

IN THE HIGH COURT AT CALCUTTA
(Commercial Division)
ORIGINAL SIDE

Present: Hon'ble Justice Shampa Sarkar

AP (COM) 421 of 2024

M/S GREENBILT INDUSTRIES PRIVATE LIMITED
VS
M/S A B DINESH CONCRETE PRIVATE LIMITED

For the petitioner :

Mr. Kumarjit Banerjee, Adv.
Ms. Sanchari Chakraborty, Adv.

For the respondent :

Mr. Sourav Kumar Mukherjee, Adv.
Ms. Falguni Jana, Adv.
Ms. Sahana Pal, Adv.
Mr. Souhardya Mitra, Adv.

Hearing concluded on: 15.01.2025

Judgment on: 27.03.2025

Shampa Sarkar, J.:-

1. This is an application for appointment of a learned Arbitrator for settlement of disputes which allegedly arose out of a transaction for acquisition of the petitioner's ACC block manufacturing unit, by the respondent. The petitioner contended that this Court must appoint an arbitrator, in view of the termination of the arbitration proceeding by Sri Prabir Gupta, petitioner's nominee, on April 20, 2023.

2. According to the petitioner, the respondent wanted to take over the entire ACC block manufacturing plant situated at Karga

village, post office Jamgaon (M), District Durg (CG), which was approximately 25 kilometres from Raipur city. The respondent approached the petitioner sometime in October 2020. Various terms and conditions regarding the aforementioned sale and takeover were allegedly discussed and an oral agreement was arrived at. It was agreed that, the assets, plants and machinery would be taken over by the respondent for a consideration of Rs.21 crores. The respondent would pay an advance of Rs.3 crores, which would be forfeited, in the event the respondent failed to perform its obligations. It was further agreed that, until the substantive agreement for sale and handover of the plant was prepared and finalized, the respondent would be allowed to run the said plant during the interregnum and for that purpose, occupational charge of Rs.4 per square feet, per month, would be payable to the respondent, from the date of handing over of physical possession. Once the physical possession was handed over, the respondent would be able to apply for various statutory permits and licenses, including registration under the Goods and Services Tax Act. In terms of the oral agreement, a written agreement dated December 7, 2020, was signed by the parties. The physical possession was handed over on December 10, 2020,

and part payment of Rs.2,80,00,000/- out of the agreed advance of Rs.3 crores, was made by the respondent. The bank transactions stood testimony to such fact.

3. The petitioner's further case was that, the parties reduced the terms and conditions of the substantive agreement into a Memorandum of Understanding (in short the said MOU) dated February 9, 2022. The said MOU contained an arbitration clause. The memorandum of understanding was circulated by email. The director of the respondent had forwarded the final draft copy of the MOU to the petitioner, via e-mail, for finalization. As the petitioner did not raise any objection, for all practical purposes, the draft MOU should be treated as the final MOU and the conduct of the parties clearly displayed such intention. The respondent failed to pay the balance of the agreed advance, the remaining consideration upon finalization of the MOU and the occupational charges for the interregnum. Disputes cropped up between the parties.

4. It was further alleged that, by the end of the year 2020, the respondent abandoned the plant without any notice to the petitioner. On April 3, 2023, one Mr. Ashok Kumar Agarwal, a director of the respondent, who was at the helm of affairs of the

respondent company, and one Mr. Aditya Agarwal, a director of the petitioner company, mutually agreed to invoke the arbitration clause contained in the MOU, which had been sent via email to the petitioner, by the respondent, on February 9, 2022. In the agreement dated April 3, 2023, the parties nominated their arbitrators, that is, the respondent nominated Sri Bijoy Kumar Tibrewal and the petitioner nominated Sri Prabir Gupta.

5. In terms of the agreement dated April 3, 2023, the date of the arbitration was proposed to be held on April 20, 2023, at Kolkata, subject to acceptability by the arbitrators. According to the petitioner, on the appointed day, neither the respondent nor the arbitrator appointed by the respondent, attended the sitting and as such, the mandate of the arbitral tribunal stood terminated. The minutes of the meeting scheduled on April 20, 2024, at 4.30 p.m. recorded such termination by the nominee of the petitioner. Thereafter, the petitioner issued a demand letter on September 14, 2023. The said demand letter was replied to by the respondent. The respondent denied all the disputes and claims of the petitioner. The petitioner then issued a notice under Section 15(2) of the Arbitration and Conciliation Act, 1996, by

appointing a substitute arbitrator, that is, a senior Advocate of the Calcutta High Court.

