IN THE HIGH COURT AT CALCUTTA
COMMERCIAL DIVISION
ORIGINAL SIDE

Present:-
Hon'ble Justice Shampa Sarkar

AP-COM/896/2024

Balasore Alloys Limited
vs.
Flynt Mining LLP

For the petitioner : Mr. Ratnanko Banerjee, Sr. Adv.
Mr. Sandeep Ladda,
Ms.Tanvi Luhariwala,
Mr. Aman Agarwal,
Mr. Ashutosh Singh

For the respondents : Mr. Sourojit Dasgupta,
Mr. Shourjya Mukherjee,
Mr. Vishwarup Acharyya,
Mr. Akash Dutta

Hearing concluded on: 17.02.2025
Judgment on: 02.04.2025

Shampa Sarkar, J.:-

1. This is an application for appointment of a learned Arbitrator in terms of Clause 16 of the agreement dated February 19, 2019. The petitioner is a company, incorporated under the Companies Act, 1956 and is an existing company within the meaning of the Companies Act, 2013. It has its registered office at Balgopalpur, District - Balasore, Odisha.

2. The respondent No.1 is a limited liability partnership, registered under the provisions of the Limited Liability Partnership Act, 2008. The name of the respondent No.2 was expunged from the array of respondents, upon

leave granted by this Court by order dated December 10, 2024. The respondent No.2 was impleaded on the ground that the said respondent was an associate of the respondent No.1. When this application came up for hearing, the petitioner did not seek to proceed against the respondent No.2, hence, leave was granted to expunge the respondent No.2.

3. The case of the petitioner, as run in this application was that, by the agreement dated February 19, 2019, it was, inter alia, agreed that the respondent No.1 would provide mining services to the petitioner, including extraction of chromite ore. The agreement provided the timelines and techniques for such mining activity, which, according to the petitioner, formed the essence thereof. The petitioner complained that the respondent No.1 acted in breach of the terms and conducted mining activity in a manner, that led to acute shortfall of the quantity of ore extracted. The tunnels which had been carved out had collapsed and ultimately the respondent No.1 abandoned the work. The initial agreement term was for 37 months, for the eastern side of the mines, that is, two months for the purpose of mobilization and 35 months for operational purposes from the effective date, that is, February 19, 2019 (the date of execution of the agreement), and a period of 56 months for the western side which was agreed to commence after 8 months from the effective date and included mobilization period of 60 days. The objective for the execution of the contract was described in Clause B of the agreement.

4. The obligation of the respondent No.1 as the service provider in the agreement was provided under Clause 2(I)(c). The other covenants to the agreement were provided under Clause 2(II)(a) & (b).

5. According to the petitioner, the respondent No.1 failed to execute its part of the obligations. The petitioner alleged that the respondent No.1 adopted a very casual approach to the excavation related activities from the very beginning. The mobilization of equipments took place after five months from the date of execution of the agreement, which was a serious lapse. As a corollary to such lapse, the petitioner allegedly suffered financial loss and also earned a bad reputation in the industry. Not only did the respondent No.1 fail to provide skilled personnel, but also failed to employ latest modern technology in spite of promises. The respondent No.1 acted in violation of the terms and conditions of the agreement. On account of deployment of unskilled personnel and failure to implement the use of modern technology, the roofs and sides of the tunnels started collapsing, which made the site conditions unsafe for the task force with an adverse cascading impact. Out of 68 tunnels, only 5 tunnels had been excavated and huge quantity of ore got locked, which could not be excavated later. On account of such inability and breach, the petitioner suffered huge financial loss. The respondent did not mend its ways even after several communications. There was huge shortfall in the quantity of extraction of ore. Clause 13 of the agreement provided for indemnification by the service provider. The same is quoted below:-

