conducted in English in New Delhi, India.*

(c) Notwithstanding anything to the contrary, either Party may apply to any court of competent jurisdiction for interim injunctive relief with respect to irreparable harm which cannot be avoided and/or compensated by such arbitration proceedings, without breach of the provisions of this Article 14, and without any abridgment of the powers of the arbitrators." (Emphasis supplied)

4. The learned counsel for the Respondent does not dispute the existence of the Distributorship Agreement; however, he submits that the arbitration clause reproduced above, does not constitute an Arbitration Agreement. He submits that the afore-noted clause uses the expression *"propose to the other in writing"*, which makes the reference to arbitration optional. As arbitration clause does not make it mandatory for the parties to resort to arbitration mechanism, it does not constitute an Arbitration Agreement as defined in Section 7 of the Act. In support of his submissions, he relies upon the judgment of the Supreme Court in ***Jagdish Chander v. Ramesh Chander***, [1](2007) 5 SCC 719.

5. In the opinion of the Court, the objection of the Respondent is devoid of merit. The judgment relied upon by the Respondent is being misinterpreted. The factual situation *viz*. the arbitration clause in ***Jagdish Chander*** *(supra)* was entirely different, and in that context, it was observed as under: -

[1](2007) 5 SCC 719

"9. Para 16 of the Partnership deed provides that if there is any dispute touching the partnership arising between the partners, the same shall be mutually decided by the parties or shall be referred to arbitration if the parties so determine. If the clause had merely said that in the event of disputes arising between the parties, they "shall be referred to arbitration", it would have been an arbitration agreement. But the use of the words "shall be referred for arbitration if the parties so determine" completely changes the complexion of the provision. The expression "determine" indicates that the parties are required to reach a decision by application of mind. Therefore, when clause 16 uses the words "the dispute shall be referred for arbitration if the parties so determine", it means that it is not an arbitration agreement but a provision which enables arbitration only if the parties mutually decide after due consideration as to whether the disputes should be referred to arbitration or not. In effect, the clause requires the consent of parties before the disputes can be referred to arbitration. The main attribute of an arbitration agreement, namely, consensus ad idem to refer the disputes to arbitration is missing in clause 16 relating to settlement of disputes. Therefore it is not an arbitration agreement, as defined under section 7 of the Act. In the absence of an arbitration agreement, the question of exercising power under section 11 of the Act to appoint an Arbitrator does not arise."

6. Furthermore, the Petitioner is conveniently ignoring the principles for interpretation of an arbitration clause/agreement as laid down in ***Jagdish Chander*** *(supra)*. The same reads as follows:

"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, Bharat Bhushan Bansal v. U.P. Small Industries Corpn. Ltd. *and* Bihar State Mineral Development Corpn. V. Encon Builders (I) (P) Ltd. *In* State of Orissa v. Damodar Das *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 excludes 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.

(Emphasis supplied)

7. Now, coming to the facts in the instant case. Here, the parties have unanimously agreed that in the event of disputes, when differences are not being resolved in the meeting between the parties, the sole remedy is by way of arbitration. The arbitration clause expressly and unambiguously spells out the main attribute of an arbitration agreement – i.e., *consensus ad idem* of the parties to enter into such an agreement and opt for arbitration as the chosen dispute resolution mechanism. The Respondent is laying undue emphasis on the words *"propose to the other"* and completely overlooking the expressions *"shall be referred to"* and *"finally resolved by arbitration"* which occur simultaneously. As the choice of wording is *"shall"* and not *"may"*, it must be assumed that parties chose the said word to provide a clear indication of their intent to make arbitration mandatory. The expression "*may*" in conjunction with *"propose"* is an enabling provision/expression,

and postulates that either party has the option to invoke the arbitration mechanism. From the expressions used in the clause, it is clearly indicated that the parties have agreed to the alternate dispute resolution mechanism of arbitration for settlement of their disputes. For such reasons, no fresh consent is required to be obtained from the other party at the stage of invocation. The only consent required is for mutually agreed appointment of the Arbitral Tribunal, which, as noted in the facts above, was not approved by the Respondent. In the opinion of this Court, as the afore-noted clause has all the elements of an arbitration agreement, and mandates the reference to arbitration mechanism, the chosen mode by the parties for dispute resolution is undoubtedly through arbitration itself. The parties were *ad idem* to resolve their disputes by way of arbitration; the arbitration clause between the parties is binding; and thus the Petitioner was entitled to invoke the arbitration agreement. The fact that disputes and differences have indeed not been resolved is not an issue before the Court, and therefore, the invocation of the arbitration clause by the Petitioner, the aggrieved party, is completely in consonance with the contractual understanding between the parties.

8. Accordingly, it manifest that parties have agreed to a specific procedure for settlement of all the disputes between them under the Agreement, i.e., they have agreed to amicably resolve/ settle all their disputes by discussion, and if the disputes are not amicably settled, then within 30 days, they shall be referred to Arbitration as set out in sub-clause (b) of Clause 14.1, at the option of the aggrieved party. Therefore, the present petition deserves to be allowed.

9. In view of the above, Mr. D.K. Saini (Retd.), Additional District Judge and Sessions Judge [+91 9312627187] is appointed as the Sole Arbitrator to adjudicate the dispute that have arisen between the parties.

10. The parties are directed to appear before the learned Arbitrator as and when notified. This is subject to the Arbitrator making the necessary disclosure under Section 12(1) of the Act and not being ineligible under Section 12(5) of the Act.

11. The learned Arbitrator will be paid his fee in terms of the provisions of the Fourth Schedule appended to the Act.

SANJEEV NARULA, J

MARCH 8, 2021/*nd*