6. In reply to the said letter, the respondent raised various objections and also disputed the nomination of the substitute arbitrator. The respondent also denied the existence of an arbitration agreement.

7. However, it is the contention of the petitioner that, the respondent also disputed the claims which indicated that there was a subsisting dispute between the parties and the dispute should be settled by arbitration. Accordingly, the petitioner has approached this court for appointment of an arbitrator, in terms of clause 12.3 of the MOU dated February 9, 2022.

8. Mr. Banerjee, learned Advocate for the petitioner submitted that the MOU dated December 7, 2020, was entered into as an interim arrangement, to facilitate handing over of the physical possession and operational control to the respondent. The parties did not intend the same to be the final MOU with regard to the sale of all the assets and terms and conditions of such sale. Such agreement was entered into, to make it easy for the respondent to obtain statutory permits, licenses and apply for GST registration. Later, the respondent reduced the terms and conditions of the

substantive agreement into writing and the MOU dated February 9, 2022, was circulated via email.

9. Exchange over email was a valid and accepted form of execution of an arbitration agreement. Clause 12.3 of the said MOU constituted a valid and binding arbitration clause between the parties, in terms of Section 7 (4) (b) of the Arbitration and Conciliation Act, 1996, (hereinafter referred to as the said Act). Clause 12.3 of the said MOU was a valid and a separate agreement. Even if, the MOU was invalidated for any other reason, the arbitration agreement continued to be a separate and independent agreement between the parties.

10. According to Mr. Banerjee, the parties acted on the basis of the MOU dated February 9, 2022. The promoters/directors representing the parties entered into an agreement on April 3, 2023, for appointment of arbitrators. The first sitting could not be held on April 20 2023, due to the absence of the respondent and its nominated arbitrator. However, the petitioner's nominated arbitrator was present. When the mandate terminated, the petitioner issued a notice under Section 15(2) of the said Act of 1996, requesting the respondent to nominate a substitute arbitrator. By an email dated February 1, 2024, the respondent

had admitted the existence of the MOU dated February 9, 2022. It would be evident from a bare perusal of the aforementioned email that, the respondent did not dispute the existence of the MOU but, alleged that the MOU was a product of misrepresentation and fraud. Such allegation that the MOU was a product of misrepresentation and fraud, was also an arbitrable dispute and this court must appoint a learned Arbitrator to arbitrate upon all issues, including the objection raised by the respondent with regard to the validity of the said MOU, in view of the termination of the arbitral proceeding.

11. Mr. Banerjee relied on the following decisions:-

- i. ***Cox and Kings Ltd. vs. SAP India Pvt. Ltd. and Another***, reported in **(2024) 4 SCC 1**.
- ii. ***Mahanagar Telephone Nigam Ltd. vs. Canara Bank and Others***, reported in **(2020) 12 SCC 767**.

12. The learned Advocate for the respondent submitted that, the petitioner had committed fraud and had misled the respondent, which in turn led to the communication of the draft MOU. The respondent had been defrauded in respect of the plant sought to be purchased, which resulted in huge financial loss. Such loss was recoverable from the petitioner. It was further urged that, this court did not have the jurisdiction to entertain the

application. According to the respondent, the said MOU had not been executed between the parties. Various blank spaces had been left in the draft MOU which were never filled up by the parties. Such omissions would indicate that the draft MOU was never finalized and the parties did not sign the same by incorporating all relevant information and details in the draft MOU.

13. The MOU of dated December 7, 2020 was executed between the parties. The same was duly signed by the parties. The same did not contain any arbitration clause. The parties acted upon the said instrument. In the MOU of December 7, 2020, the courts of Bhubaneswar were to have jurisdiction. The alleged MOU of February 9, 2022, remained in a draft form, which was incomplete. There were no further documents which would show that the terms had been finalized. The said MOU was sent by email on February 9, 2022, to enable the petitioner to make the necessary corrections and also for further discussion with Mr. Ashok Agarwal. Although, the alleged draft MOU contained an arbitration clause, but as the said MOU was neither finalized nor executed between the parties, the arbitration clause could not be

said to be binding. The same could not be treated as an enforceable clause.