> "The Service Provider hereby agrees to indemnify and hold harmless BAL, its affiliates, officers, partners, employees, direct and advisors (each individually an "Indemnified Party" and, collectively, the 'Indemnified Parties') at any time and from time to time, from and against any and all claims, losses, damages, liabilities, fines, penalties, costs, fees and expenses (including, without limitation, any amounts paid in settlement, Interest, court costs, out pocket fees and other expenses of investigations, attorneys, consultants, financial advisors and other experts), whether or not arising out of any third-

party Claim (collectively, "Loss"), to which any Indemnified Party may become subject, in so far as such Loss arise directly or indirectly out of, in any way relate to the following (each referred to as the "Indemnity Event"):
a) any inaccuracy in or any misrepresentation or breach of any of the representations and warranties by the Service Provider under this Agreement;
b) any breach or failure by the Service Provider to fulfil or perform any of its obligations, undertakings, representations, covenants or agreements contained in this Agreement;
c) any and all costs and expenses incurred by any Indemnified Party in respect of a claim under this Cause.
The indemnification rights of the Indemnified Parties under this Agreement are Independent of, and in addition to, such other rights and remedies they may have at the Applicable Laws or in equity or otherwise, including the right to seek specific performance, recession or restitution or other injunctive relief, none of which rights or remedies shall be affected or diminished thereby, and It is agreed herein that Indemnified Parties shall be at the liberty to exercise its rights under this class against the Service Provider. Further, the Indemnified Parties shall be Intended third party beneficiaries of this Clause, and notwithstanding any other provisions of this Agreement, the Indemnified Parties shall be entitled to enforce the provisions thereof."

6. On November 15, 2019, the respondent No.1 abandoned the work site without any intimation or information to the petitioner, thereby avoiding to perform its obligations under the agreement. The abandonment of the work site made the respondent No.1 responsible and liable for exemplary liquidated damages as well as costs. Accordingly, the petitioner claimed a sum of Rs.7,66,64,42,018/- against the respondents. The respondent allegedly did not take any initiative to settle the dispute amicably, but issued a demand notice dated September 14, 2022, under Form 4 of Rule 5 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules 2016, and Section 9 of the Insolvency and Bankruptcy Code, 2016 (for short IBC 2016), with regard to an alleged outstanding amount of Ra.10,08,87,965.91/-. The petitioner alleged that the contents of the

demand notice were untrue and incorrect and by letter dated November 5, 2022, denied the same. Thereafter, the respondent No.1 filed an application being CP(IB) No.19/CB/2023, under Section 9 of the IBC 2016, before the National Company Law Tribunal Cuttack Bench. The petitioner also filed a reply to the same.

7. In the meantime, the petitioner issued a notice invoking arbitration on May 9, 2024, under Cause 16 of the said agreement dated February 19, 2019. The petitioner suggested the name of a retired Judge of the Bombay High Court, as the sole arbitrator. According to the petitioner, as the parties failed to constitute the Tribunal in terms of the said clause, a sole arbitrator should be appointed. The respondent No.1 issued a reply to the notice, thereby rejecting the proposal for initiation of arbitration proceedings and also rejected the name of the proposed arbitrator. According to the petitioner, the mechanism provided under the Clause 16 for appointment of the arbitrator, had failed. This Court must refer the dispute to arbitration.

8. Mr. Ratnanko Banerjee, learned Senior Advocate appeared on behalf of the petitioner and submitted that Clause 16 of the said agreement was a valid arbitration clause. It provided the mechanism for resolution of the dispute by arbitration, the governing laws and a forum. Under the clause, all parties were to endeavour to settle the dispute amicably within 30 days, failing which the dispute was agreed to be referred jointly to the managing director of the petitioner and the designated partner of the service provider, whose decision would be binding on all the parties.

9. Mr. Banerjee submitted that, all the ingredients of a valid arbitration agreement were present in the said clause. The agreement was in writing.

The parties agreed to refer the dispute to be settled by the Managing Director, of the petitioner and designated partner of the service provider. The parties agreed that the decision would be final. The Tribunal was impartial, as each of the parties had a representative.

10. Reference was made to the decision of ***Jagdish Chander vs. Ramesh Chander and ors.,*** reported in ***(2007) 5 SCC 719***, in support of the contention that the words 'arbitration' and "arbitral tribunal" were not required to be incorporated in a valid arbitration clause. As long as the other features or elements of an arbitration agreement were present in the said clause, the same would be construed as a valid arbitration clause.

11. Further reference was made to the decision of the Hon'ble Apex Court in the matter of ***Punjab State and ors. vs. Dina Nath*** reported in ***(2007) 5 SCC 28***. In the said matter, the term arbitration was not used, but the clause was held to be an arbitration clause. It was held that, to interpret the agreement as an arbitration agreement, one had to ascertain the intention of the parties and whether the parties would treat the decision to be final and binding.

