

(2013) 09 BOM CK 0103

In the Bombay High Court

Case No : Civil Appellate Jurisdiction Arbitration Appeal No. 31 of 2013

Ameyas Infraprojects Pvt. Ltd. and Yashashri Apartments,
Kohinoor Colony

APPELLANT

Vs

PBA Infrastructure Ltd. and Atlanta Infrastructure Limited

RESPONDENT

Date of Decision : 03-09-2013

Acts Referred:

Arbitration and Conciliation Act, 1996 — Section 11, 16, 34, 34(4), 37

Citation : (2013) 09 BOM CK 0103

Hon'ble Judges : Ranjit More, J

Bench : Single Bench

Advocate : J.P. Sen, instructed by and Mrs. Teja katdare, for the Appellant; M.M. Vashi, for the Respondent

Final Decision : Dismissed

Judgement

Ranjit More, J.—By this appeal, preferred u/s 37 of the Arbitration and Conciliation Act, 1996 (for short "the said Act"), the appellant is challenging the common order passed by the learned sole arbitrator in applications preferred by respondent Nos. 1 & 2 u/s 16 of the said Act. By the impugned order, learned Arbitrator, held that the claims contained in Paragraphs 41(i), 41(v)(a) to 41(v) (1), 42, 43, 44.1 44.2 44.3, and prayers contained in Paragraph 49(a) & (b) thereof to the extent that they cover claims mentioned in the above said paragraphs are beyond the scope of arbitral reference and learned arbitrator has no jurisdiction to decide the same.

2. The brief facts giving rise to the present appeal are as follows:

Respondent No. 1 PBA Infrastructure Limited (PBA) and respondent No. 2-M/s. Atlanta Infrastructure Limited (Atlanta) formed a joint venture in the name of Prakash-Atlanta Joint Venture (PAJV). PAJV was awarded a contract by the National Highway Authority of India (NHAI) to construct Lucknow by-pass. PAJV sub-contracted the work to the appellant - M/s. Ameyas Infraprojects Private

Limited (Ameya) under an agreement dated 23rd August, 2001. Ameya gave up this subcontract. Thereafter PBA, Atlanta and Ameya entered into a partnership deed on 1st July, 2002 (AAP). PAJV thereafter appointed AAP as a subcontractor by an agreement dated 5th July, 2002.

On 1st November, 2004, Ameya gave notice to Atlanta and PBA that it was retiring from partnership with immediate effect. The other partners i.e. PBA and Atlanta then dissolved the firm of AAP. The parties entered into MOUs dated 6th November, 2004 and 24th November, 2004. The disputes were referred to an arbitrator-Mr. Shadilal Chopra. All the three parties filed Statements of Claim before the arbitrator. Replies to the statements of claim were also filed. The said Mr. Shadilal Chopra passed an award on 14th March, 2007. The said award was challenged by Ameya before this Court by filing arbitration petition u/s 34 of the said Act. On 9th December, 2011, this Court, by consent of the parties, set-aside the award and Hon"ble Justice Shri S.N. Variava (Retired Supreme Court Judge) was appointed as an Arbitrator to adjudicate the dispute between the parties. The evidence which was already on record, by consent, was directed to be taken into consideration. Liberty was also granted to the parties to apply for leading additional evidence. In pursuance of the above order, learned arbitrator allowed the parties to lead additional evidence and thereafter, the matter was closed for arguments.

The appellant's counsel, thereafter, on 12th February, 2013, commenced his submission. The respondents' counsel objected appellant's counsel in making submission in respect of matters which, according to him, had been disallowed by the earlier arbitrator as being beyond the scope of reference. The appellant's counsel insisted that the present reference was in respect of all disputes between the parties. The respondent's counsel thereafter took out two separate applications objecting arbitral tribunal's jurisdiction in respect of certain claims made by the appellant as they are beyond the scope of reference. As stated above, by the impugned order, learned sole arbitrator, upheld the respondent's objections and petitioner's claim contained in Paragraphs 41(i), 41(v)(a) to 41(v) (1), 42, 43, 44.1 44.2 44.3, and prayers contained in Paragraph 49(a) & (b) are held beyond the scope of reference and, therefore, Tribunal has no jurisdiction.

3. Mr. Sen, learned counsel for the appellant, submitted that for convenience, the respondents for the purpose of construction of Lucknow bypass referred to themselves as JV or PAJV. There is no legal entity independent of respondent Nos. 1 & 2 and JV or PAJV merely refers to consortium or joint association. Similarly partnership firm of AAP Construction Company is not legal entity but is a mere compendious description of the appellant and respondents. He submitted that arbitration agreement between the parties was arrived at, as is evident from various documents. He submitted that the arbitration agreement between the parties also came to be recorded in order dated 9th December, 2011, passed by this Court. Mr. Sen, submitted that the earlier arbitrator wrongly limited the reference to the dispute between the partners of AAP and passed the award

which was set-aside by this Court by consent and thereafter, parties once again have reached an agreement to refer the dispute between themselves for arbitration for de novo adjudication. He submitted that the reference which is referred by this Court is a fresh reference and not in continuation of the earlier reference which came to an end on earlier arbitrator rendering his award. He, therefore, insisted that the reference before the present arbitrator was in respect of all the disputes between the parties i.e. dispute between partners of AAP as well as disputes between PAJV and AAP. He lastly submitted that in these circumstances, the impugned order deserves to be quashed and set-aside.

