$~6 (2020)

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

Date of Decision: 26th July, 2021

\+ ARB. P. 488/2020

ASHWANI KUMAR ..... Petitioner

Through: Mr. Sparsh Goyal, Adv.

versus

SCRAFT PRODUCTS PVT. LTD. ..... Respondents

Through: Mr. Ajay Kohli, Ms. Priyanka Ghorawat and Ms. Saloni Jain, 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 in respect of disputes arising from a Memorandum of Understanding dated 3rd January, 2018, containing an ambiguously-worded Arbitration Agreement in Clause F, which reads as follows:

> *"F. In case of any dispute in execution of the assignments as agreed above, the matter may be referred to an arbitrator in whom both have faith, or go with legal proceedings as per related to the subject shall be with the jurisdiction of Delhi court."* [sic; Emphasis supplied]

2. The use of 'may' in conjugation with reference to arbitration, has given rise to the conundrum before this Court. Is this clause a binding agreement

to arbitrate? This is the primary contention before this Court. But before we go into the same, it would be apposite to briefly record a few essential facts of the case, which are as follows:

2.1. Petitioner (a loan consultant) [*hereinafter referred to as '**AK**'*] and Respondent (its client) [*hereinafter referred to as '**Scraft**'*] entered into an MOU/Agreement dated 03rd January, 2018, whereunder Scraft agreed to pay consultancy charges to AK @ 5% of the loan amount sanctioned to it.

2.2. Due to AK's efforts, Scraft was sanctioned a loan to the tune of Rs. 12 crores from Kotak Mahindra Bank on 24th April, 2018.

2.3. A Fee Refund Agreement was executed between the parties on 25th April, 2018, whereunder, out of the agreed consultation fee of Rs. 60 lakhs, Scraft paid Rs. 5 lakhs as advance to AK. This agreement also contained a nearly-identical Arbitration clause, which is reproduced below:

> "*5. In case of any dispute in execution of the assignments as agreed above, the matter may be referred to an arbitrator in whom both have faith, or go with legal proceedings as per jurisdiction of Delhi Court.*"

2.4. On 24th September, 2018, Scraft wrote to Kotak Mahindra Bank seeking cancellation of the loan processed in its favour. After some time, AK was informed that Scraft had cancelled the loan and got it re-sanctioned on the same papers/files that were prepared by AK.

2.5. Upon Scraft's failure to pay full consultancy charges to AK, a legal notice was issued on 15th May, 2019 demanding outstanding dues of Rs. 53 lakhs. Scraft, in its reply dated 28th May, 2019 contended that AK had failed to arrange for the financial facility to the satisfaction of Scraft; parties had mutually rescinded the MOU/Agreement dated 3rd March, 2018; and hence, no monies were due from Scraft to AK.

2.6. On 16th June, 2019, AK sent a notice intimating the appointment of Mr. Pravesh Kumar Trehan, Advocate, as the Sole Arbitrator. The arbitration proceedings commenced; Statements of Claim and Defence were filed. Later, Scraft moved this Court seeking quashing of the mandate of the learned Arbitrator on account of unilateral appointment by AK.[1] Coordinate Bench of this Court, *vide* order dated 21st August, 2020, with the consent of AK, quashed the appointment made under the arbitration clause provided in the Fee Refund Agreement, granting him liberty to approach the Court for fresh appointment under Section 11 (6) of the Act. The question as to whether there is a valid arbitration agreement between the parties was left open, in the following words:

> "7. *It is clarified that this order will not come in the way of the respondent approaching the High Court under Section 11 of the Arbitration Act for appointment of an Arbitrator. However, this would be without prejudice to the stand of the petitioner that the above referred arbitration clause does not amount to an arbitration agreement under the Arbitration Act and no reference to arbitration can be made.*"
>
> [Emphasis supplied]

3. Now, Scraft opposes the instant petition on the grounds that: [i] Clause F of the MOU is not a firm/mandatory/binding Arbitration Clause as there is

