

THE HON'BLE THE ACTING CHIEF JUSTICE SUJOY PAUL

ARBITRATION APPLICATION No.163 of 2024

ORDER:

Sri Rakesh Kaidala, learned counsel appearing for Sri G.Venu Gopal, learned counsel for the applicant and Sri M.V.Pratap Kumar, learned counsel for the respondent.

2. With the consent, finally heard.

3. This is an application under Section 11(6) of the Arbitration and the Conciliation Act, 1996 (for short 'the Act').

4. The case of the learned counsel for the applicant is that there exists an arbitration clause and also a dispute and therefore, in view of the demand of the applicant, the respondent should have agreed to appoint an arbitrator. Since the respondent failed to do so, this Court in exercise of power under Section 11(6) of the Act can appoint an arbitrator.

5. Learned counsel for the applicant placed reliance on clause 12.2 of the 'Facilities Sharing Agreement' (hereinafter referred to as, 'the Agreement') dated 21.01.2020. He submits that in view of clause 12.2 of the Agreement, a legal notice dated

30.08.2023 was sent to the respondent for invoking the arbitration clause under the said Agreement. The respondent did not respond to the said legal notice and therefore, the present application is filed.

6. Learned counsel for the applicant placed reliance on the judgment of the Supreme Court in **Milkfood Limited v. GMC Ice Cream (P) Limited**¹ and the judgment of the High Court of Delhi in **Bharat Chugh v. M.C.Agrawal**².

7. By placing reliance on paragraph No.51 of the decision in **Milkfood Limited** (supra), learned counsel for the applicant submitted that once there exists an arbitration clause, indisputably, the service of notice and/or issuance of request for appointment of an arbitrator must be held to be determinative of the commencement of the arbitral proceeding. By placing reliance on paragraph No.25 of the decision in **Bharat Chugh** (supra), learned counsel for the applicant submitted that sending a notice informing the addressee that civil and criminal legal remedies would be available in the event

¹ (2004) 7 SCC 288

² 2021 SCC OnLine Del 5373

of failure, cannot, in the view of the judgment of Delhi High Court, constitute a notice invoking arbitration.

8. Learned counsel for the respondent opposed the prayer mainly on the ground that although there exists an arbitration clause, the applicant, in the event of demanding appointment of arbitrator, should have said so specifically in its notice.

9. By taking this Court to the language used in paragraph No.11 of the notice dated 30.08.2023, it is urged by the learned counsel for the respondent that the said notice was basically sent demanding payment of compensation amount within the stipulated time, failing which, the applicant will proceed to appoint an arbitrator and initiate appropriate proceedings. Subsequently, no such action or demand for appointment of arbitrator was initiated, when the respondent failed to pay the compensation. Thus, this legal notice, by no stretch of imagination, can be treated to be a notice in consonance with clause 12.2 of the Agreement. In support of his submissions, learned counsel for the respondent placed reliance on the judgments of the High Court of Delhi in **Alupro Building**

Systems Private Limited v. Ozone Overseas Private Limited³
and **Shriram Transport Finance Company Limited v. Narender Singh⁴**.

10. It is urged that in **Alupro Building Systems Private Limited** (supra), learned Single Judge of the High Court of Delhi opined that the choice of arbitrator must be reflected from the notice. The view taken in **Alupro Building Systems Private Limited** (supra) got a stamp of approval by the Division Bench of High Court of Delhi in **Shriram Transport Finance Company Limited** (supra). Heavy reliance is placed on paragraph Nos.32 and 33 of **Shriram Transport Finance Company Limited** (supra).

11. The parties have confined their arguments to the extent indicated above and no other point is pressed.

12. I have heard the parties at length and perused the relevant documents.

13. There is no dispute between the parties that there exists a dispute resolution clause i.e., clause 12.2 of the Agreement, which reads thus:-

³ 2017 SCC OnLine Del 7228

⁴ 2022 SCC OnLine Del 3412

“All disputes and differences arising between the parties hereto, including any dispute or difference in regard to the interpretation of any provision or term or the meaning thereof, or in regard to any claim of one party against the other or in regard to the rights and for obligations of any party or parties hereto under this Agreement shall be referred to arbitration by a sole arbitrator to be appointed by the Parties and such arbitration shall be governed by the provision of the Arbitration and Conciliation Act, 1996. The venue of the arbitration will be in Hyderabad only and the language or arbitration shall be English. The courts in Hyderabad shall have jurisdiction.”

