

Voltas Limited Vs. M.P. Entertainment and Developers Pvt. Ltd.

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Court : Mumbai

Decided On : Sep-16-2016

Judge : S. J. Kathawalla

Appeal No. : Arbitration Application No. 50 of 2015

Appellant : Voltas Limited

Respondent : M.P. Entertainment and Developers Pvt. Ltd.

Judgement :

Oral Judgment:

1. The above Application is filed by the Applicant -- Voltas Limited against the Respondent -- M.P. Entertainment and Developers Pvt. Ltd. for appointment of a Sole Arbitrator under Section 11 (6) of the Arbitration and Conciliation Act, 1996 ("the Act") to adjudicate the disputes and differences that have arisen between the parties relating to two Work Orders both dated 2nd August, 2007 (Exhibits-A and A-1 to the Application).

2. According to the Applicant, the facts leading to the filing of the present Application, in brief are as follows :

2.1. On 2nd August, 2007, two inter-connected Work Orders namely MP/ENT/033/07-08 and MP/ENT/033/1/07-08 were issued to the Applicant by the Respondent for "HVAC Low Side" and supply of 3 water-cooled 475 TR centrifugal

chiller unit. Both the Work Orders (at pages 22 and 24 of the Application) contained the following Clause :

"In case of any dispute during the execution of the work and if the matter is referred to Arbitration then it will be resolved by dual Arbitrator, one by client and another by contractor" (emphasis supplied).

(hereinafter referred to as the Subject Clause)

2.2. Disputes arose between the parties during the pendency of the works and the Applicant by their Advocate's legal notice dated 25th January, 2010 terminated the contract and called upon the Respondent to pay the balance outstanding dues. Thereafter the Respondent Company's ownership had changed hands and its representative agreed to make payment of the balance outstanding amount. Thereafter the Respondent made part payment which was accepted by the Applicant without prejudice to their rights and contentions to recover the balance outstanding amount along with overdue interest.

2.3. The Applicant finished the commissioning works of the three chillers and forwarded the commissioning reports to the Respondent. On 10th August, 2011, the Applicant raised its final invoice for Rs. 73,08,826.41 for the entire work and submitted the same to the Respondent for payment. Since the payments were not received by the Applicant from the Respondent, the Applicant through their Advocate's letter dated 12th July, 2014, invoked the arbitration clause and called upon the Respondent to appoint a sole Arbitrator. According to the Applicant, the Respondent through their Advocate's reply dated 6th August, 2014 responded to the said notice. Paragraphs 1 and 2 of the said reply are reproduced hereunder :

"1. At the outset, I say and submit that the Purchase order bearing No. MP/ENT/033/07-08 as well as Purchase Order No./ENT/033/1/07-08 were not concluded contracts and therefore no arbitration proceedings qua said contracts can be initiated, even otherwise the arbitration clause provide that the said purchase orders is to the following effect:

"In case of any dispute during the execution of the work and if the matter is referred to the Arbitrator then it shall be resolved by dual arbitrator, one by client and another by contractor."

2. I, under instructions of my client say and submit that in view of aforesaid arbitration clause it is clear beyond any doubt that one Arbitrator was to be appointed by your client and one by my client, as such your notice seeking consent for appointment of any one of the retired Hon'ble Judges of Bombay High Court, being dehorse to arbitration agreement, cannot be accepted. The submission is without prejudice to contention of my client that no concluded contract exists between the parties, however, my client reserve their right to have the option of appointing an Arbitrator, once Arbitrator is appointed from your client side."

According to the Applicant, though the Respondent purported to claim that there was no concluded contract, the Respondent admitted the existence of the Arbitration Agreement between the parties and did not claim that it was merely an agreement to agree or that further consent was required.

2.4. The Applicant thereafter filed the above Application seeking appointment of a Sole Arbitrator as set out in paragraph 1 hereinabove.

3. Learned Advocate appearing for the Respondent has submitted that he is opposing the above Application on several grounds. However, his first and main contention is that the Subject Clause relied upon by the Applicant does not postulate an Agreement, which necessarily or rather mandatorily requires the appointment of an Arbitrator. In view thereof, the learned Advocates appearing for the parties have agreed that they will initially address the Court only on the preliminary point i.e. whether the Subject Clause constitutes an Arbitration Agreement ? and only in the event of this Court holding that there exists a mandatory / binding Arbitration Agreement between the parties, shall they proceed to address the Court on other grounds on which the Respondent wishes to oppose the above Application. This Court has therefore proceeded to hear the learned Advocates for the parties on the aforestated preliminary point.