[1] CM(M) 378/2020 titled *Scraft Products Pvt. Ltd. v. Ashwini Kumar & Anr.*

no obligation to go to Arbitration; and [ii] a mere possibility of parties agreeing to arbitrate in the future, does not constitute a valid arbitration agreement. In support of this proposition, Scraft relies upon the following judgments:

i. ***Jyoti Brothers v. Sree Durga Mining Company***;[2]
ii. ***Wellington Associates Ltd. v. Kirit Mehta***;[3]
iii. ***Jagdish Chander v. Ramesh Chander & Ors***.;[4]
iv. ***Linde Heavy Truck Division Ltd. v. Container Corporation of India Ltd. & Anr***.;[5]
v. ***Avant Garde Clean Room & Engg Solutions Pvt. Ltd. v. Ind Swift Limited***;[6]

4. Countering the above submissions, AK relies upon the judgment in ***Vidya Drolia v. Durga Trading Corporation***,[7] as well as ***Pravin Electricals Pvt. Ltd. v. Galaxy Infra and Engg. Pvt. Ltd.***,[8] to contend that the question of existence of Arbitration Agreement should be left for the Arbitrator, to be decided as a preliminary issue.

Analysis

5. The Court has heard the counsels for the parties at considerable length. With the tribunal being competent to determine the question of validity of an arbitration agreement under the doctrine of *kompetenz-kompetenz*, minimal

[2] 1956 SCC OnLine Cal 188.
[3] (2000) 4 SCC 272.
[4] (2007) S SCC 719.
[5] 2012 SCC OnLine Del 5434.
[6] 2014 SCC OnLine Del 3219.
[7] (2021) 2 SCC 1.
[8] 2021 SCC OnLine SC 190.

judicial intervention is favoured at the pre-arbitral stage. Nevertheless, in cases where no arbitration agreement is perceivable, the Court can decline to refer the parties to arbitration.

6. On this issue, a three-judge bench of the Supreme Court in ***Mayavati Trading Private Limited v. Pradyuat Deb Burman***,[9] upon considering the 246th Law Commission Report (2014), the Statement of Objects and Reasons of the 2015 Amendment to the Act, as well as its own earlier judgments, held that the Court's power under Section 11(6A) is confined to the examination of the existence of an arbitration agreement and is to be understood in a narrow sense. The controversy over the meaning of the phrase "*existence of arbitration agreement*" was delved into by a subsequent three-judge bench in ***Vidya Drolia*** (*supra*), which concluded that:

> *"153. Accordingly, we hold that the expression "existence of an arbitration agreement" in Section 11 of the Arbitration Act, would include aspect of validity of an arbitration agreement, albeit the court at the referral stage would apply the prima facie test on the basis of principles set out in this judgment. In cases of debatable and disputable facts, and good reasonable arguable case, etc., the court would force the parties to abide by the arbitration agreement as the Arbitral Tribunal has primary jurisdiction and authority to decide the disputes including the question of jurisdiction and non-arbitrability."* [Emphasis supplied]

7. Thus, it is no longer *res integra* that the existence (which includes the validity and lawfulness) of an arbitration agreement can be examined by this Court itself. A clause that does not withstand the statutory requirements or essential elements under Section 2(b) r/w Section 7 of the Act is no arbitration agreement. If arbitration agreement is absent, reference of disputes to an arbitrator can be denied by this Court under Section 11. Section 7(1) defines '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." The determination of existence of such an Agreement also largely depends upon the language of the clause which contains it, as it reveals the intention of the parties. An ambiguously or vaguely worded clause, which does not exhibit the parties' unequivocal intention to arbitrate certain or all disputes, is not a valid arbitration clause. In fact, this question has fallen for consideration in several cases where similar terminology has been used in the arbitration agreement, including the judgments cited above by the Respondent. We now proceed to analyse the same:

8.1. In the case of ***Jyoti Brothers*** (*supra*), the arbitration clause between the parties read as:

> *"In the event of any dispute arising out of this contract the same can be settled by Arbitration held by a Chamber of Commerce at Madras. Their decision shall be binding to the Buyers and the Sellers."*
>
> [emphasis supplied]

