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APPOINTMENT OF ARBITRATOR UNDER INCOMPLETE MOU

Background.

The Calcutta High Court (**HC**), in *Greenbilt Industries Private Limited* case,¹ held that a draft MOU exchanged by contracting parties cannot be the basis for referring a dispute to arbitration.

Brief Facts.

- In October 2020, DCPL intended to take over the ACC block manufacturing unit of GIPL in Karga. An oral agreement was then arrived at wherein, the assets, plants and machinery of the unit would be taken over by DCPL for a consideration. Till the substantive sale would be finalized, DCPL would run the unit.
- In December 2020, a Memorandum of Understanding (**2020 MOU**) was signed between the parties. It stated that the courts of Bhubaneswar had jurisdiction.
- In February 2022, terms between the parties was reduced to another Memorandum of Understanding (**2022 MOU**), the draft of which was circulated by email in February 2022. This draft contained an arbitration clause.²
- GIPL alleged that DCPL did not pay the balance of the agreed advance, consideration and occupational charges. Accordingly, disputes arose between the parties.
- In 2023, the directors Ashok Kumar Agarwal of DCPL and Aditya Agarwal of GIPL mutually decided to invoke the arbitration clause in the 2022 MOU draft.
- Thereafter, an agreement between the directors was entered separately in 2023, regarding nomination of arbitrators. They nominated their respective arbitrators. The arbitration was decided to be held on the April 20, 2023, at Kolkata. However, Ashok Kumar's appointed arbitrator was absent on that date.
- Following this, GIPL issued a demand notice, and a notice under Section 15(2)³ of the Arbitration and Conciliation Act, 1996 (**ACA**).

Question & Principle of Law.

GIPL approached HC for appointment of arbitrator per clause 12.3 of the 2022 MOU. The issue in question was whether the HC can refer the dispute to arbitration on the strength of the draft MOU.

¹ *M/S Greenbilt Industries Private Limited Vs M/S A B Dinesh Concrete Private Limited* AP (COM) 421 of 2024.

² Paragraph 3 of the judgement.

³ Section 15 (2) of the Arbitration and Conciliation Act – *When the mandate of an arbitrator expires, a substitute arbitrator is to be appointed with the same rules of the arbitrator being replaced.*

GIPL's Contentions.

The 2020 MOU was an interim arrangement.

The parties acted based on the 2022 MOU. When DCPL's arbitrator was not present, notice was issued under Section 15 (2) to nominate a substitute arbitrator.

GBPL contended that the DCPL's argument on the MOU being a product of fraud is also an arbitrable dispute, HC must appoint arbitrator to arbitrate on all the issues, including the validity of the MOU.

It relied on *Cox and Kings* case⁴ and *Mahanagar Telephone Nigam Ltd* case.⁵

DCPL's Contentions.

Contended that the GIPL and Aditya had committed fraud, and deliberately misled DCPL, which resulted in the 2022 MOU draft.

HC did not have the jurisdiction to entertain the application as the MOU was incomplete. Several details were omitted, and it was not finalized or executed. Hence, the arbitration clause could not be binding. The 2020 MOU was the document signed by both parties and hence must be relied on.

The document signed in 2023, by Ashok and Aditya, was done in their individual capacities and could not bind the companies.

HC's Reasoning & Decision.

HC observed that:

- The 2022 MOU was only circulated via email in February 2022. It has blank spaces and is not executed by the parties. It had an arbitration clause but no forum clause.
- As per the 2022 MOU draft, the parties had not agreed to confer jurisdiction on the HC. The cause of action arose in Odisha and Chhattisgarh.
- The 2023 agreement leads to the observation that the parties were not the companies, but that the document was executed to solve the pending matters between Ashok and Aditya.⁶ There is no information stating or connecting this document to the 2020 MOU.
- The companies are separate entities and the agreement between Ashok and Aditya to settle their disputes cannot bind the companies to the proceeding.⁷
- The GIPL demand notice does not make any reference to any arbitration clause.⁸

In the absence of any jurisdiction/forum selection clause, the HC cannot act as the referral court. Also, the cause of action did not arise within the jurisdiction of the HC⁹ and the 2022 MOU draft cannot confer jurisdiction on the HC.¹⁰

This *Counselence Connect* contains information in a nutshell on a recent change in law.

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⁴ *Cox and Kings Ltd. vs. SAP India Pvt. Ltd. and Another*, (2024) 4 SCC 1.

⁵ *Mahanagar Telephone Nigam Ltd. vs. Canara Bank and Others* (2020) 12 SCC 767.

⁶ Paragraph 25 of the judgement.

⁷ Paragraph 26 of the judgement.

⁸ Paragraph 29 of the judgement.

⁹ Paragraph 31 of the judgement.

¹⁰ Paragraph 31 of the judgement.