Babanrao Rajaram Pund vs M/S Samarth Builders And Developers on 7 September, 2022

Author: Surya Kant

Bench: Indira Banerjee, Surya Kant, M.M. Sundresh

REPORTABLE

IN THE SUPREME COURT OF INDIA
CIVIL APPELLATE JURISDICTION

CIVIL APPEAL NO. ____ OF 2022
[ARISING OUT OF SPECIAL LEAVE PETITION (CIVIL) NO.15989 OF 2021]

Babanrao Rajaram Pund …. Appellant

VERSUS

M/s. Samarth Builders & Developers & Anr. ... Respondents

JUDGMENT

Surya Kant, J.

1. Leave granted.

2. The bone of contention in the instant proceedings is whether Clause 18 of the Development Agreement dated 29.05.2014 possesses the necessary ingredients to constitute a legal and valid arbitration agreement? The genesis of the dispute lies in the aforesaid agreement executed between the parties for construction of an apartment complex called “Amay Apartments”. The construction was to be carried out by Respondent No.1 partnership firm on the land owned by the Appellant. Respondent No. 2 is the partner of Respondent No. 1 partnership firm.

Factual Background:

3. The Appellant owns and possesses the land bearing Plot Nos. 13 & 14, measuring 4000 sq. ft situated in Village Deolai, District Aurangabad, Maharashtra. Appellant harbored a desire to

develop the said property through the construction of residential and commercial complexes. Respondent No.1 is a developer engaged in the business of construction and development of residential and commercial buildings. When it came to know that the Appellant wished to develop his property, the First Respondent approached the Appellant and offered to develop the site. The Appellant and Respondent No. 1, thus, entered into a 'Development Agreement' and pursuant thereto the Appellant also executed a General Power of Attorney (GPA), in favour of Respondent No. 1.

4. The Agreement stipulated that the First Respondent shall construct "Amay Apartments" within a period of 15 months which was extendable, incumbent on payment of a penalty amount. Respondent No. 1 agreed to hand over the constructed area to the extent of 45% to the Appellant on or before the completion of the period of 15 months, and to retain the remaining 55% of the developed portion. The Parties also entered into a Deed of Declaration under Section 2 of the Maharashtra Apartment Ownership Act,1970 which was registered on 20.10.2015 for the purposes of retaining the facilities, amenities, common spaces, and to specify the portions of the developed property. Respondent No. 1, however, failed to complete the development works within the stipulated time of 15 months. The Appellant served Respondents with a Legal Notice on 11.07.2016, communicating his desire to terminate the Development Agreement and cancel the GPA as the period of 15 months along with the extendable period of 3 months had already lapsed. In addition to this, the Appellant issued a publication in the newspaper dated 11.07.2016 informing the general public that he had terminated the Agreement as well as the GPA. Respondents in their reply to the Legal Notice controverted the contents of the Notice. This gave rise to disputes and differences between the parties.

5. It is pertinent to mention at this juncture that Clause 18 of the Development Agreement, purported to be an 'arbitration clause', reads as follows:

> "18. All the disputes or differences arising between the parties hereto as to the interpretation of this Agreement or any covenants or conditions thereof or as to the rights, duties, or liabilities of any part hereunder or as to any act, matter, or thing arising out of or relating to or under this Agreement (even though the Agreement may have been terminated), the same shall be referred to arbitration of a Sole Arbitrator mutually appointed, failing which, two Arbitrators, one to be appointed by each party to dispute or difference and these two Arbitrators will appoint a third Arbitrator and the Arbitration shall be governed by the Arbitration and Conciliation Act, 1996 or any re□enactment thereof."

6. The Appellant in the interregnum, sought an injunction under section 9 of the Arbitration and Conciliation Act, 1996 (the Act) in M.A..R.J.I No. 285 of 2016 and the District Court at Aurangabad vide order dated 30.09.2016, restrained Respondent No. 1 from selling any tenements on the developed property till further orders.

7. Thereafter, the Appellant invoked the arbitration clause in the Development Agreement on 07.11.2016 and issued a notice to this effect to the Respondents regarding referral of the dispute to Mr. Shyam Rajale as the sole arbitrator. Though the notice was duly served, the Respondents failed

to respond to it. This led the Appellant to file an application under section 11 of the Act before the High Court.