In view of peculiar facts of the case and that there were five different Chambers of Commerce in Madras, such an Arbitration agreement was held to be bad in law on the ground of being vague and unspecific in respect of identification of the Arbitrator. Further, the word '*can*', as used in the arbitration clause, was found to be indicative of arbitration being an alternative method, but not the sole method, of dispute resolution. The clause was interpreted as requiring a further agreement to arbitrate i.e., "*a contract to enter into a contract*". Thus, the Court held that:

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[9] (2019) 8 SCC 114.

> *"I do not consider a contract to enter into a contract to be a valid contract in law at all. I am, therefore, of the opinion that this is not a valid submission to Arbitration. The word "can" by the most liberal interpretation only indicates a possibility. A legal contract is more than a mere possibility. It is possibility added to obligation. If a seller says "I can sell goods" that does not mean an immediate or present contract to sell.*
> *Similarly, if a person says "I can go to arbitration" that statement does not make an immediate contract to send disputes to arbitration. A mere pious wish or desire for arbitration does not make a contract for arbitration. An arbitration agreement has to be couched not in precatory but obligatory words. No particular form can be laid down as universal for framing an arbitration agreement but this much is certain, words used for the purpose must be words of choice and determination to go to arbitration and not problematic words of mere possibility.*
> *(...) The Agreement must be a present agreement and a concluded agreement according to the test of an ordinary contract. If it fails in that test, then there is no submission and no Arbitration agreement at all.*
> *(...) a serious right to enforce Arbitration should be more clearly expressed because it is an ouster of an ordinary person's right to come to the Courts. Such right cannot be lost by ambiguous and equivocal words. The usual language to express that would be the language of the two cases just mentioned, namely, "at the option of" so and so."*

8.2. In ***Wellington Associates*** (*supra*), the Arbitration Clause forming the subject matter of dispute, was worded as under:

> *"5. It is also agreed by and between the parties that any dispute or differences arising in connection with these presents may be referred to arbitration in pursuance of the Arbitration Act, 1947, by each party appointing one arbitrator and the arbitrators so appointed selecting an umpire. The venue of arbitration shall be at Bombay."*
>
> [emphasis supplied]

The Court, while deciding the question of existence of a valid Arbitration Agreement, *inter alia*, held that no reference can be made to an Arbitral Tribunal unless the "Arbitration Agreement" required reference to arbitration in the mandatory sense, in terms of Section 7 of the Act. It was further observed that if an objection is raised by the Respondent regarding the invalidity of Arbitration agreement within the meaning of Section 7 of the Act, then such a question will have to

be decided in the proceedings under Section 11 of the Act. Further, deliberating upon the intention of the parties, the Court looked at the immediately preceding clause in the contract, being the jurisdiction clause, which stated that "*only*" Courts in Bombay will have jurisdiction. On a holistic reading of the two clauses, it was held that clause 5 was deliberately drafting using such obfuscatory language, to merely serve as an enabling provision, and the parties did not intend to make arbitration the sole remedy.

8.3. In ***Jagdish Chander*** (*supra*), a uniquely worded Arbitration Clause fell for consideration of the Court. The same is culled out hereinbelow:

> *"(16) If during the continuance of the partnership or at any time afterwards any dispute touching the partnership arises between the partners, the same shall be mutually decided by the partners or shall be referred for arbitration if the parties so determine."* [emphasis supplied]

The Court, observing the underlined phrase, took the view that such a clause merely indicates 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 a clause too would require the parties to arrive at a further agreement to go to arbitration at the time when dispute arises. In these circumstances, the existence of Arbitration Agreement as a condition precedent was found to be missing.

