

Arbitration Case No. 3/2014

20.6.2016

Shri Atulanand Awasthy, learned counsel for the applicants.

None for respondent despite of service of notice.

Applicants seek appointment of an Arbitrator for resolving the dispute said to have arisen out of Agreement of sale said to be executed between the applicants and the respondent, whereby, the respondent agreed to sell land bearing Khasra No. 2/2/Ka, P.C No. 10 Development Block Fanda, Tahsil Huzur, district Bhopal admeasuring 0.360 hectares for total consideration of Rs.28,50,000/- out of which an amount of Rs.4,50,000/- was paid as advance. It is urged that since respondent did not honour the contract, a dispute has arisen and though a notice was sent on 5.7.2013 invoking clause 6 of the Agreement for sale for appointing an arbitrator but no steps were taken, therefore, present application.

After hearing learned counsel for the applicants at length, this Court is of considered opinion that the application cannot be allowed for more than one reasons:

Firstly, the agreement was executed between Hari Singh Saini, on the first part, being the proposed seller and S/Shri Faiz Aman, Faisal Mohammad Khan, Ovis Uddin Khan and Saad Sharafat on the second part. Present application is filed by Faisal Mohammad Khan and Ovis Uddin Khan. There is no authorization in their favour by other two purchasers, i.e., Faiz

Aman and Saad Sharafat. It cannot, therefore, be said that a dispute has arisen amongst the parties. Learned counsel for the applicants fails to establish that even where out of proposed purchasers even one of them is aggrieved of non performance of contract, would have a right to seek appointment of an Arbitrator for the alleged dispute. Being a joint agreement the applicants themselves cannot without joining the other two parties claim that there has arisen a dispute which is required to be referred to the Arbitrator. For this reason the present application cannot be entertained.

Secondly, the Arbitration Clause 6 is termed as under:

6. यह कि यदि उक्त विक्रित भूमि के संबंध में पक्षकारों के मध्य कोई वाद विवाद उत्पन्न होता है तो उक्त विवाद को आपसी सहमति से आर्बिट्रेशन कंसीलेशन एक्ट 1996 के अंतर्गत एक आर्बिट्रेटर नियुक्त कर उसका निराकरण करवाया जावेगा। आर्बिट्रेटर जो आदेश प्रदान किया जावेगा वह आदेश दोनों पक्षकारों पर समान रूप से मान्य व बंधनकारी होगा।

Though the clause uses expression that a dispute will be resolved vide arbitration under Arbitration and Conciliation Act, 1996 but the expression precedes with an expression that in case a dispute arises the parties will amicably settle through arbitration. These attributes do not construe the clause to be an arbitration clause. In this context reference can be had of the decision in Jagdish Chander v. Ramesh Chander and others [2007 (5) SCC 719]; wherein their Lordships were pleased to hold:

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* [1998 (3) SCC 573], *Bharat Bhushan Bansal vs. U.P. Small Industries Corporation Ltd.* [1999 (2) SCC 166] and *Bihar State Mineral Development Corporation v. Encon Builders (I) (P) Ltd.* [2003 (7) SCC 418]. In *State of Orissa v. Damodar Das* [1996 (2) SCC 216], 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 an 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.”

Since the case at hand would be covered by the law laid down by the Supreme Court in paragraph 8 (iv) of Jagdish Chander (supra) the application for appointment of an Arbitrator cannot be carried forward.

Thirdly, the agreement to sell is on Rs.100/- non-judicial stamp paper though it records transaction of Rs. 4,50,000/- as an advance paid towards the intended purchase of immovable property which is allegedly valued at Rs.28,50,000/-. It is requirement of law, i.e., Section 17 of the Registration Act, 1908, that such an instrument need to be compulsorily registered. In the considered opinion of this Court a non-registration thereof will not create a right in the party to seek execution of the said contract; either for appointment of an Arbitrator or for a specific performance of agreement to sell. For this reason also the application for appointment of arbitrator cannot be allowed.

In view of above analysis the application deserves to be and is hereby dismissed. No costs.

(SANJAY YADAV)
JUDGE