14. With regard to the document dated April 3, 2023, the learned Advocate stated that the said document could not be treated as an arbitration agreement in respect of companies. It did not partake the characteristic of an arbitration agreement. The document had been signed by Mr. Ashok Kumar Agarwal and Mr. Aditya Agarwal in their individual capacities. They never represented the respective companies between whom the subject MOU had been allegedly executed. Even assuming that the draft MOU had an independent arbitration clause, but as the MOU of 2020 had the forum selection clause and the MOU circulated in 2022, was in furtherance to the MOU of 2020, the forum selection clause in the MOU of 2020, would prevail. According to Section 11(12)(b) of the 1996 Act, the application should have been filed before the High Court of Odisha, as the respondent carried on business at Odisha and there was a forum selection clause. The MOU of 2020 was executed in Odisha. The plant was situated at Chattisgarh and no part of the cause of action had arisen within the jurisdiction of the Calcutta High Court.

15. The respondent further submitted that the petitioner issued a notice dated September 14, 2023, which did not mention anything about the arbitration clause. Had the petitioner believed that the draft MOU had been finalized and clause 12.3 was a binding arbitration agreement between the parties, in that event, in the demand notice dated September 14, 2023, the petitioner, would have mentioned the existence of the arbitration clause. The sitting on April 20, 2023, which was allegedly attended by the petitioner and the arbitrator nominated by the petitioner, was not connected to the subject transaction.

16. It was further submitted that a complaint was filed by the respondent in the Paharpur police station against the petitioner and its office bearers in respect of the draft MOU circulated in 2022, on the ground that the same was the creature of fraud and misrepresentation. The police authorities failed to register the FIR and the respondent was compelled to file a proceeding before the learned J.M.F.C (O) Bhubaneswar vide I.C.C case No.3652 of 2023. The learned court directed the police authorities to register the complaint petition and to report compliance to the learned court.

17. The issue is whether this court can refer the dispute to arbitration on the strength of the alleged draft MOU forwarded via e-mail by the respondent, to the petitioner, on February 9, 2022.

18. Admittedly, the MOU of December 7, 2020 was signed and executed by and between the parties as a step towards acquisition of the ACC block manufacturing plant of the petitioner, by the respondent. The said MOU contained various clauses, including a forum selection clause. It did not contain an arbitration clause. Clause 9 of the agreement provided that competent courts at Bhubaneswar, within which the agreement had been made, would have exclusive jurisdiction. It appears that a mail was sent by one Laba Kumar Shaha dated February 9, 2022, to the representative of the petitioner/director, which stated as follows:-

“The final draft MOU is attached here with, if any clarification, please discuss with Ashokji.”

19. The said email is dated February 9, 2022, but the attachment that is, the final draft MOU, which has been relied upon, is dated _____ day of November 2020, at Raipur. The blank space remained unfilled.

20. Thus, the said MOU does not appear to have been finalized with the correct date and month. It was circulated, according to the petitioner, on February 9, 2022. The MOU contains various blank spaces, which were not filled in by the parties. These blank spaces were with regard to vital information relating to the identity of the representatives of the respondents, the approximate amount of loan which was availed of by the respondent, modalities of takeover, the outstanding liability, the consideration for purchase of assets, the bank liability, mode of payment in the first, second, third phase, etc.

21. The arbitration clause is quoted below:-

“12.3 All disputes or claims arising between the Parties hereto during the subsistence of this MOU or thereafter, in connection with this MOU, including but not limited to disputes relating to the validity, interpretation, performance, breach, termination, rescission or nullity thereof as well as pre or post contractual obligations, even if such claims are based on other legal grounds than this MOU, shall be finally settled by arbitration in accordance with the Arbitration and Conciliation Act 1996 and Rules made thereunder.”

22. The said clause does not provide a forum. The last page of the said MOU does not contain the signatures of the parties and the witnesses. The schedules to the said MOU were left blank.

23. Thus, it appears that the said MOU was at the draft stage. The necessary incorporation of facts and figures were not made. The same does not appear to be a complete document. Even for

argument's sake, if it is accepted that the communication of the draft MOU via email and non-response of the petitioner to the draft MOU, amounted to acquiescence by conduct, this court does not find that the parties had agreed to confer jurisdiction either to this court or to courts at Kolkata. The cause of action arose at Odisha and Raipur/Chattisgarh.