8. It was contended on behalf of the Respondents before the High Court that the contract lacked the express wording necessary for it to be considered a valid and binding agreement to refer the disputes to arbitration. Specifically, the absence of the term, "the parties agreeing in writing to be bound by the decision of an arbitral tribunal", was highlighted by Respondent No. 1 to contend that Clause 18 of the Development Agreement was not enforceable. To buttress this plea, reliance was placed on the decisions of this Court in Bihar State Mineral Development Corporation and Anr. v. Encon Builders (I) (P) Ltd.1, and Karnataka Power Transmission Corporation Ltd. and Anr. v. Deepak Cables (India) Ltd.2, wherein it was held that in case of exclusion of attributes of an arbitration agreement from a dispute resolution clause, it would not amount to a valid arbitration agreement. Respondents further urged that it was crucial that "the parties should have agreed that the decision of the private tribunal in respect of the disputes will be binding on them."

9. Although the High Court vide the impugned judgment dated 07.07.2021, acknowledged the existence of Clause 18 in the Agreement that provides for disputes to be referred to arbitration, it accepted the contentions of Respondents and came to the conclusion that Clause 18 indeed lacks certain essential ingredients of a valid arbitration agreement, as it does not mandate that the decision of the arbitrator will be final and binding on the parties. Consequently, the High Court dismissed the application as not maintainable. The aggrieved Appellant is now before this Court.

10. Notice was issued to the Respondents on 20.10.2021 and as per the office report dated 18.08.2022, they have been duly served but have not entered appearance. We accordingly proceeded to hear the matter ex parte on 22.08.2022.

1 (2003) 7 SCC 418.

2 (2014) 11 SCC 148.

Submissions:

> 11. Learned counsel for the Appellant vehemently urged that Clause 18 crystallises the intention of the parties to refer disputes between them to arbitration and to be bound by the decision of the arbitrator.

The High Court failed to read into the intention of the parties and erroneously drew an inference contrary to the spirit and object of Clause 18. According to him, the clause clearly mentions that "all the disputes or differences arising between the parties" are to be referred to arbitration of a Sole Arbitrator mutually appointed, failing which the dispute shall be referred to a tribunal consisting of three arbitrators. Moreover, there is no alternative provided in the agreement other than the arbitration for the purpose of resolution of the disputes. Even the governing law of the arbitration had been agreed upon by the parties as the Arbitration and Conciliation Act, 1996, manifesting their animus to be bound by the decision of the arbitrator. There are also no specific exclusions of any

attributes of an arbitration agreement in Clause 18 as envisaged by this Court in Deepak Cables which, in turn, relied upon Jagdish Chander v. Ramesh Chander & Ors.3.

12. Finally, it was submitted that this Court has time and again held that an arbitration clause need not be penned down in any specific form. The High Court was thus not justified in holding that Clause 18 3 (2007) 5 SCC 719.

of the Development Agreement did not meet the essential criteria of a valid arbitration clause.

Analysis

13. It is a settled proposition of law that the existence of a valid arbitration agreement under Section 7 of the Act is sine qua non for a court to exercise its powers to appoint an arbitrator/arbitral tribunal under Section 11 of the Act. The short question that falls for our consideration is whether Clause 18 constitutes a valid arbitration clause for the purpose of invoking powers under Section 11 of the Act?

14. Section 2 (1)(b) of the Act, defines "arbitration agreement" to mean an agreement referred to in section 7, which inter alia lays down the following characteristics of an Arbitration Agreement:

> "7. Arbitration agreement— (1) In this Part, "arbitration agreement" means 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.
>
> (2) An arbitration agreement may be in the form of an arbitration clause in a contract or in the form of a separate agreement.
>
> (3) An arbitration agreement shall be in writing. (4) An arbitration agreement is in writing if it is contained in—
>
> (a) a document signed by the parties;
>
> (b) an exchange of letters, telex, telegrams, or other means of telecommunication [including communication through electronic means] which provide a record of the agreement; or
>
> (c) an exchange of statements of claim and defence in which the existence of the agreement is alleged by one party and not denied by the other.
>
> (5) The reference in a contract to a document containing an arbitration clause constitutes an arbitration agreement if the contract is in writing and the reference is such as to make that arbitration clause part of the contract."

15. It may be seen that section 7 of the Act does not mandate any particular form for the arbitration clause. This proposition was settled by this Court way back in Rukmanibai Gupta v. Collector, Jabalpur and Ors.4, while viewing erstwhile section 2(a) of the Arbitration Act, 1940 which contained the definition of "arbitration agreement". It was held that:

> "6. .....Arbitration agreement is not required to be in any particular form. What is required to be ascertained is whether the parties have agreed that if disputes arise between them in respect of the subject□matter of contract such dispute shall be referred to arbitration, then such an arrangement would spell out an arbitration agreement. A passage from RUSSELL ON ARBITRATION, 19th Edn., p. 59, may be referred to with advantage:
>
> If it appears from the terms of the agreement by which a matter is submitted to a person's decision that the intention of the parties was that he should hold an inquiry in the nature of a judicial inquiry and hear the respective cases of the parties and decide upon evidence laid before him, then the case is one of an arbitration."

