

Buildmyinfra Private Limited vs Gyan Prakash Mishra on 22 July, 2022

Author: Prateek Jalan

Bench: Prateek Jalan

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IN THE HIGH COURT OF DELHI AT NEW DELHI

Date of Decision: 22.07.2022

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ARB.P. 340/2022

BUILDMYINFRA PRIVATE LIMITED

..... Petitioner

Through: Ms. Tia Majumdar, Advocate.

[M: -9999132712]

versus

GYAN PRAKASH MISHRA

..... Respondents

Through: Mr. Surendra Kumar Rana,

Advocate. [M: -8168288465]

CORAM:

HON'BLE MR. JUSTICE PRATEEK JALAN

PRATEEK JALAN, J. (ORAL)

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1. By way of this petition under Section 11 of the Arbitration and Conciliation Act, 1996 ["the Act"], the petitioner seeks appointment of an arbitrator to adjudicate the disputes arising between the parties under a "Confidentiality and Non-Compete Agreement" ["the Agreement"] dated 01.07.2019.

2. The contention of the petitioner, which is engaged in the business of providing industrial solutions, is that it issued an offer letter dated 10.07.2018 to the respondent to join its employment and the respondent accepted the same and joined the employment of the petitioner on 17.07.2018. Following his appointment, the respondent signed the Agreement dated 01.07.2019. The recital to the Agreement notes that the respondent was designated as the Project Head - IT & Networking of the petitioner-company and that he had accepted the employment with the employer vide an acceptance letter dated 17.07.2018. The Agreement contains a non-competition clause in clause 2.1 which restrains the employee [respondent herein] from engaging or participating directly or indirectly in a competing business during the period of his employment and for a period of one year thereafter. The consideration under the Agreement is stipulated to be the emoluments paid by the petitioner to the respondent. The Agreement contains an arbitration clause in clause 7.3 which reads as follows:-

"7.3 In the event the efforts and discussions described in Clause 7.2 fail to resolve the matter, such dispute, controversy or claim shall be settled by arbitration in accordance with the Indian Arbitration and Conciliation Act, 1996, and any statutory modification or re- enactment thereof. It is further agreed that the place of arbitration shall be Gurgaon and the Arbitrator shall be appointed mutually by the Parties. The decision of the arbitrator shall be final and binding upon the Parties."

3. Ms. Tia Majumdar, learned counsel for the petitioner, submits that the respondent, in violation of the aforesaid agreement, constituted a rival business by the name of M/s Gangatika Technologies, and solicited business from the petitioner's clients. There was some correspondence between the parties inter se, following which the petitioner, through counsel, addressed a legal notice dated 03.02.2021 to the respondent alleging violation of the Agreement by commencement of the competing proprietorship business.

4. Ms. Majumdar refers me to a communication, sent through counsel on 17.02.2021, wherein the respondent stated that the respondent had joined the petitioner's organisation and been issued an employment letter. However, it was contended that the Agreement was not part of the employment letter or the terms and conditions of the respondent's employment, that it was a one way document for which no consideration was paid and it was therefore void. It was further stated that Agreement lost its validity in December 2020, as the respondent recalled, at this stage, that no copy of the Agreement was ever supplied to him. The respondent alleged that he was not part of M/s Gangatika Technologies during the period of his employment. He asserted a claim against the petitioner to the tune of 66,086/-.

5. The petitioner finally invoked the arbitration clause in the Agreement by a legal notice dated 08.06.2021. The respondent again, by a notice dated 03.09.2021 took the same position with regard to the validity of the Agreement.

6. The respondent has also since filed a suit [CS No. 4042/2021] before the Court of Civil Judge (Senior Division), Gurgaon, seeking a declaration that the Agreement is null and void and also seeking a decree in the sum of 66,086/-.

7. In the meanwhile, the petitioner first approached this Court under Section 11 of the Act by way of ARB.P. 1082/2021 [Buildmyinfra Private Limited through Its Authorized Representative Aalok Bansall vs. Gyan Prakash Mishra]. Learned counsel for the petitioner was permitted to withdraw the said petition by an order dated 07.12.2021 with liberty to file the same afresh.

8. Mr. Surendra Kumar Rana, learned counsel for the respondent, resists the appointment of an arbitrator principally on the following grounds:-

- a. That the respondent had never signed the Agreement and is therefore not bound by the arbitration clause contained therein.
- b. That the arbitration clause provides for the place of arbitration to be in Gurgaon and this Court does not possess the territorial jurisdiction to entertain the present petition.
- c. That the respondent's suit

challenging the validity of the Agreement being pending before the Civil Judge (Senior Division), Gurgaon, this Court ought not to appoint an arbitrator in the interim.

9. I am of the view that none of the aforesaid three arguments are merited. The jurisdiction of the Court under Section 11 of the Act is limited, as held in *Vidya Drolia and Others vs. Durga Trading Corporation* (2021) 2 SCC 1 and the subsequent judgment of the Supreme Court in *Bharat Sanchar Nigam Limited and Another vs. Nortel Networks India Private Limited* (2021) 5 SCC 738. The Court's enquiry while considering the petition under Section 11 of the Act is generally limited to the existence of the arbitration agreement/ clause except in certain exceptional situations. In cases where the arbitration agreement prima facie exist, the arbitrator ought to be appointed and the parties relegated to their remedies before the arbitral tribunal.