24. The alleged agreement dated April 3, 2023, which has been relied upon by the petitioner as a subsequent agreement between the parties regarding nomination of their arbitrators, does not contain any reference to the final MOU of November, 2020, which was circulated by email dated February 9, 2022. It is in the nature of a declaration, which is extracted here under for convenience.

“To Whom It May Concern

This is to establish that following parties have met on 03.04.2023 and it has been mutually decided between them to nominate and appoint 2 persons (one person each to be nominated by each party) as arbitrators to form an arbitration panel with the intention to solve the pending matter between Sri Ashok Kumar Agarwal (First Party) and Aditya Agarwal (Second Party)

The date of arbitration is proposed to be 20.04.2023 at Kolkata (Subject to acceptability by the arbitrators)

person Nominated by Sri Ashok Kumar Agarwal:

Sh Bijay Kumar Tibrewal (Contact No. 9437053993)

Person Nominated by Sri Aditya Agarwal:

Sn Prabir Gupta (Contact No: 7003703495)

Both the arbitrators may involve a third person as arbitrator, if required by them, to which both the parties shall have no objection

All decisions taken by the arbitrators shall be final and binding upon both the parties.

The costs of such arbitrators shall be borne by nominating parties. Any other costs, if any, to be borne as decided by the arbitrators.”

25. The said document does not reveal that the disputes discussed were in relation to the subject final draft MOU of November 2020. The parties thereto were not the companies. The document was executed to solve the pending matters between Ashok Kumar Agarwal and Aditya Agarwal. The said agreement mentions that arbitration will be held at Kolkata, subject to acceptance by the arbitrator. There is nothing on record to connect the said document to the subject MOU. There is nothing on record to show that the arbitrator accepted Kolkata as the place/seat/venue.

26. The document indicates that the parties, that is, Ashok Kumar Agarwal and Aditya Agarwal had mutually decided to constitute an arbitral tribunal. Each party nominated an arbitrator with the intention to solve pending matters between Ashok Kumar Agarwal and Aditya Agarwal. The subject transaction or the final draft MOU of November 2020, circulated

on February 9, 2022, was not between Aditya Agarwal and Ashok Kumar Agarwal, but between the petitioner and the respondent, which are both private limited companies and juristic persons. The companies are separate entities and the agreement between Ashok and Aditya to settle their disputes, cannot bind the parties to the proceeding.

27. On the date of the sitting, i.e., April 20, 2023, the nominee of the petitioner was present along with Mr. Aditya Agarwal, but neither Ashok nor Ashok's nominee was present. Accordingly, the proceeding was terminated. The demand letter dated September 14, 2023, which was issued by the learned Advocate of the petitioner much after the circulation of the email, does not contain any mention or reference to the arbitration clause.

28. The same was a demand notice by which the learned Advocate for the petitioner had mentioned the MOU of December 7, 2020, and raised various allegations against the respondent, including non-payment of the balance of the advance, non-payment of occupational charges and abandonment of the plant without any notice or reason. The petitioner alleged that the respondent had been in occupation of the plant from December 10, 2020 to December 2022, but suddenly vacated the premises

without any prior information or notice. The relevant portion of the demand notice is quoted below, for convenience:-

“As per the terms and condition of an oral agreement, which was arrived in trust and good faith will with the long standing business relationship with you as in ABDCL. you wanted to purchase our said Manufacturing plant with all its assets and Manufacturing Unit. It was also decided that you will advance a sum of Rs. 3 crores as token money which can be forfeited in case you fail to perform the terms of the agreement. It was further decided that you will be allowed to run the said Manufacturing unit till the time of the final sale was not done/executed (maximum 12 months from the date of MOU) and for that you will pay my client Occupational charges of Rs. 4/- per sq. feet per month payable on or before the 10th day of that month. You also further agreed that all the rates and taxes, statutory charges, will be borne by you from the date of taking over the possession. And all government formalities and insurance which was necessary for running such manufacturing unit and personnel including menial staff will be taken out by you.

As per an oral agreement you applied to the Goods And Service Tax Department for registration and having a GST number from the said Plant office and for that a written agreement was finalized and signed by both the parties which showed that you were in occupation of the said factory. It was further agreed that you will be allowed to use the raw material and other setup of the Plant. You also agreed to pay my client commission on the production till the sale is completed. You also agreed to pay for the cost of Raw material used while manufacturing which were purchased by my client.