4. The Learned Senior Advocate appearing for the Applicant has submitted that the arbitration clause set out hereinabove clearly provides that in case of any dispute the matter has to be referred to an Arbitrator and has proceeded to advance a mode for appointment of Arbitrator. Therefore, it was the clear contractual intention of the parties to refer future disputes to arbitration. The use of the word "if" does not make it optional for the parties to arbitrate, but is relatable to the remainder of the clause/methodology/mode of appointment of arbitrators. In any case, the word "if" is superfluous. The Subject Clause clearly specifies an agreement to arbitrate. The Applicant has also submitted that whilst interpreting the arbitration clause, a pragmatic /common sense approach has to be taken to give effect to the clause agreed to by the parties and a pedantic or a technical approach should be avoided. When faced with an unworkable clause, it is the duty of the Court to make the same workable within the permissible limits of the law. An interpretation ought to be given for the encouragement of arbitration. No party can be allowed to take advantage of inartistic drafting of an arbitration clause in any agreement, especially once a clear intention of the parties to go for arbitration in case of any future disputes is evident in the Agreement, the material on record, and from the surrounding circumstances. The Applicant has in support of the above submissions, strongly relied on the decision of the Hon'ble Supreme Court in *Enercon (India) Ltd. and others vs. Enercon GMBH and another* (2014) 5 SCC 1) and the judgments and commentaries referred to therein. As regards the construction of Arbitration Clauses, and the principal defects found in arbitration clauses such as those of inconsistency, uncertainty and inoperability are concerned, the Applicant has also referred and relied upon extracts from several commentaries such as *Law and Practice of Commercial Arbitration in England* (second Edition by Sir Michael J. Mustil and Stewart C. Boyd; *Redfern and Hunter on International Arbitration* (sixth Edition) by Nigel Blackaby, Constatine Partasides QC with Alan Redfern and Martin Hunter; *O.P. Malhotra on the Law and Practice of Arbitration and Conciliation* (Third Edition). The Applicant has also relied on the judgments of the English Courts viz. *Hobbs Padgett and Co. (Reinsurance) Ltd. vs. J.C. Kirkland Ltd. and Kirkland* (1969) (2) Lloyd's Law Reports, 547) and *Tritonia Shipping Inc. vs. South Nelson Forest Products Corporation* (1966) (1) Lloyd's Law Reports 114) wherein different formats of Arbitration Clauses have been discussed

and interpreted.

5. The Applicant has also relied on the doctrine of Contra Preferentum and has submitted that if a clause in a contract appears to be ambiguous, it should be interpreted against the interest of the person who insisted that the clause be included. According to the Applicant, this doctrine is well explained in the decisions of the Division Bench of this Court in the case of MMRDA vs. Unity Infraproject Ltd. (2008) 5 Bom CR 196). In this context, the Applicant has also relied on the decision of the Hon'ble Supreme Court in the case of United India Insurance Company Limited Versus Pushpalaya Printers (2004 (3) SCC 694).

6. It is therefore submitted on behalf of the Applicant that the preliminary point raised by the Respondent that the Subject Clause in the Work Orders is an optional clause and the same does not constitute a mandatory and binding Arbitration Agreement between the parties, be rejected and the Application under Section 11 of the Act be proceeded with.

7. The Learned Advocate appearing for the Respondent has reiterated that the Subject Clause in the Work Orders is an optional clause and cannot be termed as a mandatory/binding arbitration agreement arrived at between the parties to refer the disputes arising in the Work Orders to arbitration. It is submitted that the said Clause is at the highest an agreement contemplating the possibility of going for arbitration. It is only a reflection of a possibility of the parties agreeing to arbitration in future, as contra-distinguished from an obligation to refer the dispute to arbitration. The Subject Clause does not postulate an agreement which necessarily or rather mandatorily requires the appointment of an arbitrator. The Learned Advocate for the Respondent has, in support of the proposition that in an arbitration clause the use of terminology such as "may" or "if" does not constitute a binding obligation to go for arbitration, and in such circumstances it is not permissible to appoint an arbitrator to adjudicate the dispute between the parties unless there is a further agreement on their part, relied on the decisions of the Hon'ble Supreme Court and this Court in (i) Jagdish Chander vs. Ramesh Chander and others (2007) 5 SCC 719 paras 8-11), Wellington Associates Ltd. vs. Kirit Mehta (2000) 4 SCC 272, paragraphs 17 to 22), (iii) Anand P. Nair vs.

