IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION

IN ITS COMMERCIAL DIVISION

COMMERCIAL ARBITRATION APPLICATION NO. 458 OF 2024

Sanjiv Manmohan Gupta ...**Applicant**

Versus

Sai Estate Consultants Chembur Pvt. Ltd. ...**Respondent**

WITH

COMMERCIAL ARBITRATION PETTTION (L) NO. 29862 OF 2023

Sanjiv Manmohan Gupta ...**Applicant**

Versus

Sai Estate Consultants Chembur Pvt. Ltd. ...**Respondent**

Mr. Nirman Sharma, *a/w Krushang Kedia, i/b Girish Kedia, Advocates for the Applicant/Petitioner.*

Mr. Dharam Jumani, *a/w Suraj Iyer, Mr. Mihir Nerurkar, Gauri Joshi, i/b Ganesh & Co., Advocates for Respondent.*

CORAM: **SOMASEKHAR SUNDARESAN, J.**

RESERVED ON: **February 3, 2025**

PRONOUNCED ON: **March 11, 2025**

JUDGEMENT:

Context and Factual Background:

1. The captioned proceedings entail an Application under Section 11 ("***Section 11 Application***") of the Arbitration and Conciliation Act, 1996 ("***the Act***"), and a Petition filed under Section 9 of the Act ("***Section 9 Petition***"). The short question that needs consideration is whether the parties have executed an arbitration agreement.

2. The Respondent had availed of services of the Applicant-Petitioner for outdoor advertisements on hoardings. The Applicant-Petitioner makes a claim for outstanding payments owed by the Respondent for such services.

Contentions of the Parties:

3. It is the Applicant-Petitioner's case that the arbitration agreement is contained in the invoices raised by the Applicant-Petitioner on the Respondent – these invoices were raised during the period between February 2018 and June 2019 (found on *pages 41, 49, 55, 60, 66, 73, 79, 84, 87, 91, 94, 96, 99, 102, 107, 110 and 114* of the Application). Each of these invoices contains an arbitration clause. The Applicant-Petitioner submits that invoices have been raised and acted upon because the services have been accepted;

monies have been paid on the basis of the invoices (the last payment was received on December 23, 2019, 22 months after the first invoice); tax has been deducted at source on most of the invoices; and each of the invoices bears an endorsement or seal of the Respondent. The Applicant-Petitioner invoked arbitration by a notice dated August 22, 2023.

4. The Respondent objects to such invocation on multiple grounds, summarised below:-

a) the arbitration agreement does not exist, and that an arbitration clause in an invoice cannot constitute an arbitration agreement;
b) for each piece of service provided by the Applicant-Petitioner, a Letter of Confirmation was issued, and that document did not have an arbitration clause;
c) the Letter of Confirmation was followed by provision of services, which was then followed by an invoice, and therefore, an arbitration clause "slipped into" an invoice raised after the services had been provided cannot constitute an arbitration agreement;
d) such a clause would at best be a unilateral reference to arbitration and the parties cannot be said to be *ad idem* in referring their disputes to arbitration;

e) the invoices have been received by a staff member who need not be considered an authorised signatory;

f) some of the invoices contain an endorsement "Received (not checked)" while other invoices contain an endorsement "Received for Verification", and therefore, the terms and conditions in them could not be said to became binding on the Respondent without examining if the person accepting the invoices is an authorised signatory; and

g) the invocation is inadequate and it does not put the Respondent to notice about the precise scope of the dispute sought to be referred to arbitration.

Analysis and Findings:

5. Having considered the material on record and the written submissions filed by the parties, I note that the issues that the Respondent desires to drag the Section 11 Court into considering, entail assessment of evidence to answer mixed questions of fact and law. This is in contrast to the declared law on the scope of this Court's jurisdiction under Section 11 of the Act.