You were in physical occupation of the said plant from 10th December 2020 till 1* December 2022 for a considerable period but you vacated the premises without any prior information and / or notice. Besides this ABDCL has also created liabilities towards some local and outside labourers and contractor and some of other liabilities which you were liable to pay. But to the utter surprise of my client you failed to pay any amount toward taxes and other statutory dues, thus you have committed breach of trust and details of such taxes and other dues are given below.

Occupational Charges towards use of Factory Premises @ Rs. 4/- per sft for 243936 sft for 25 months as per Rent Chart including Interest @ 12% p.a.

Amount

26319196

Depreciation on Plant & Mach for 25 months as following:

01.12.2020 to 31.03.2021

8895810

01.04.2021 to 31.03.2022	23151346
01.04.2022 to 01.12.2022	13389195
Rent for using Misc Assets like Transformer, Weigh Bridge, Pallets, etc. lumpsum@ 2 lac per month for 25 months	5000000
Commission on production for offices ice, GST, etc.Rs. 100/- per CuM of Production	6000000
Rent for accommodation to 3 personnel staff	1125000
Damages	100000000
Loss of Interest for the period of 25 months	12500000
Mental Harrasement	100000000
Unpaid Electricity Bill for the month of September-November 2022	10,02,151
Satutory Licenses for 2 years	
Pollution-Air & Water	1500000
Water Board	1000000
Boiler	100000
Property Tax	100000
Pending Outstanding liabilities towards labourers	1000000
Raw Material Stock Consumed as on in Dec 2020	618250
Damages to Plant & Mach at the time of Exit	3500000
TOTAL	305200948

On several occasions my client had requested you to pay the said amount but all their request had fallen onto your deaf ears. Having no option they once again requested u to pay, in lieu of the total outstanding amount.

By reason of your wrongful acts, delay and conducts, my client has suffered loss and damages in excess of Rs. 305200948 excluding Interest. Interest to be calculated at the rate of 12% p.a. for the period from 01.12.0220 to 01.12.2022, both of which you are liable to pay within 15 days from receipt of the said notice. You are also liable to pay a further interest at the rate of 12% p.a. till the date of recovery.

In the aforesaid facts and circumstances, I on behalf of my client call upon you to demand payment of amount as mentioned in above paragraph along with interest from you within 15 days from the date of receipt of this notice. In default my client will have no other alternative but to take appropriate proceeding both civil and criminal before appropriate court/ forum without giving you any further notice and you will be liable for all costs and consequences arising thereof.”

29. The tenor of the said letter clarifies the position that, the petitioner was asserting the terms and conditions of an oral agreement and the signed agreement of December 7, 2020. The last paragraph of the said letter indicates that the petitioner would make the respondent liable by instituting civil and criminal proceedings for the alleged breaches and consequences thereof. The letter does not indicate at all that, there was any arbitration clause between the parties and the petitioner was going to invoke the said clause.

30. There does not appear to be any notice invoking arbitration. On the contrary, reliance has been placed on the agreement of 3rd April 2023, in which Ashok Kr. Agarwal and Aditya Agarwal had mutually agreed to resolve pending matters between themselves, by a panel consisting of their nominated arbitrators, and the meeting would be at Kolkata if accepted by the arbitrators. The said document cannot be construed as an arbitration agreement between petitioner and respondent companies. The forum selection cannot be attributed to the second MOU which was forwarded by e-mail. Moreover, the proceeding was terminated by the nominee of Aditya Agarwal. It

was a case of termination and not recusal or withdrawal of the learned Arbitrator.

31. In view of the discussions hereinabove and in the absence of any jurisdiction/forum selection clause, the High Court at Calcutta cannot act as the referral court in the instant case. The cause of action did not arise within the jurisdiction of this court. Receipt of a draft MOU at the office of the petitioner, cannot confer any jurisdiction to this Court

32. In the facts and circumstances of this case, the judgments relied upon by Mr. Banerjee, do not apply.

33. Under such circumstances, the application is dismissed.

34. This order will not prevent the petitioner from proceeding in accordance with law, before the appropriate forum.

35. This order is restricted to the adjudication of this application, seeking reference to arbitration by this Court.

36. There shall be no order as to cost.

(Shampa Sarkar, J.)