Surabhi Living Heritage Pvt. Ltd. and another (Arbitration Application No. 131 of 2014 , paragraph 7) and (iv) NAS Aviation Services Pvt. Ltd. vs. Kingfisher Airlines Ltd. (Arbitration Petition No. 456 of 2013 with Arbitration Application No. 151 of 2013- paras 22 to 24).

8. It is submitted on behalf of the Respondents that the submission made on behalf of the Applicant, that the Respondent has in its reply letter dated 6th August, 2014 not disputed the arbitration agreement and has merely reserved its right to appoint its own Arbitrator is incorrect. It is also submitted that the decisions as well as the commentaries relied upon by the Applicant does not assist the Applicant in the present case. It is further submitted that the contra preferentum rule has no application to the present case. It is therefore submitted that in the present case there is no binding arbitration agreement and the arbitration application ought to be dismissed with costs.

9. The learned Senior Advocate appearing for the Applicant has in rejoinder submitted that the case law relied upon by the Respondent does not assist the case of the Respondent. He sought to distinguish the judgment of the Hon'ble Supreme Court in Jagdish Chander vs. Ramesh Chander and others (supra) on the ground that the Hon'ble Supreme Court was considering a clause which states that if the parties so determine' there would be a reference to arbitration, and therefore the clause contemplated a further determination, rendering it non-mandatory. It is also submitted on behalf of the Applicant that the judgments relied upon by the Respondent contemplated a situation where there were two contrasting clauses, one which provided for resolution of disputes in Court, and the other which provided for resolution of disputes by arbitration, and therefore the arbitration clauses were found to be non-mandatory.

10. I have considered the oral as well as written submissions advanced by the learned Advocates for the parties. I have also gone through the decisions as well as the commentaries relied upon by the learned Advocates in support of their respective submissions. At the cost of repetition, the Subject Clause is once again reproduced hereunder:

In case of any dispute during the execution of the work and if the matter is referred to Arbitration then it will be resolved by dual Arbitrator, one by client and another by contractor" (emphasis supplied).

In my view, the above Clause makes it clear beyond any doubt that the Subject Clause is an optional clause whereby parties have agreed that if during the execution of the work a dispute arises between them, the parties may choose to go to arbitration and if they so choose to refer the matter to arbitration, then each party shall appoint one arbitrator. As correctly submitted on behalf of the Respondent, the said clause is at the highest an agreement contemplating the possibility of going for arbitration. It is only a reflection of a possibility of the parties agreeing to arbitration in future, as contra-distinguished from an obligation to refer the dispute to arbitration. There is no binding arbitration agreement in the present case, and the words of the Subject Clause do not meet the attributes of an arbitration agreement in as much as there is no binding obligation to refer the dispute to arbitration. The Subject Clause does not postulate an agreement which necessarily or rather mandatorily requires the appointment of an arbitrator.

11. The Hon'ble Supreme Court of India has in the case of Jagdish Chander vs. Ramesh Chander and ors. (supra) clearly held that in the context of a clause which used similar terminology, viz. if the parties so determine, the disputes shall be referred to arbitration (paragraph 2 of the judgment), such a clause did not constitute a binding obligation to refer the dispute to arbitration, but merely contemplated a possibility of going for arbitration. The Hon ble Supreme Court reiterated the well-settled principles in regard to what constitutes an arbitration agreement (paragraph 8 of the judgment). In paragraph 8(iv) it was inter alia made clear that a clause using the words if the parties agree, the disputes shall be referred to arbitration, was a non-mandatory clause, and did not constitute an arbitration agreement. The Applicant sought to distinguish this judgment on the ground that the Hon ble Supreme Court was considering a clause which states that if the parties so determine there would be a reference to arbitration, and therefore the clause contemplated a further determination, rendering it non-mandatory. This submission is not well founded as the Subject Clause in the present case (at page 22 of the Arbitration Application) implicitly contemplates the

very same thing, viz. that the parties may go for arbitration if they so decide subsequently, as is evident from use of the words if the matter is referred to arbitration then it would be resolved . Furthermore, the Hon'ble Supreme Court in this judgment has laid down well settled principles which apply across the board, as to what would not constitute a binding Arbitration Agreement, all of which clearly apply to a clause such as the Subject Clause in the present Application.