16. This very principle was reiterated in K.K.Modi v. K.N.Modi and Ors.5 which also dealt with section 2(a) of the 1940 Act. While 4 (1980) 4 SCC 556.

5 (1998) 3 SCC 573.

attempting to decide whether the arbitration clause embodied in a Memorandum of Understanding was a valid arbitration clause or not, this Court laid down the essential attributes of an arbitration agreement in following terms:

> "17. Among the attributes which must be present for an agreement to be considered as an arbitration agreement are:
>
> (1) The arbitration agreement must contemplate that the decision of the tribunal will be binding on the parties to the agreement, (2) that the jurisdiction of the tribunal to decide the rights of parties must derive either from the consent of the parties or from an order of the court or from a statute, the terms of which make it clear that the process is to be an arbitration, (3) the agreement must contemplate that substantive rights of parties will be determined by the agreed tribunal, (4) that the tribunal will determine the rights of the parties in an impartial and judicial manner with the tribunal owing an equal obligation of fairness towards both sides, (5) that the agreement of the parties to refer their disputes to the decision of the tribunal must be intended to be enforceable in law and lastly, (6) the agreement must contemplate that the tribunal will make a decision upon a dispute which is already formulated at the time when a reference is made to the tribunal.

18. The other factors which are relevant include, whether the agreement contemplates that the tribunal will receive evidence from both sides and hear their contentions or at least give the parties

an opportunity to put them forward; whether the wording of the agreement is consistent or inconsistent with the view that the process was intended to be an arbitration, and whether the agreement requires the tribunal to decide the dispute according to law." [Emphasis applied]

17. In the afore-cited case, the dispute resolution clause stipulated that the disputes were to be referred to the Chairman, IFCI or his nominee. This Court came to the conclusion that the clause in dispute did not constitute a valid arbitration covenant as it could not be said with clarity that the parties contemplated the disputes to be arbitrated.

18. Encon Builders (supra) placed reliance on K.K. Modi's case and further condensed the essential features of an arbitration agreement into four elements i.e.:

> "13. The essential elements of an arbitration agreement are as follows:
>
> (1) There must be a present or a future difference in connection with some contemplated affair. (2) There must be the intention of the parties to settle such difference by a private tribunal. (3) The parties must agree in writing to be bound by the decision of such tribunal.
>
> (4) The parties must be ad idem."

19. It is important to appreciate the nature of the arbitration clause in Encon Builders' case, which was to the following effect:

> "In case of any dispute arising out of the agreement, the matter shall be referred to the Managing Director, Bihar State Mineral Development Corporation Limited, Ranchi, whose decision shall be final and binding."

20. The above-reproduced clause was held to be invalid primarily due to the fact that the Managing Director, who was chosen to be the adjudicator-cum-arbitrator of the dispute(s) arising between the parties, was likely to be biased as he had an interest in the outcome of the case. The principle that one cannot be a judge of his own cause was thus aptly applied to invalidate the subject clause. It was evidently not a case of an arbitral clause lacking essential ingredients of an arbitration agreement. In our opinion, this case renders no assistance to the Respondents.

21. In Jagdish Chander (supra), again a two-Judge bench of this Court dealt with a peculiar arbitration clause, stipulating that:

> "(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 applied] Reference to the arbitration under the above reproduced clause was contingent on the determination by the parties, as their explicit intention to arbitrate was conspicuously missing. This Court, therefore, held

that the arbitration clause was invalid as the parties had shown mere desire or hope to have the disputes settled by arbitration. While interpreting Section 7 of the 1996 Act and placing reliance on K.K.Modi (supra) as well as Encon Builders (supra), it was further held that:□"8.(i)....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.....

(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."

22. Adverting to the case in hand, it may be seen that the contents and the nature of Clause 18 are substantially different from the dispute resolution pacts in K.K.Modi, Jagdish Chander, or Encon Builders (supra). We say so for three reasons. Firstly, apart from the fact that Clause 18 of the Development Agreement uses the terms "Arbitration" and "Arbitrator(s)", it has clearly enunciated the mandatory nature of reference to arbitration by using the term "shall be referred to arbitration of a Sole Arbitrator mutually appointed, failing which, two Arbitrators, one to be appointed by each party to dispute or difference". Secondly, the method of appointing the third arbitrator has also been clearly mentioned wherein the two selected Arbitrators are to appoint a third arbitrator. Finally, even the governing law was chosen by the parties to be "the Arbitration and Conciliation Act, 1996 or any re□enactment thereof." These three recitals, strongly point towards an unambiguous intention of the parties at the time of formation of the contract to refer their dispute(s) to arbitration.