6. The conduct of the parties evidently shows that there is a *prima facie* demonstration that advertising services were availed of by the Respondent from the Applicant-Petitioner, which were governed by exchange of correspondence and documentation in a continuum ranging from correspondence to the Letter of Confirmation to the invoices. The services were indeed covered by the invoices. The invoices were accepted and partly paid for, without challenging the arbitration clause in them. Multiple opportunities to question the arbitration clause were available – each time an invoice was raised. Even if the invoices were received subject to verification, they were indeed paid for initially without any protest about the arbitration agreement. In fact, after the first demand notice was issued on August 2, 2019, the Respondent issued 20 cheques aggregating to Rs. 1 crore. Ten of these cheques were even honoured (the balance cheques are said to have been returned at the Respondent's request), indicating that the parties indeed acted upon the invoices.

7. Evidently, the invoices are an integral part of the documentation executed by the parties, and on these very invoices, cheques were issued, which *prima facie* is adequate indication of the invoices having been accepted. Such invoices containing an arbitration clause would point to the

condition relating to arbitration being accepted. The invoices clearly had an arbitration clause. It is only later that disputes have emerged, and the Respondent took a stance that there is no arbitration agreement in place.

8. The parties got into disputes and the Applicant-Petitioner, in his capacity as an operational creditor, invoked the Insolvency and Bankruptcy Code, 2016 ("***IBC***") seeking to declare the Respondent insolvent. The Adjudicating Authority under the IBC admitted the Respondent into a Corporate Insolvency Resolution Process ("***CIRP***"), a decision that was overturned by the National Company Law Appellate Tribunal ("***NCLAT***") by an order dated July 5, 2022, ruling that when disputes over operational debt exist between the parties, the jurisdiction of the IBC would not be available (it is only available for admitted operational debt). The Supreme Court dismissed an appeal against the NCLAT's order on August 18, 2023, finding nothing wrong with it. The NCLAT only ruled on IBC and left it open to the Applicant-Petitioner to pursue any other remedy available in law.

9. The issue of limitation is a matter of evidence, involving mixed questions of fact and law, which fall in the domain of the arbitral tribunal and not the Section 11 Court. The contention that invocation is defective also does not inspire any confidence. The Respondent is clearly aware of what the

nature and scope of the dispute has been, and is not at all taken by surprise. The parties have even litigated under the IBC all the way to the Supreme Court, and it is too late in the day for the Respondent to feign surprise at the contents of the invocation notice.

10. A Learned Single Judge (*Bharati Dangre J.*) of this Court in the case of ***Bennett Coleman***[1] had occasion to consider an arbitration clause contained in tax invoices raised in the course of dealings. Taking note of the case law cited in that case, the Learned Single Judge ruled thus:

> *27. Since in the present case, **it can be clearly seen that the parties have acted upon the invoices and there was no denial of the invoices raised by the applicant, the clause contained in the invoices which clearly stipulate a reference to arbitration, deserve to be construed as an arbitration clause**. The decision of this Court in case of Concrete Additives (supra) is delivered in the peculiar facts of the case and **the law being well crystallized to the effect that any document in writing exchanged between the parties which provide a record of the agreement and in respect of which there is no denial by the other side, would squarely fall within the ambit of Section 7 of the Arbitration and Conciliation Act, 1996 and would amount to an arbitration clause. The objection raised by the respondent thus stand overruled and by accepting that the clause contained in the tax invoice amount to an arbitration clause**, I am persuaded to exercise the powers under subsection 6 of Section 11 of the Act and pass the following order:"*
>
> ***[Emphasis Supplied]***

[1] *Bennett Coleman & Co. Ltd. v. MAD (India) Pvt. Ltd. – 2022 SCC OnLine Bom 7807*

11. The very same principles would apply to the case at hand. The parties indeed acted upon the tax invoices. Cheques were issued. If the arbitration clause in the tax invoices was not acceptable, there would have been a resistance to it. Since there were multiple invoices, there were multiple opportunities to object to them. Instead, the invoices were indeed processed and cheques were issued. Therefore, whether the party accepting the invoice was authorised to bind the Respondent to an arbitration agreement also becomes a moot issue. The Respondent, in processing the invoices engaged with the Applicant and continued to do so. In any case, examining whether there is a prima facie existence of a formal arbitration agreement is what falls within the scope of my jurisdiction.