12. In Wellington Associates Ltd. vs. Kirit Mehta (supra), the Hon'ble Supreme Court has categorically held that an Arbitration Agreement must postulate an agreement which necessarily or rather mandatorily requires the appointment of an arbitrator. Clauses such as those using the word may are merely enabling provisions by which the parties may agree to go for arbitration, and in such cases fresh consent to go for arbitration would be necessary.

13. In Anand P. Nair vs. Surabhi Living Heritage Pvt. Ltd. and another (supra), this Court has held that the main attribute of an arbitration agreement is consensus ad idem to refer the dispute to arbitration, and if the same is missing then there could be no appointment of an arbitrator. This Court also observed that there was no question of a clause being made workable as stated in Enercon s case, when the arbitration agreement itself did not exist.

14. Again, in NAS Aviation Services Pvt. Ltd. vs. Kingfisher Airlines Ltd. (supra) , this Court has held that Section 7 of the Arbitration and Conciliation Act, 1996 contemplates an arbitration agreement which makes it obligatory to go for arbitration. It was held that where the clause makes it optional to go for arbitration then any purported intention to go for arbitration cannot be foisted on the parties.

15. Relying on the Judgment of the Hon'ble Supreme Court in the case of Enercon (India) Ltd. and ors. vs. Enercon GMBH and another (supra) and the decisions and commentaries referred to therein, the Applicant has submitted that a pragmatic approach is required and that attempts must be made to make the arbitration clause workable. In that case, it is evident that there was a binding arbitration agreement but there was a difficulty in appointing the third arbitrator thereby potentially rendering the arbitration agreement unworkable. It is in that context that the Hon'ble Supreme Court has held that a pragmatic approach is required and

that attempts must be made to make the arbitration clause workable. Therefore, the Hon'ble Supreme Court proceeded to take steps to make the clause workable in the manner set out in paragraph 91 of the said judgment.

16. Again, there can be no exception to the principles laid down by the Hon'ble Supreme Court in the Enercon Judgment and the judgments referred to therein viz. that while deciding an Application under Section 11 of the Arbitration and Conciliation Act, 1996, the designate of the Chief Justice would have to take into consideration the intention of the parties to refer the disputes to arbitration as may inter alia be gathered from the correspondence between the parties and the surrounding circumstances; and that no party could be allowed to take advantage of inartistic drafting of an arbitration clause in an agreement, so long as the clear intention of the parties to go for arbitration is evident from the agreement and material on record, including the surrounding circumstances. However, the said judgments do not apply in the present case as the clause in question is unambiguous and clear and in itself reflects the intention of the parties, viz. that if disputes arise they may choose to refer the disputes to arbitration. When the clause is clear and unambiguous then there is no warrant to look elsewhere for the purported intention of the parties. In any event, in all the judgments relied upon by the Applicant, the arbitration clause in question was a binding, mandatory arbitration clause which provided that the parties shall refer all disputes to arbitration. Therefore, the only question before the Hon ble Supreme Court was whether despite the binding agreement, did the parties not intend to have their disputes settled by arbitration? In the present case ex-facie the Subject Clause is not couched in mandatory terms. It is clear and un-ambiguous that no binding obligation to refer matters to arbitration exists in the Subject Clause, and hence there is no question of the parties intention to go to arbitration being evident from the reply letter, as alleged. The reply letter itself expressly sets out that there was no concluded contract between the parties, and therefore there was no question of the so-called arbitration clause being applicable. The Respondent had strictly without prejudice contended that if however there was deemed to be a concluded contract, and if the Subject Clause was to apply as an arbitration clause, the Respondent was reserving its right to appoint an arbitrator. The reply letter must be read in the context of the Subject Clause, that is to say that if the parties

agreed in future to go to arbitration, then the Respondent was reserving its right to appoint an arbitrator as per the procedure in the Subject Clause. The Respondent has in no manner entered into a fresh agreement or given fresh consent to arbitration, as would be required, from a bare reading of the Subject Clause.