12. In the instant matter as well, Mr. Banerjee submitted that the parties had decided that if the disputes were not settled mutually, they would refer the same to the tribunal, consisting of the Managing Director of the petitioner and the designated partner of the respondent No.1. The arbitrators were referred to by their designation and not by name. Officers of the railways were very often named as arbitrators in railway contracts. Similar provisions were also available in the contracts of the Public Sector Undertakings. The fact that the Managing Director of the petitioner and the

designated partner of the respondent No.1 had signed the agreement was of no consideration at all. What was pertinent, was to ascertain whether the parties had an intention to refer the dispute to a private tribunal for final adjudication.

13. Mr. Banerjee further submitted that in the decision of ***Perkins Eastman Architects DPC and anr. vs. HSCC (India) Ltd.,*** reported in ***2019 SCC OnLine SC 1517***, it was held that by reason of Section 12(5) and Section 10 of the Arbitration and Conciliation Act, 1996, the arbitral tribunal could not consist of interested parties or even number of members. Here, the procedure for appointment may had failed, on account of such legal provision, but the same did not make the clause invalid. Thus, this Court must refer the dispute to a sole arbitrator, upon holding that the agreement between the parties was a binding arbitration agreement. The named arbitrators were de jure unable to perform on account of the change in law. The tribunal should be replaced by a sole arbitrator, to be appointed by the High Court.

14. It was further submitted that the proceedings under Section 9 of the IBC 2016 would not be a bar for appointment of an arbitrator. Mere filing of the proceedings before the NCLT, would not be a proceeding in rem. The same would not operate as a bar in invoking the provisions of the said Act. The arbitration clause was invoked within the period of limitation. The advantage of the decision of the Hon'ble Apex Court in *suo moto* WP(C) No.3 of 2020, In Re: Cognizance for Extension of Limitation, which excluded the period from March 15, 2020 to February 28, 2022, for the purpose of computing the period of limitation, would be applicable in this case.

15. Mr. Sourojit Dasgupta, learned Advocate for the respondent, opposed the prayer for appointment of an arbitrator by this Court. He submitted that clause 16 of the agreement did not satisfy the pre-requisites of an arbitration agreement as contemplated under the Arbitration and Conciliation Act, 1996. This Court did not have the jurisdiction to receive, try and determine the application. The respondent No.1 had filed an application under Section 9 of the IBC 2016, NCLT, Cuttack. The petitioner participated in the proceedings. When the petitioner replied to the demand notice issued by the respondent No.1 dated November 5, 2022, the petitioner had not made any demand with regard to the alleged loss suffered on account of the breach allegedly committed by the respondent No.1. There was no mention of an arbitration clause. For the first time, the petitioner came up with a notice invoking arbitration when the demand for a sum of Rs.7,66,64,42,018/- was made. The application was an afterthought and the entirety of the claim was sham and moonshine.

16. According to the respondent No.1, the work commenced on July 1, 2019. Running account bills from August 5, 2019 to December 3, 2019, had been raised. Apart from making certain ad hoc payments till January 17, 2020, a huge amount had remained due and payable by the petitioner. On account of unpaid dues, the respondent issued two demand notices under the IBC 2016, dated February 25, 2020, and September 14, 2022. Thereafter, on February 1, 2023, the respondent filed an application under Section 9 of the IBC 2016, before the NCLT, which was pending adjudication. The petitioner filed an affidavit in the said proceeding and the application was fixed for final hearing. Thereafter, on May 19, 2024, the

petitioner issued the notice under Section 21 of the Arbitration Conciliation Act, 1996, to the respondent allegedly on the basis of Clause 16.

17. The issue is whether the prayer of the petitioner can be allowed.

18. Clause 16 of the agreement provides as follows:-

> "**Clause 16. Resolution of Dispute, Governing Laws and Jurisdiction**
>
> In case of any dispute between the parties, on any terms arising out of the agreement, the parties shall enter into discussion to resolve the dispute mutually.
> The parties hereto agree that the Service Provider shall be obliged to carry out their obligation under the Agreement to the satisfaction of BAL even if a dispute is persisting.
> All the parties shall endeavour to settle the dispute amicably within a period of 30 (thirty) days failing which the dispute shall be referred jointly to Managing Director of BAL, and Designated Partner of Service Provider whose decision shall be binding on all parties.
> This Agreement shall be governed by and construed in accordance with the Indian laws and the courts of Kolkata shall have exclusive jurisdiction."

