2018 INSC 821

REPORTABLE

IN THE SUPREME COURT OF INDIA

CIVIL ORIGINAL JURISDICTION

ARBITRATION PETITION (CIVIL) NO. 22 OF 2018

M/s. Zhejiang Bonly Elevator Guide Rail Manufacture Co. Ltd. **…Petitioner(s)**

VERSUS

M/s. Jade Elevator Components **…Respondent(s)**

J U D G M E N T

Dipak Misra, CJI

In the instant arbitration petition, preferred under Section 11(5) of the Arbitration and Conciliation Act, 1996 (for brevity, 'the Act'), the petitioner seeks for constitution of an arbitral tribunal with a sole arbitrator to adjudicate the claims of the petitioner under the Commission Processing Contract dated 11.09.2014 and to pass such further order as may be deemed fit and proper in the facts and circumstances of the case.

Signature Not Verified
Digitally signed by DEEPAK SINGLANI
Date: 2018.09.14 11:34:11 IST
Reason:

2. The petitioner, company incorporated under the laws of People's Republic of China having its office at Sanquiao Village, Fuchun Street, Fuyang, China, is engaged in the business of, inter alia, exporting and

supplying high quality elevator guiderails, fish-plates, accessories and allied goods. The respondent, a partnership firm based in India having its office at Plot No.455, Road No.11, “A” Cross Road, GIDC, Kathwada, Ahmedabad – 382430, Gujarat, is engaged in the business of supplying elevator components for use in the modernization of existing lifts and the new design of the elevator.

3. The contract, namely, Commission Processing Contract (hereinafter referred to as ‘the Contract’) was entered into between the parties on 11.09.2014 in respect of supply of certain products under the Contract. In the course of performance of the Contract, as certain differences had arisen and the parties were unable to amicably settle the disputes which fell within the scope of the arbitration clause, the petitioner appointed Justice V.S. Agarwal, former Judge, High Court of Judicature at New Delhi as the sole arbitrator. On 30.03,2018, the petitioner called upon the respondent to consent to the appointment of the sole arbitrator within a period of thirty days from the receipt of the notice. The respondent received the said notice on 31.03.2018 and the respondent in its reply dated 05.04.2018 refused to concur and consent to the appointment of the sole arbitrator. Because of the aforesaid situation, the petitioner has been compelled to move this Court for appointment of the sole arbitrator. When the matter was

listed before this Court after service of notice, the learned counsel for the respondent has placed reliance on the reply dated 05.04.2018 given by the counsel for the respondent. In the said reply, the facts asserted by the petitioner have been disputed. That apart, it has been stated that the claims put forth are beyond the provisions of the Contract.

4. To appreciate the controversy, it is required to be seen whether there is an arbitration clause for resolution of the disputes. Clause 15 of the agreement as translated in English reads as follows:-

> "15. Dispute handling:
>
> Common processing contract disputes, the parties should be settled through consultation; consultation fails by treatment of to the arbitration body for arbitration or the court."

5. It is submitted by learned counsel for the petitioner that if the clause of 'dispute handling' is scrutinized appropriately, the disputes are to be settled through consultation and, if the consultation fails by treatment of to the arbitration body for arbitration or Court and, therefore, the matter has to be referred to arbitration. It is canvassed by him that the clause is not categorically specific that it has to be adjudicated in a court of law. It leads to choices and the choice expressed by the petitioner is arbitration.

6. Learned counsel for the respondent, in his turn, would urge that when it is stated arbitration or Court, the petitioner should knock at the doors of the competent court but not resort to arbitration, for the clause cannot be regarded as an arbitration clause which stipulates that the disputes shall be referred to arbitration.

7. To appreciate the clause in question, it is necessary to appositely understand the anatomy of the clause. It stipulates the caption given to the clause 'dispute handling'. It states that the disputes should be settled through consultation and if the consultation fails by treatment of to the arbitration body for arbitration or the court. On a query being made, learned counsel for the parties very fairly stated that though the translation is not happily worded, yet it postulates that the words "arbitration or the court" are undisputable as far as the adjudication of the disputes is concerned. There is assertion that disputes have arisen between the parties. The intention of the parties, as it flows from the clause, is that efforts have to be made to settle the disputes in an amicable manner and, therefore, two options are available, either to go for arbitration or for litigation in a court of law.

8. This Court had the occasion to deal with such a clause in the agreement in ***INDTEL Technical Services Private Limited vs. W.S.***

Atkins Rail Limited[1]. In the said agreement, clause No.13 dealt with the settlement of disputes. Clauses 13.2 and 13.3 that throw light on the present case were couched in the following language:-

> "13.2. Subject to Clause 13.3 all disputes or differences arising out of, or in connection with, this agreement which cannot be settled amicably by the parties shall be referred to adjudication;
>
> 13.3. If any dispute or difference under this agreement touches or concerns any dispute or difference under either of the sub-contract agreements, then the parties agree that such dispute or difference hereunder will be referred to the adjudicator or the courts as the case may be appointed to decide the dispute or difference under the relevant sub-contract agreement and the parties hereto agree to abide by such decision as if it were a decision under this agreement."

9. Interpreting the aforesaid clauses, the Judge designated by the learned Chief Justice of India held thus:-

> "Furthermore, from the wording of Clause 13.2 and Clause 13.3, I am convinced, for the purpose of this application, that the parties to the memorandum intended to have their disputes resolved by arbitration and in the facts of this case the petition has to be allowed."

10. The aforesaid passage makes it clear as crystal that emphasis has been laid on the intention of the parties to have their disputes resolved by arbitration.

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1 (2008) 10 SCC 308

11. In the case at hand, as we find, Clause 15 refers to arbitration or court. Thus, there is an option and the petitioner has invoked the arbitration clause and, therefore, we have no hesitation, in the obtaining factual matrix of the case, for appointment of an arbitrator and, accordingly, Justice Prakash Prabhakar Naolekar, formerly a Judge of this Court, is appointed as sole Arbitrator to arbitrate upon the disputes which have arisen between the parties. The learned Arbitrator shall be guided by the Arbitration & Conciliation (Amendment) Act, 2015. The learned Arbitrator shall make positive efforts to complete the arbitration proceedings as per the Act of 2015.

12. The Registry is directed to send a copy of this order to the sole Arbitrator. Learned counsels for the parties are also at liberty to bring it to the notice of the Arbitrator.

13. The arbitration petition is, accordingly, allowed. There shall be no order as to costs.

.....CJI.
(Dipak Misra)

.....J.
(A. M. Khanwilkar)

.....J.
(Dr. D.Y. Chandrachud)

New Delhi;
September 14, 2018