17. It was contended by the Applicant that the word 'if' ought to be read to mean that parties were bound to go for arbitration, and when they did, the procedure for appointment of the arbitrator was provided for in the Subject Clause. It was contended that if the Subject Clause was not intended to be an arbitration agreement there would be no reason to prescribe a procedure for appointment of an arbitrator. This argument ignores the Judgments of the Hon ble Supreme Court and this Court in *Wellington Associates* (paragraph 9), *Anand P. Nair* (paragraph 7) and *NAS Aviation Services India* (paragraph 15), in all of which cases the purported arbitration clause set out a procedure for appointment of a tribunal or panel of arbitrators, as in the present case. In all the judgments, notwithstanding the so-called procedure being provided, the Courts were of the view that the clause did not constitute a mandatory arbitration agreement, and hence there was no question of appointment of an arbitrator. The only correct way to read the Subject Clause is that if the parties decide in future to go for arbitration, then each of them will be entitled to appoint an arbitrator. This procedure being provided does not in itself make the Subject Clause a mandatory, binding, obligatory clause for referring disputes to arbitration.

18. The contention of the Respondent that the judgments relied upon by the Applicant contemplated a situation where there were two contrasting clauses, one which provided for resolution of disputes in Court, and the other which provided for resolution of disputes by arbitration, and therefore the arbitration clauses were found to be non-mandatory, ignores the Judgment in *Jagdish Chander s case* (supra), where there was no such clause enabling parties to resolve disputes in Court. In a situation analogous to the present one, the Hon ble Supreme Court held in that case, that the clause on its own ex-facie was not an obligatory binding arbitration agreement.

19. Again, the mere fact that there may be a clause providing for resolution of disputes in Court by way of filing of a suit, will not alter or affect the binding or optional nature of the prospective arbitration clause. This is because inherent in every party to a dispute, is the right to approach a Court of law by filing a suit. Therefore in every case, whether explicitly set out in the contract or not, a party always has a right to approach the Court and file a suit. The only test for determination is whether the prospective arbitration clause, as it stands, contemplates a binding obligation or a mandate to refer disputes to arbitration. The prospective arbitration clause must be judged on its own merit. The fact that there is a provision for dispute resolution by filing a suit, may at the highest be a further circumstance demonstrating that the prospective arbitration clause is not binding, but the absence of such a clause is certainly not determinative of the mandatory / optional nature of the prospective arbitration clause.

20. As regards the Judgments of English Courts relied on by the Applicant, the same do not assist the case of the Applicant. In the said Judgments, the arbitration clause was clearly a binding clause, and it was held that mere brevity in terminology used in the clause was not a ground for refusing a reference to arbitration. Pertinently in the judgment of *Mangistaumunaigaz Oil* (supra) the Court was not interpreting an optional arbitration clause. The words if any were interpreted to be an abbreviation for if any dispute arises or to be surplusage (page 621 of the judgment Col. 1). Therefore, this was a case where the Court held that the words if any meant that if any dispute arises between the parties, the disputes would be mandatorily referred to arbitration. This was not a case where the word if was in the context of the reference to arbitration, that is to say there was an option of the parties to decide if they wish to refer the matter to arbitration or not.

21. The contention raised by the Applicant based on the Rule of Contra Preferentum that if there was ambiguity in the Subject Clause, as the Work Orders have been issued by the Respondent, the ambiguous words would be construed against the Respondent, also cannot be accepted. First and foremost this argument is predicated on there being ambiguity in the Subject Clause. There is no such ambiguity whatsoever and hence the Contra Preferentum Rule has no

application in the present case. Again, the Judgment in Mumbai Metropolitan Region case (supra) does not assist the Applicant, as it explains the Rule to mean that if there is any doubt or ambiguity in the words of any exclusion clause, the words are construed against the party putting forth the documents and in favour of the other party. In the present case it is the Applicant who is putting forth the subject clause, and even if, it is assumed that there is any ambiguity, it must be construed more forcefully against the Applicant.

22. The Applicant has also relied on certain commentaries as set out in paragraph 4 above, including the commentary of O. P. Malhotra, on the point that if there is uncertainty in the arbitration agreement it must be interpreted to give effect to the requirement to refer disputes to arbitration. In the same commentary, it is clarified (page 386 running page 226 of the compilation of judgments second paragraph) that if two constructions are possible, the construction which will make the agreement reasonable, rather than unreasonable, should be adopted. However, as set out above, in the present case only one construction of the Subject Clause is possible viz. that there is no mandatory binding obligation to refer disputes to arbitration. Hence, the said commentaries do not assist the Applicant.

23. In the circumstances, I hold that there is no binding Arbitration Agreement in the present case. The above Application is therefore dismissed. However, there shall be no order as to costs.

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