8.4. In ***Avant Garde*** (supra), the Arbitration Clause contained in a Purchase Order read as under:

> *"Arbitration – dispute if any arising out of this Agreement shall be subject to the exclusive jurisdiction of the Court in city of Delhi".*

Relying upon the decisions in ***Wellington Associates*** (*supra*) and ***Jagdish Chander*** (*supra*), this Court took the view that the essential attributes to consider this clause as an Arbitration Agreement were missing. The mere use of the word "Arbitration" at the beginning/heading of the clause was not enough, specially when the body completely contradicted the requirement of reference of dispute to arbitration by subjecting disputes to the exclusive jurisdiction of a particular Court. Existence of arbitration agreement was negated on this ground.

8.5. In ***Linde Heavy Truck*** (*supra*), the Respondent in a recovery suit filed an application seeking reference to arbitration, by relying upon the following clause:

> *"15.5. If, after 30 (thirty) day from the commencement of such informal negotiation, CONCOR and the supplier have been unable to resolve amicably the contract dispute, either party may require that the dispute be referred for resolution by arbitration in accordance with the rules of Arbitration of the "Standing Committee on Public Enterprises" of India (SCOPE) from the "Conciliation and Arbitration" and award made in pursuance thereof shall be binding on the parties."* [emphasis supplied]

Relying upon ***Wellington Associates***, (*supra*) ***Jagdish Chander*** (*supra*) and ***Jyoti Brothers*** (*supra*), the Court held that:

> *"Normally, the arbitration clause stipulates that the disputes between the parties shall be referred to arbitration and the expression "may" is not used in such clauses, though it can hardly be disputed that mere use of the expression "may" would not be determinative in every case and in a given case, the terms and conditions and/or the conduct of the parties may lead to an inference that despite using the expression "may" the parties had, in fact, agreed for a compulsory arbitration to resolve their disputes."* [emphasis supplied]

9. In light of the aforesaid judgments, it becomes clear that in the Court's

quest to determine the existence of a valid arbitration agreement, the intention of the parties to refer disputes to arbitration is gathered from the language in which the Agreement are couched along with the conduct of the parties. In case, the Arbitration Clause only exhibits a vague possibility and not a conclusive decision of the parties to arbitrate in the future, i.e. to say in other words, if the arbitration agreement is only a "contract to contract" and will require a fresh, unequivocal consent to the dispute resolution mechanism of arbitration, then, it is not a valid agreement. The only way to remedy this is to enter into a fresh agreement. But, if such fresh consent is denied, then the Arbitration Clause cannot be enforced as a binding agreement by approaching this Court.

10. Keeping the aforesaid discussion in view, the Arbitration Clause in the instant case is now examined. The clause uses the phrase "*may*" and not "*shall*". Although, use of the expression "*may*" is not always decisive and in some cases, the Courts have indeed construed the word "*may*" to mean as "*shall*". However, such an interpretation is permissible only if that is the true intention of the parties – as decipherable from other sources. Here, however, the use of the word "*may*" shows that the parties wanted to make Arbitration optional. This intent becomes obvious when we notice that the clause also uses the phrase "*the matter may be referred to an arbitrator in whom both have faith or go with legal proceedings as per jurisdiction of Delhi Court.*" The conjunction "*or*" gives the parties the option to choose between two dispute resolution mechanisms, if and when disputes arise. This envisages the requirement for a future fresh consent for arbitration. Moreover, in the instant case, Scraft is not agreeable to go for arbitration. Thus, AK would

have to resort to the other option of settlement of their disputes, i.e., before Civil Court, as contemplated in the clause.

11. The Court also does not find merit in AK's contention that this question should be left for adjudication by the learned Arbitrator. Since the clause in the Agreement indicates that the parties did not enter into a binding Arbitration Agreement, the pre-requisites as envisaged under Section 7 of the Act have not been met. Hence the Court cannot, at the instance of AK alone, without the existence of a valid binding arbitration agreement between the parties showing their intent to arbitrate, refer the parties to Arbitration.

12. There is no merit in the present petition, and the same is dismissed.

SANJEEV NARULA, J

JULY 26, 2021
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(corrected and released on 17th August, 2021)