19. The appraisal of the clause reveals that there is no reference to the word arbitration. However, the law has been well settled. Even if the word arbitration is not mentioned in the dispute resolution clause, mere absence thereof would not make the clause invalid, if the said clause indicated that there had been meeting of the minds of the parties to refer any dispute to a private tribunal, which was supposed to decide the dispute in an impartial manner, upon giving adequate opportunity to the parties to place their case and the parties had agreed to be bound by the decision of the said tribunal.

20. In the decision of ***Jagdish Chander (supra),*** the Hon'ble Apex Court held that intention of the parties to enter into an arbitration agreement will have to be gathered from the terms of the agreement. If the terms of the agreement clearly indicated an intention on the part of the parties to refer the dispute to a private tribunal for adjudication and a willingness to be

bound by the decision of such tribunal on such disputes, it would constitute as an arbitration agreement. While there was no specific form of an agreement, the words used should disclose a determination and an obligation to refer to arbitration, but not merely a possibility of going for arbitration.

21. In the present case, the Managing Director of BAL, represented the company and signed the contract. The designated partner of the respondent No.1 also represented the partnership firm and signed the contract. Thus, these two officials were representing the parties to the contract and were binding themselves to the terms and conditions of the contract. They were also bound to ensure that the parties to the contract performed their rights and liabilities there under.

22. Under such circumstances, this Tribunal cannot be construed to be an impartial private tribunal as laid down in ***Jagdish Chander (supra)***.

23. Mr. Banerjee contended that arbitration clauses often provided a nominee of a signatory party to act as an arbitrator, especially in respect of railway contracts and other contracts of public sector undertakings, in this case the same analogy cannot be imported. This is a contract between two private entities and they were represented by their Managing Director and the designated partner, respectively, who were intrinsically with the execution of the contract and who would also be involved in the disputes and differences which had arisen. In railway contracts or contracts with the PSUs, the departments through a particular official is the signatory, but the named arbitrator is usually a higher authority or an official who was neither representing the department by signing the contract on behalf of the

department nor obliged to perform the contract. In any event, Section 10 read with section 12(5) would make these two persons ineligible to act as arbitrators after the amendment of the law in 2015. This arbitration clause was entered into in 2019. At best, it was an in-house mechanism provided for resolution of the dispute in case the parties could not resolve the dispute amicably. This is not an arbitration agreement as contemplated under the said Act, as amended.

24. The conduct of the parties clearly indicate that there was no binding arbitration agreement and the respondent No.1 had approached the NCLT, Cuttack for initiation of insolvency proceedings against the petitioner, as the corporate debtor. The petitioner also participated in the said proceeding and after several months has invoked Clause 16, by treating the same to be an arbitration clause. In the reply filed to the notice issued under the IBC as also in the objection filed before the NCLT, the petitioner did not contend that the matter should be resolved by arbitration.

25. The Managing Director of BAL and the designated partner of the respondent No.1 cannot act as arbitrators as they have represented their respective entities in the contract. This is opposed to the fundamental principle of the arbitrator's impartiality and independence. The dispute resolution clause, as framed in the said agreement, does not uphold impartiality and independence of the arbitrators. Parties could not have knowingly decided to refer the dispute to a tribunal consisting of their representative signatories, by ignoring that there would be conflict of interest and the decision making ability would be compromised. The procedure prescribed is contrary to the principles of natural justice. Also,

under the Indian law, the arbitrators were required to disclose potential conflict of interest. This was not possible in the instant case. Moreover, an arbitral tribunal could not be constituted by even member of persons. Thus, in my view, the parties did not intend the clause to be an arbitration agreement under Section 7 of the said Act.

26. Another important point is that, in case of railway contracts or contracts relating to Public Sector Undertakings, the arbitration clause were provided in the General Conditions of Contracts which were made applicable to work orders or purchase orders. They were generally dotted line contracts. Those GCCs were framed much before the law had undergone a change.

