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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

Decided on: 11th October, 2022

\+ **ARB.P. 621/2021**

PANASONIC INDIA PRIVATE LTD ..... Petitioner

Through: Mr. Kunal Kher, Advocate.

versus

SHAH AIRCON THROUGH
ITS PROPRIETOR SHADAB RAZA ..... Respondent

Through: Mr. Zahid Hanief, Advocate.

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CORAM:
HON'BLE MR. JUSTICE PRATEEK JALAN

JUDGMENT

1. By way of this petition under Section 11 of the Arbitration and Conciliation Act, 1996 [hereinafter referred to as "the Act"], the petitioner [hereinafter referred to as "Panasonic"] seeks appointment of an arbitrator to adjudicate disputes which have arisen between the parties under an Agreement dated 05.09.2016, entitled "Distribution Agreement" [hereinafter referred to as "the Agreement"].

Facts

2. By way of the Agreement, Panasonic was to sell electronic goods to the respondent [hereinafter referred to as "Shah Aircon"], which, according to Panasonic, is a proprietorship firm dealing in

electronic goods. The Agreement contains clauses[1] with regard to jurisdiction and dispute resolution in the following terms: -

> *"XXIV. GOVERNING LAW :*
> *This Agreement and all PO under this Agreement shall be exclusively governed by and construed in accordance with the laws of India, without regard to choice of law principles.* ***All issues relating to appointment of arbitrator or any petition or application to be made to the Court under the applicable arbitration law or any Arbitration Award or any issue arising out of such arbitration proceedings shall be subject to the exclusive jurisdiction of Courts at New Delhi only****.*
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> ***XXV. ARBITRATION:***
> *The parties will attempt to settle any dispute, claim or controversy arising out of this Agreement through consultation and negotiation in good faith and in a spirit of mutual co-operation. If those attempts fail, then either Party* ***can*** *refer the disputes, issues or claims arising out of or relating to this Agreement for arbitration by a sole arbitrator who shall be appointed by the Managing Director of the Panasonic.* ***The arbitration proceedings shall be held in New Delhi, conducted in English, and shall be subject to the provisions of the Arbitration and Conciliation Act 1996.*** *The Arbitrator shall give a reasoned award.* ***In the event the Appoint Authority fails to act or appoint a sole arbitrator, then either Party can have the sole arbitrator appointed under the provisions of the Arbitration and Conciliation Act, 1996.*** *The use of any ADR procedure will not be construed under the doctrines of laches, waiver or estoppels to affect adversely the rights of either party, and nothing in this Section will prevent either party from resorting to judicial proceedings if (1) good faith efforts to resolve the dispute under these procedures have been unsuccessful, or (2)*

[1] Refer "General Terms & Conditions" of the Agreement [Pg 7 onwards of the petitioner's list of documents].

interim relief from a court is necessary to prevent serious and irreparable injury to one party or to others."[2]

3. Panasonic's claims arise out of alleged unpaid invoices which were raised by it for electronic goods sold to Shah Aircon. In the course of correspondence between the parties, claims were raised by both parties against each other. The correspondence commences with a legal notice dated 20.08.2020, sent on behalf of Shah Aircon, in which it claimed that it was appointed as an authorized distributor of Panasonic for District Faridabad, Haryana. It was further alleged that after the distributorship was given to Shah Aircon, Panasonic sold goods to some dealers directly, and the bills were made in the name of Shah Aircon. Shah Aircon claimed to have suffered losses to the tune of approximately ₹29 lacs due to Panasonic, and also alleged that Panasonic sold goods worth of approximately ₹20 lacs to third parties in the name of Shah Aircon, but payment for the same was not received by it.