(emphasis supplied)

14. It is also not in dispute that the legal notice dated 30.08.2023 was sent by the applicant. This notice, indeed, mentions in its subject “Legal notice invoking arbitration under the facilities sharing agreement dated 21.01.2020”. However, reliance is placed on paragraph No.11 of the said notice, which reads thus:-

“In light of the time and effort invested and the huge expenditure incurred by our Client in the progress and growth of the Unit and your breach of the terms of the Agreement, **you are called upon to make a payment of the Compensation Amount, within seven (07) days from the receipt of this Notice, failing which, our Client shall proceed to appoint an arbitrator and initiate appropriate proceedings under the Arbitration and Conciliation Act, 1996,** as amended up to date. If you chose to ignore this Notice, you may do so at your own risk and peril.”

(emphasis supplied)

15. A microscopic reading of paragraph No.11 of the aforesaid notice makes it clear that the argument of the learned counsel for the respondent has substantial force. The bone of contention in the notice was to get compensation within seven days, *failing which*, the applicant reserved its right to proceed to appoint an arbitrator and initiate appropriate proceedings. When the respondent, admittedly, failed to make the payment of compensation, it was open to the applicant to invoke the arbitration clause as threatened in the notice. However, no such document is placed on record to show that any such notice was subsequently issued.

16. The curtains on this aspect were drawn by the Division Bench of the High Court of Delhi in **Shriram Transport Finance Company Limited** (supra). The relevant portion of the said judgment reads thus:-

32. The judgment in *Alupro Building case* [*Alupro Building Systems (P) Ltd. v. Ozone Overseas (P) Ltd.* 2017 SCC OnLine Del 7228] has aptly explained the relevance of a notice under Section 21 of the Act. It was held that the Act does not contemplate unilateral appointment of an arbitrator by one of the parties, there has to be a consensus for such appointment and as such, the notice under Section 21 of the Act serves an important purpose of facilitating such a consensus on the appointment of an arbitrator. It was further held in *Alupro Building case* [*Alupro Building Systems (P) Ltd. v.*

Ozone Overseas (P) Ltd. 2017 SCC OnLine Del 7228] that the parties may opt to waive the requirement of notice under Section 21 of the Act. However, in the absence of such a waiver, this provision must be given full effect to.

33. We are in agreement with the principles as expressed in the decision of *Alupro Building case [Alupro Building Systems (P) Ltd. v. Ozone Overseas (P) Ltd.]* 2017 SCC OnLine Del 7228], which are enunciated below:

(i) The party to the arbitration agreement against whom a claim is made should know what the claims are. The notice under Section 21 of the Act provides an opportunity to such party to point out if some of the claims are time-barred or barred by law or untenable in fact or if there are counterclaims.

(ii) Where the parties have agreed on a procedure for appointment, whether or not such procedure has been followed, will not be known to the other party unless such a notice is received.

(iii) It is necessary for the party making an appointment to let the other party know in advance the name of the person who it proposes to appoint as an arbitrator. This will ensure that the suitability of the person is known to the opposite party including whether or not the person is qualified or disqualified to act as an arbitrator for the various reasons set forth in the Act. Thus, the notice facilitates the parties in arriving at a consensus for appointing an arbitrator.

(iv) Unless such notice of commencement of arbitral proceedings is issued, a party seeking reference of disputes to arbitration upon failure of the other party to adhere to such request will be unable to proceed under Section 11(6) of the Act. Further, the party sending the notice of commencement may be able to proceed under the provisions of sub-section 5 of Section 11 of the Act for the appointment of an arbitrator if such notice does not evoke any response.

(emphasis supplied)

17. Clause (iii) of paragraph No.33 of the aforesaid judgment, in no uncertain terms, makes it clear that the necessity for a party making an appointment is to inform the other party in

advance about the name of person who is proposed to be appointed as an arbitrator. This condition is made so that the suitability of that person is known to the opposite side in advance and he can examine and decide about his suitability, etc.

18. In the instant case, admittedly, the applicant's notice mentioned hereinabove is not relating to a demand of appointment of an arbitrator, although it suggests so in the clause of 'subject'. Apart from this, the applicant has not suggested any name of the arbitrator to the other side.

19. So far the judgments cited by the learned counsel for the applicant are concerned, the judgment of Supreme Court in **Milkfood Limited** (supra) does not improve the case of the applicant in view of no demand and suggestion of name of arbitrator in the legal notice with accuracy and precision. Similarly, the judgment of the learned Single Judge of the High Court of Delhi in **Bharat Chugh** (supra) is of no assistance in view of the Division Bench Judgment of the High Court of Delhi in **Shriram Transport Finance Company Limited** (supra).

20. In this view of the matter, no case is made out for exercise of jurisdiction under Section 11(6) of the Act. The applicant has failed to comply with the prerequisites for appointment of an arbitrator.

21. Accordingly, the arbitration application is dismissed. However, this order will not come in the way of the applicant to send appropriate notice to the respondent in accordance with law.

Interlocutory applications, if any pending, shall also stand closed.

SUJOY PAUL, ACJ

Date: 04.04.2025
sa/vs

THE HON'BLE THE ACTING CHIEF JUSTICE SUJOY PAUL

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