12. The scope of review under Section 11 is explicitly set out in Section 11(6A) of the Act. It is now trite law, with particular regard to the decisions of a seven-judge Bench in the ***Interplay Judgement***[2] followed by multiple others, including ***SBI General***[3] and ***Patel***[4] that the Section 11 Court ought not to venture beyond examining the existence of a validly existing arbitration agreement that has been formally executed. Even questions of existential

[2] *In Re: Interplay Between Arbitration Agreements Under Arbitration and Conciliation Act, 1996 & Stamp Act, 1899 – (2024) 6 SCC 1*
[3] *SBI General Insurance Co. Ltd. v. Krish Spinning – 2024 SCC OnLine SC 1754*
[4] *Ajay Madhusudan Patel v. Jyotrindra S. Patel – 2024 SCC OnLine SC 2597*

substance is a matter that falls squarely in the domain of the arbitral tribunal, in view of Section 16 of the Act.

Order and Directions:

13. In these circumstances, I find that the matter eminently deserves to be referred to arbitration leaving all questions on merits open to the arbitral tribunal to determine. No useful purpose would be served by keeping these proceedings pending on the docket of this Court, particularly after the law on the scope of jurisdiction of the Section 11 Court has been emphatically declared. Given the scope of the jurisdiction under Section 11, I do not think it necessary or appropriate to deal with prolix pleadings and copious references to case law filed by each party splitting hairs over every issue and sub-issue raised by the other party. Consequently, the Section 11 Application is finally disposed of, by referring all the disputes and differences between the parties in respect of the services covered by all the invoices referred to in the Section 11 Application, in the following terms:

> A] Mr. Cyrus Bharucha, a Learned Advocate of this Court, is hereby appointed as the Sole Arbitrator to adjudicate upon the disputes and differences between the parties arising out of and in connection with the Agreement covered by these proceedings;

Office Address:- Office No. 3, 2nd Floor, Bardy House,
12/14, Veer Nariman Road, Fort,
Mumbai- 400 001.
Email ID: cy.bharucha@gmail.com

B] A copy of this Order will be communicated to the Learned Sole Arbitrator by the Advocates for the Applicant-Petitioner within a period of one week from today. The Applicant-Petitioner shall provide the contact and communication particulars of the parties to the Arbitral Tribunal along with a copy of this Order;

C] The Learned Sole Arbitrator is requested to forward the statutory Statement of Disclosure under Section 11(8) read with Section 12(1) of the Act to the parties within a period of two weeks from receipt of a copy of this Order;

D] The parties shall appear before the Learned Sole Arbitrator on such date and at such place as indicated, to obtain appropriate directions with regard to conduct of the arbitration including fixing a schedule for pleadings, examination of witnesses, if any, schedule of hearings etc. At such meeting, the parties shall provide a valid and functional email address along with mobile and landline numbers of the respective Advocates of the parties to the Arbitral Tribunal.

Communications to such email addresses shall constitute valid service of correspondence in connection with the arbitration;

E] All arbitral costs and fees of the Arbitral Tribunal shall be borne by the parties equally in the first instance, and shall be subject to any final Award that may be passed by the Tribunal in relation to costs.

14. The Section 9 Petition shall be treated as an application under Section 17 of the Act by the arbitral tribunal appointed hereby. Given the efflux of time, the Applicant-Petitioner shall be at liberty to mould and modify the contents of the Section 9 Petition to make it relevant to the current factual matrix at hand.

15. With the aforesaid directions both the Section 11 Application and the Section 9 Petition are hereby ***finally disposed of***.

16. All actions required to be taken pursuant to this order, shall be taken upon receipt of a downloaded copy as available on this Court's website.

[SOMASEKHAR SUNDARESAN J.]