4. After further correspondences, including a legal notice dated 07.09.2020, sent on behalf of Shah Aircon, Panasonic addressed a communication through counsel dated 05.10.2020 to Shah Aircon, demanding a sum of ₹37,29,976/-, and invoked the arbitration clause contained in the Agreement in the event Shah Aircon failed to pay the amount mentioned therein. Shah Aircon replied to the said letter on 29.10.2020, stating *inter alia* that the demand notice was sent with an intention to not pay the legal dues which Panasonic owed to Shah Aircon, and to avoid reconciliation of accounts.

[2] Emphasis supplied.

5. As the parties were unable to resolve their disputes *inter se*, Panasonic finally invoked the arbitration clause by a letter dated 29.01.2021. Shah Aircon responded by a letter dated 26.02.2021, *inter alia* stating that it did not sign the Agreement with Panasonic. Shah Aircon further averred that the disputes between the parties were only in relation to rendition of accounts, for which it had approached the court of competent jurisdiction in Gurugram, Haryana by filing a civil suit, and that Panasonic had no power to appoint an arbitrator.

6. As stated in this letter, Shah Aircon has filed a civil suit[3], *inter alia* seeking rendition of accounts and permanent injunction, which is pending before the Court of learned Civil Judge (Junior Division), Gurugram, Haryana [hereinafter referred to as "the Civil Court"]. Panasonic has made an application in the suit for reference to arbitration under Section 8 of the Act.

7. It is in these circumstances that Panasonic filed the present petition under Section 11 of the Act on 15.07.2021.

8. Notice in the present petition was issued on 16.07.2021, but it appears from the order sheets that service could not be effected upon Shah Aircon for some time, and that it entered appearance only on 01.09.2022. On 01.09.2022, Shah Aircon was granted an opportunity to file its reply to the petition, which has been filed, and is on record.

Submissions

9. Although various defences have been taken by Shah Aircon in the reply, both as to the reference to arbitration, and on the merits of

[3] CS No. 797/2021, entitled Shah Aircon vs. Panasonic India Pvt Ltd. and Ors.

Panasonic's claims, Mr. Zahid Hanief, learned counsel for Shah Aircon, urged the following contentions before the Court:-

a. Mr. Hanief submitted that the purported arbitration clause in the Agreement is not a valid arbitration clause as the reference of disputes to arbitration is not mandatory. Mr. Hanief emphasised that the clause uses the word "*can*", as opposed to "*shall*", which, according to him, signifies an option in the hands of a party as to whether to refer a dispute to arbitration or not. In connection with this argument, he cited the judgment of the Supreme Court in *Jagdish Chander vs. Ramesh Chander and Ors.*[4], and the judgment of the High Court of Calcutta in *Jyoti Brothers vs. Sree Durga Mining Company*[5].

b. Mr. Hanief submitted that Panasonic's claims are barred by limitation. He drew my attention to the heading "*Term*" in the Agreement[6] to show that the columns for the "*Effective Date*" and "*End Date*" of the Agreement were not indicated. It is the case of Shah Aircon that Panasonic enters into distribution agreements of the sort involved in the present case for a period of one year at a time, and under Clause II (ix) of the General Terms & Conditions of the Agreement, read with Schedule II and III thereof[7], invoices were to be paid within a maximum credit period of 14 days from the date of billing. Drawing on these arguments, he submitted that the Agreement would have

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[4] (2007) 5 SCC 719.

[5] AIR 1956 Cal 280.

[6] Refer page No. 4 of the petitioner's list of documents [See row No.5 column No. 1].

[7] Refer page No. 22 of the petitioner's list of documents [See heading "D" of Schedule III].

been valid at best until September, 2017, and the credit period under the invoices would have been available to Shah Aircon only for a period of 14 days thereafter. In such circumstances, Mr. Hanief submitted that the commencement of arbitration proceedings in terms of Section 21 of the Act by Panasonic's communication dated 29.01.2021, was outside the period of limitation.

c. Mr. Hanief drew my attention to certain invoices raised by Panasonic dated 30.08.2018 and 15.11.2018, which have been placed on record with Shah Aircon's list of documents. The said invoices also contain jurisdiction and dispute resolution clauses, which are in the following terms:-