27. Thus, the decision of two private entities to refer their dispute to their representatives who executed the subject contract, even if by designation, cannot be held to be a clear intention to bind themselves to an arbitration, as contemplated under the 1996 Act. The subject contract is of 2019. The law had been amended in 2015. The free will of the parties to settle their disputes by an arbitral tribunal as contemplated under the said Act, is absent. This Court cannot act under Section 11 of the said Act.

28. Although, a director of a company may not be proceeded against in an arbitral proceeding, but in this case, he was responsible to see that the work was being executed under the prevailing law, a designated partner of a LLP is responsible for statutory obligations, liable for non-compliances thereof, liable for breach of contract and other wrongful acts. There is a direct conflict if the same person also arbitrates the disputes.

29. Unless the clause indicates the clear intention to refer the dispute for arbitration within the meaning and purport of the Arbitration and Conciliation Act, 1996, this court cannot refer the dispute. The clause does not reflect a conscious, mutual and determination of the parties to refer all or any kind of dispute arising out of the contract to arbitration and not to any other court or forum. The Managing Director and the designated partners are involved in the business relationship created by the agreement. The parties decided to resolve all disputes at the company level.

30. There must be a discernible intention to arbitrate as per the provisions of the said Act of 1996. This is an in-house mechanism cannot be construed as an arbitration clause in view of the discussions hereinabove. Independent and neutral person/persons, must be named as arbitrators.

31. Accordingly, the application is dismissed upon this court coming to a conclusion that Clause 16 is not a valid arbitration clause as contemplated under the Arbitration and Consolation Act, 1996.

32. Arbitration agreement has been defined as hereunder:-

> "**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 1 [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."

33. By signing the contract, the Managing Director of BAL and the designated partner committed that the respective parties would be bound by the obligations and responsibilities outlined in the contract. Both parties have alleged breach. Thus, it would be absurd to hold that under such circumstances, the same persons could impartially settle the disputes.

34. In the matter of ***Jagdish Chander (Supra),*** the Hon'ble Apex Court 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 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.

35. In this report also, the impartiality of the private tribunal has been emphasized.

36. In the decision of ***Mahanadi Coalfields Ltd. and Anr. Vs M/s IVRCL AMR Joint Venture*** decided in ***Civil Appeal No. 4914 of 20222 (Arising out of SLP(C) No 1098 of 2020***, the Hon'ble Apex Court held as follows:-

> "13. The above extract makes it abundantly clear that clause 15 of the Contract Agreement is a dispute resolution mechanism at the company level, rather than an arbitration agreement. Consequently, in case of a dispute, the respondent was supposed to write to the Engineer-in-charge for resolving the dispute. Clause 15 does not comport with the essential attributes of an arbitration agreement in terms of section 7 of the 1996 Act as well as the principles laid down under Jagdish Chander (supra). A plain reading of the above clause leaves no manner of doubt about its import. There is no written agreement to refer either present or future disputes to arbitration. Neither does the substantive part of the clause refer to arbitration as the mode of settlement, nor does it provide for a reference of disputes between the parties to arbitration. It does not disclose any intention of either party to make the Engineer-in-Charge, or any other person for that matter, an arbitrator in respect of disputes that may arise between the parties. Further, the said clause does not make the decision of the Engineer-in-Charge, or any other arbitrator, final or binding on the parties. Therefore, it was wrong on the part of the High Court to construe clause 15 of the Contract Agreement as an arbitration agreement.

37. In the decision ***of K.K. Modi v. K.N. Modi*** reported in **(1998) 3 SCC 573,** the Hon'ble Apex Court held as follows:-

> "**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."

38. In the case in hand, compliance of Clause (4) above is not ensured.

39. In **Punjab State (supra)** the clause read as follows:-

"Any dispute arising between the department and the contractor/society shall be referred to the Superintending Engineer, Anandpur Sahib, Hydel Circle No.1, Chandigarh for orders and his decision will be constituted an arbitration agreement."

40. However, the above report does not indicate that the Superintending Engineer had signed the contract on behalf of the authority.

41. A common sense approach by a common business man, will not lead this Court to hold that Clause 16 is a valid arbitration clause under the applicable Indian law.

42. The application is dismissed.

(Shampa Sarkar, J.)