23. We are, therefore, of the firm opinion that the High Court fell in error in holding that the Appellant's application under section 11 was not maintainable for want of a valid arbitration clause. We find that Clause 18 luminously discloses the intention and obligation of the parties to be bound by the decision of the tribunal, even though the words "final and binding" are not expressly incorporated therein. It can be gleaned from other parts of the arbitration agreement that the intention of the parties was surely to refer the disputes to arbitration. In the absence of specific exclusion of any of the attributes of an arbitration agreement, the Respondents' plea of non□ existence of a valid arbitration clause, is seemingly an afterthought.

24. Even if we were to assume that the subject□clause lacks certain essential characteristics of arbitration like "final and binding" nature of the award, the parties have evinced clear intention to refer the dispute to arbitration and abide by the decision of the tribunal. The party autonomy to this effect, therefore, deserves to be protected.

25. The deficiency of words in agreement which otherwise fortifies the intention of the parties to arbitrate their disputes, cannot legitimise the annulment of arbitration clause. A three□Judge Bench of this Court in Enercon (India) Ltd. and Ors. v. Enercon Gmbh and Anr.6 dealt with an arbitration clause that did not provide for a method of electing the third arbitrator. The court held that "the omission is so obvious that the court can legitimately supply the missing line." The line "the two arbitrators appointed by the parties shall appoint the third arbitrator" was read into the clause so as to give effect to it. It was further held that:

> "88. In our opinion, the courts have to adopt a pragmatic approach and not a pedantic or technical approach while interpreting or construing an arbitration agreement or arbitration clause. Therefore, when faced with a seemingly unworkable arbitration clause, it would be the duty of the court to make the same workable within the permissible limits of the law, without stretching it beyond the boundaries of recognition. In other words, a common sense approach has to be adopted to give effect to the intention of the parties to arbitrate. In such a case, the court ought to adopt the attitude of a reasonable business person, having business common sense as well as being equipped with the knowledge that may be peculiar to the business venture. The arbitration clause cannot be construed with a purely legalistic mindset, as if one is construing a provision in a statute...."

26. The UNCITRAL Model Law on International Commercial Arbitration, 1985 from which the Arbitration and Conciliation Act, 1996 originated, envisages minimal supervisory role by courts. When section 7 or any other provisions of the Act do not stipulate any particular form or requirements, it would not be appropriate for a court to gratuitously add impediments and desist from upholding the validity of an arbitration agreement.

6 (2014) 5 SCC 1.

27. There is no gainsaying that it is the bounden duty of the parties to abide by the terms of the contract as they are sacrosanct in nature, in addition to, the agreement itself being a statement of commitment made by them at the time of signing the contract. The parties entered into the contract after knowing the full import of the arbitration clause and they cannot be permitted to deviate therefrom.

28. It is thus imperative upon the courts to give greater emphasis to the substance of the clause, predicated upon the evident intent and objectives of the parties to choose a specific form of dispute resolution to manage conflicts between them. The intention of the parties that flows from the substance of the Agreement to resolve their dispute by arbitration are to be given due weightage. It is crystal clear to us that Clause 18, in this case, contemplates a binding reference to arbitration between the parties and it ought to have been given full effect by the High Court.

Conclusion:

29. In light of the above discussion, the Civil Appeal stands allowed. Clause 18 of the Development Agreement is held to be a valid arbitration clause. Consequently, the impugned judgment and order dated 07.07.2021 passed by the High Court of Judicature of Bombay at Aurangabad is set aside.

30. Since the Appellant has already invoked the arbitration clause, without any further ado, this Court appoints Mr. Justice P.V. Hardas (Contact number: +91□9834933135), former Judge of the Bombay High Court, as the Sole Arbitrator to resolve all disputes/differences between the parties. The learned Arbitrator shall be entitled to a fee as per the Fourth Schedule of the Act, as amended from time to time. The Registry is directed to send a copy of this order to the learned Sole

Arbitrator.

31. The issues on merits that may be raised by the parties are kept open and shall be determined by the learned Arbitrator in accordance with law.

.....J. (SURYA KANT) .....J. (ABHAY S. OKA) NEW DELHI:

SEPTEMBER 07, 2022