> *"Terms & Conditions: 1. Subject to exclusive jurisdiction of courts at Delhi only.*
> *2. Interest @ 18%P.A. shall be charged if payment is not received within Stipulated period.*
> *3. Dispute Resolution: Any dispute, controversy or claim arising out of or related to this invoice shall be referred for adjudication to Sole Arbitrator to be appointed by Managing Director/President of Panasonic or any person nominated by him. The arbitration shall be governed by the Indian Arbitration & Conciliation Act, 1996 and shall be conducted at Gurgaon in English language."*

Mr. Hanief's contention based on this document was that this Court lacks jurisdiction to entertain this petition which ought to have been filed before the appropriate Court having jurisdiction over the designated venue of the arbitration i.e. Gurugram, Haryana.

10. Mr. Kunal Kher, learned counsel for Panasonic, on the other hand, rebutted the aforesaid contentions with the following arguments:-

a. With regard to the interpretation of the arbitration clause, Mr. Kher submitted that the essential ingredients of a valid arbitration agreement stipulated in Section 7 of the Act are satisfied in the present case. He argued that, upon a combined reading of Clauses XXIV and XXV of the Agreement, it is clear that the parties intended a mandatory reference to arbitration, and that such intention cannot be eclipsed by mere use of the word "*can*", as suggested by Mr. Hanief.
b. On the question of limitation, Mr. Kher disputed the submissions of Mr. Hanief, and argued that this is not a case where the claims are so obviously barred by limitation as to render a reference to arbitration unnecessary. He submitted that Shah Aircon's contention on limitation may be referred for adjudication by the arbitral tribunal.
c. On the question of jurisdiction, Mr. Kher drew my attention to the exclusive jurisdiction clauses contained both, in the Agreement, and in the invoices, to which Mr. Hanief referred. Both the clauses vest exclusive jurisdiction over disputes in the Courts in Delhi. Additionally, the arbitration clause in the Agreement also designates Delhi as the venue of arbitration. Although the arbitration clause in the invoices designates Gurugram as the venue of arbitration, Mr. Kher submitted that the reference sought in the present case is under the Agreement,

and not under the invoices. In any event, he cited the judgments of two co-ordinate benches of this Court in *Cravants Media Pvt. Ltd vs. Jharkhand State Co-Operative Milk Producers Federation Ltd. and Anr.*[8], and *Stella Industries Ltd. vs. Vero Moda Retails Pvt. Ltd.*[9] to argue that an exclusive jurisdiction clause contained in a contract having an arbitration clause would prevail over designation of a particular venue, which is intended only to signify the place for the conduct of the arbitral proceedings.

Analysis

(I) Jurisdiction:

11. In the context of the above submissions, the first question to be addressed concerns the jurisdiction of this Court. I am of the view that Mr. Hanief's submission on this account is unmerited. The disputes of which Panasonic seeks reference to arbitration are under the Agreement. The Agreement provides for exclusive jurisdiction of the Courts in New Delhi, and specifically for the parties to have recourse to this Court, for appointment of an arbitrator. As against this, the arbitration clause in the invoices, to which Mr. Hanief refers, only provides for the venue of the arbitration i.e., Gurgaon, and the language in which arbitration should be conducted i.e., English. Even in the invoices, exclusive jurisdiction is vested in courts in Delhi. Even if it is assumed that the venue of the arbitration is as provided in

[8] Judgement dated 06.12.2021 in ARB.P. 915/2021.
[9] Judgment dated 25.05.2022 in ARB.P. 504/2020.

the invoices, Clause XXIV of the Agreement confers jurisdiction upon the Courts in New Delhi.

12. This Court, *inter alia* in *Cravants Media Private Limited*[10], and in *Stella Indusstries Ltd*[11], has held that a provision conferring jurisdiction for appointment of the arbitrator upon this Court would prevail over a designation of the venue of the arbitration in a different Court. In the present case, Clause XXIV of the Agreement is unambiguous. I, therefore, hold that this Court has the jurisdiction to entertain the present petition.