10. In the present case, the original of the Agreement has also been produced in Court. It prima facie bears the signature of the respondent at the foot of every page and also on the last page, although he has signed on the last page at the place where the petitioner's representative was required to sign. Mr. Rana endeavours to submit that the Agreement was invalid as it does not contain the signature of the petitioner's representative. However, on this point, the judgment of the Supreme Court in *Govind Rubber Limited vs. Louis Dreyfus Commodities Asia Private Limited* (2015) 13 SCC 477 [paragraphs 15 and 16] cited by Ms. Majumdar, makes it clear that it is not necessary for the written document to be signed by all the parties, so long as the existence of an arbitration agreement can be culled out from the exchange of letters, telex, telegrams or other means of communication which provide a record thereof. So long as it can prima facie be shown that the parties are ad idem, the liability of a party cannot be negated only because the agreement has not been signed by him or her.

11. In the present case, the Agreement has indeed been signed by the respondent, who himself resists the appointment of an arbitrator thereunder. The non-signing of the Agreement by the petitioner, who asserts its validity, cannot in these circumstances come to the aid of the respondent when the respondent, in the exchange of communication through counsel, has acknowledged the relationship of employment and also acknowledged the existence of the Agreement itself. The contents of the legal notices sent on behalf of the respondent to the learned counsel for the petitioner indicate that the respondent's contention was not with regard to the existence of the Agreement but with regard to the validity of its substantive terms. For example, it was asserted on behalf of the respondent that the Agreement was not part of his employment letter or the condition of his employment but a one way document without consideration. It was also contended that the Agreement had lost its validity, but not that it had never been signed or executed by the respondent. This contention of Mr. Rana is therefore rejected.

12. As far as jurisdiction of this Court is concerned, the stipulation in the Agreement is to the effect that the place of arbitration shall be Gurgaon. That the place of arbitration does not per se amount to designation of a "seat" of the arbitration, is now settled. Reference in this connection may be made to the judgment of the Supreme Court in *Mankastu Impex Private Limited vs. Airvisual Limited* (2020) 5 SCC 399 [paragraph 20]. Upon a consideration of existing authority, a coordinate bench of this Court in *Aarka Sports Management Pvt. Ltd. vs. Kalsi Buildcon Pvt. Ltd.* (2020) 271

DLT 194 has summarised the legal principles with regard to the jurisdiction of the Court for the purposes of a petition under Section 11 of the Act in the following terms:-

"24. Section 20(1) of the Arbitration and Conciliation Act empowers the parties to determine the seat of arbitration. The parties are at liberty to choose a neutral seat of arbitration where neither the cause of action arose nor the parties reside or work and Sections 16 to 20 of the Code of Civil Procedure would not be attracted.

25. Once the seat is determined, the Court of that place shall have exclusive jurisdiction to deal with all matters relating to arbitration agreement between the parties.

26. If the parties have not determined the seat of arbitration, the seat of arbitration shall be determined by the Arbitral Tribunal under Section 20(2) of the Arbitration and Conciliation Act.

27. If the parties have not agreed on the seat of the arbitration, the Court competent to entertain an application under Section 11 of the Arbitration and Conciliation Act would be the "Court" as defined in Section 2(1) (e) of the Act read with Sections 16 to 20 of the Code of Civil Procedure.

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29. Since the parties have not agreed on the seat of the arbitration, the Court within the meaning of Section 2(1)(e) of Arbitration and Conciliation Act read with Sections 16 to 20 of Code of Civil Procedure would be competent to entertain an application under Section 11 of the Arbitration and Conciliation Act."

13. In the present case, the respondent is an individual who admittedly resides and carries on business within the jurisdiction of this Court. Further, acts of the respondent which constitute the basis of the cause of action claimed by the petitioner, also occurred within the jurisdiction of this Court, as the alleged rival business of the respondent i.e. M/s Gangatika Technologies operates at the same address as the respondent's residence, which is also within the jurisdiction of this Court. I am therefore of the view that this Court is the relevant Court within the meaning of Section 2(1)(e) of the Act read with Section 20 of the Code of Civil Procedure, 1908. Mr. Rana's contention on jurisdiction is also rejected.

14. As far as the pendency of the respondent's suit in the Gurgaon Court is concerned, it is to be noted that the respondent approached the Gurgaon Court only after the service of the first petition filed by the petitioner in this Court under Section 11 of the Act. Be that as it may, Mr. Rana concedes that the respondent has neither sought nor been granted any interim relief in the said suit which would impede the appointment of an arbitrator in these circumstances.

15. In view of the above, I am of the view that the defences urged by Mr. Rana are all unmerited and the petition must succeed.

16. The petition is therefore disposed of with the following directions:-

a) The disputes and differences arising between the parties under the Agreement dated 01.07.2019 are referred to the arbitration of Mr. Ankit Yadav, Advocate [Tel: 8574590040].

b) As requested by learned counsel for the parties, the arbitration will be held under the aegis of the Delhi International Arbitration Centre, Shershah Road, New Delhi-110503.

c) The arbitrator is requested to make a declaration in terms of Section 12 of the Act, prior to entering upon the reference.

d) The remuneration of the learned arbitrator will be computed in accordance with the Fourth Schedule of the Act.

17. All rights and contentions of the parties are left open for consideration before the arbitrator.

PRATEEK JALAN, J JULY 22, 2022 „pv /