(II) Interpretation of Clauses XXIV and XXV:

13. The next question concerns interpretation of the arbitration clause in the Agreement, particularly as to whether it constitutes a binding agreement to refer disputes to arbitration. Mr. Hanief's submission to the contrary rests upon the use of the word "*can*" in Clause XXV of the Agreement, and the last part of the said clause which provides for recourse to civil proceedings in certain circumstances.

14. The requirements for existence of a valid arbitration clause are encapsulated in Section 7 of the Act, which *inter alia* states that the parties must contemplate a mandatory reference to arbitration. The conditions for a valid arbitration agreement, as laid down in Section 7 of the Act, are also laid down in the judgments of the Supreme Court *inter alia* in *K.K Modi vs. K.N Modi and Ors.*[12], *Bihar State Mineral*

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[10] Supra (note 8).
[11] Supra (note 9).
[12] (1998) 3 SCC 573, refer paragraph 17(5).

Development Corporation and Anr. vs. Encon Builders (I)(P) Ltd.[13], and *Babanrao Rajaram Pund vs. Samarth Builders and Developers and Anr*[14].

15. The interpretation of an arbitration clause, as indeed of all contractual provisions, must be predicated upon a construction of the contract as a whole, and no particular word or phrase should be unduly emphasised to negate the clause of its true meaning. The use of the word "*can*", which normally signifies an option, as opposed to the word "*shall*", which is mandatory in nature, is not determinative of the present case. This is because the word "*can*" is juxtaposed with the words "*either party*", signifying the option of *either* Panasonic, or Shah Aircon, to refer disputes to arbitration. If either of the parties can exercise such an option by referring the disputes under the Agreement to arbitration, it is for all practical purposes, binding upon the other party as well. The remainder of the clause, insofar as it refers to the venue of arbitration, the language of arbitration, the applicability of the Act, the requirement to give reasons, and the procedure for appointment of an arbitrator by reference to Court, also supports the view that the parties intended a mandatory reference to arbitration, and incorporated the ancillary provisions into the Agreement for this purpose only. Clause XXIV of the Agreement strengthens this position, inasmuch as it confers exclusive jurisdiction on this Court in case of a dispute, with special reference to arbitration proceedings, and the appointment of an arbitrator.

[13] (2003) 7 SCC 418, refer paragraph 17.

[14] 2022 SCC OnLine SC 1165 [Judgment in Civil Appeal arising out of S.L.P.(Civil) 15989/2021, decided on 07.09.2022], refer paragraph 23.

16. The final part of Clause XXV of the Agreement also does not persuade me to a contrary conclusion. The clause permits recourse to judicial proceedings, if *"(1) good faith efforts to resolve the dispute under these procedures have been unsuccessful or (2) interim relief from a court is necessary to prevent serious and irreparable injury to one party or to others*"[15]. In the first situation, this obviously does not intend to derogate from the arbitration clause, but provides for a situation where arbitration has been rendered impossible despite good faith efforts of the parties. The second possibility deals with urgent interim reliefs which, in any event, are contemplated under Section 9 of the Act.

17. The two judgments which were cited by Mr. Hanief in support of this proposition are, in my view, inapplicable to the facts and circumstances of the present case.

18. After referring to its earlier judgments, the Supreme Court in *Jagdish Chander*[16], held as follows: -

> *"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 v. U.P. Small Industries Corpn. Ltd. [(1999) 2 SCC 166] and Bihar State Mineral Development Corpn. 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*

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[15] Refer page No. 18 of the petitioner's list of documents.

[16] Supra (note 4).

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 a 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 exclude 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."*[17]

19. The arbitration clause in *Jagdish Chander*[18] provided that the disputes "*shall be mutually decided by the parties or shall be referred to arbitration if the parties so determine*"[19]. It is on the interpretation of the phrase "*if the parties so determine*" that the Court came to the conclusion that the arbitration agreement lacked consensus *ad idem* to refer the parties to arbitration, and required fresh agreement for this purpose. In the present case, in contrast, for the reasons stated hereinabove, I have come to the conclusion that no fresh consent for arbitration is contemplated, and the Agreement adequately demonstrates consensus between the parties.

20. With respect to the judgment of the Calcutta High Court in *Jyoti Brothers*[20], Mr. Hanief particularly emphasised the fact that the arbitration clause in that case also used the word "*can*", which the Court held indicates a mere possibility significant of a pious wish, or desire, but not an obligatory contract. The Court, therefore, held that the arbitration agreement in that case was not a present agreement, or a concluded agreement, to submit present or future disputes to arbitration.

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[17] Emphasis Supplied.

[18] Supra (note 4).

[19] Refer paragraph 9 of *Jagdish Chander*.

[20] Supra (note 5).

21. The arbitration clause under consideration in *Jyoti Brothers*[21] was in the following terms:-

> *"In the event of any dispute arising out of this contract the same **can be settled** by Arbitration held by a Chamber of Commerce at Madras. Their decision shall be binding to the buyers and the sellers."*[22]

22. The Calcutta High Court distinguished the view of the Court of Appeal in *Kedarnath Atmaram vs. Kesoram Cotton Mills*[23], *inter alia* on the ground that the arbitration clause in *Jyoti Brothers*[24] does not express on whose option it was to call for arbitration. We are not faced with that difficulty in this case where the clause clearly holds that either of the parties can call for arbitration.

23. For the aforesaid reasons, I am of the view that, on a proper interpretation of the arbitration clause in the present case, the parties, in fact, arrived at a mandatory understanding that their disputes under the Agreement would be referred to arbitration.

(III) Limitation:

24. Turning to Mr. Hanief's contentions on the question of limitation, and Shah Aircon's liability on merits, these issues are best reserved for adjudication by the learned arbitrator. The recent judgment of the Supreme Court in *Bharat Sanchar Nigam Ltd and Anr. vs. Nortel Networks India Pvt Ltd.*[25], relying upon the judgment of a three Judge Bench in *Vidya Drolia and Ors. vs. Durga Trading*

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[21] Supra (note 5).
[22] Emphasis supplied.
[23] I.L.R. (1950) 1 Cal 550.
[24] Supra (note 5).
[25] (2021) 5 SCC 738.

Corporation[26], has clearly held that limitation is in general "*a mixed question of fact and law*"[27], which is in the realm of the arbitrator to resolve. It is only in an exceptional case, where the claims are *ex facie* time barred, that the Court would decline reference to arbitration under Section 11 of the Act. In the present case, Mr. Hanief's argument on limitation is based upon various disputed assertions as to the tenure of the Agreement, the credit period, etc., which are not readily evident from the documents on record. In these circumstances, I am unable to accept his submission that this is a case of an entirely meritless claim, or "*deadwood*", so as to justify denial of Panasonic's request for reference of disputes for adjudication by an arbitrator.

Conclusion

25. For the reasons aforesaid, the petition succeeds, and is disposed of with the following directions: -

a. Mr. Vidit Gupta, Advocate [Mobile No:- +91-9910995511] is appointed as the Arbitrator to adjudicate the disputes between the parties under the Agreement.

b. The learned Arbitrator is requested to make a declaration in terms of Section 12 of the Act prior to entering upon the reference.

c. The renumeration of the learned Arbitrator will be computed in terms of Schedule IV of the Act.

d. All rights and contentions of the parties, on maintainability, arbitrability of the claims under the Agreement, and on merits

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[26] (2021) 2 SCC 1.

[27] Refer paragraph 5 of *Nortel*.

of the claims, are left open for adjudication by the learned Arbitrator.

26. There will be no order as to costs.

PRATEEK JALAN, J

OCTOBER 11, 2022
'pv/Faisal'/