4. Mr. Vashi, learned counsel for the respondents, on the contrary supported the order impugned in the appeal. He submitted that the proceedings before the present arbitrator are in continuation with the proceedings held before the earlier arbitrator. He relied upon the order of this Court passed on 9th December, 2011, in proceedings u/s 34 and contended that the very fact that this Court directed that evidence already on record to be taken into consideration supports his contention. He also submitted that since the earlier arbitrator restricted the arbitral reference to the dispute between the partners of AAP, now the reference cannot be enlarged so as to include the dispute arising out the agreement dated 5th July, 2002, between PAJV and AAP. Mr. Vashi, submitted that the reference made by this Court by order dated 9th December, 2011, in Section 34 petition, cannot be considered as a fresh reference and, therefore, the learned arbitrator has rightly come to the conclusion and passed the impugned order.

5. Having considered the rival submissions of respective counsel and having gone through the memo of appeal along with annexures thereof, I find no merit in the appeal. The main question which deserves consideration is which disputes were referred to arbitration tribunal and whether reference is limited to the disputes between partners of AAP or it also includes the disputes between PAJV and AAP.

6. It is clear from the letter dated 15th January, 2005, Minutes of order dated 18th May, 2005 and issues framed, that the earlier arbitrator restricted the reference to the dispute between the partners of AAP only. This position is not seriously disputed by Mr. Sen. Mr. Sen also does not dispute that if the present reference is held to be in continuation of the earlier reference, then, its scope cannot be enlarged so as to include the dispute between PAJV and AAP. Mr. Sen, however, asserted that the reference made to the present arbitrator by this Court was fresh one and, therefore, the present arbitrator is required to decide all the disputes including the dispute between PAJV and AAP.

7. Having perused the impugned order minutely, I do not find any finding therein as to whether the present reference is in continuation of the earlier reference. Learned Arbitrator, however, recorded the finding that the High Court by the said order dated 9th December, 2011, did not refer any dispute between PAJV and AAP under agreement dated 5th July, 2002, to arbitration. Since there is no finding by learned arbitrator regarding continuation of earlier proceedings, normally the proceedings are required to be remanded back for inviting finding in

that regard. However, learned arbitrator arrived at conclusion that what was referred to arbitration was the dispute between the partners of AAP and not any dispute between PAJV and AAP. If this finding is sustained, then, there is no need to remand the matter.

8. Let us, therefore, consider which disputes were referred to the arbitrator by this Court. This Court on 9th December, 2011, passed the following order in petition u/s 34 of the said Act:-

P.C.:

By consent of parties, the award impugned in the petition is set-aside.

By consent of parties, Hon"ble Mr. Justice S.N. Variava (Retired Supreme Court Judge) is appointed as an Arbitrator. Disputes between the parties are referred to the learned Arbitrator for adjudication. By consent of parties, it is clarified that the learned Arbitrator shall take into consideration the evidence which is already on record and in case, any of the parties apply for leading additional evidence, the learned Arbitrator shall consider that application in accordance with law.

Petition disposed of.

9. Mr. Sen submitted and learned arbitrator accepted that the above order cannot be an order u/s 34(4) of the said Act. Learned Arbitrator also held that there is no arbitration clause in agreement dated 5th July, 2002, between PAJV & AAP and, therefore, in the absence of written arbitration agreement, the Chief Justice or his designate cannot invoke powers under Sections 8 or 11 of the said Act. Mr. Sen, in this regard, relied upon Recital "K" in sub-contract agreement dated 5th July, 2002 between PAJV or AAP to contend that arbitration clause contained in sub-contract agreement dated 23rd August, 2001 was incorporated in agreement dated 5th July, 2002. Learned Arbitrator did not accept the submission of appellant's counsel in this regard and held that in view of recital "K" in sub-contract agreement dated 5th July, 2002, only those terms and conditions which would be relevant under subsequent contract, would be incorporated. This finding of the arbitrator cannot be interfered with in the light of decision of the Apex Court in M.R. Engineers & Contractors Pvt. Ltd. versus Som Datt Builders Ltd. in Civil Appeal No. 4150 of 2009. The Apex Court, in this decision, made distinction between reference to another document in a contract and incorporation of another document in a contract, by reference. It was held that, in the first case, the parties intend to adopt only specific portions or part of the referred document for the purposes of the contract. In the second case, the parties intend to incorporate the referred document in entirety into the contract. The Apex Court summarized the scope and intent of Section 7(5) of the said Act in Paragraph 13 which is reproduced hereinbelow:

13. The scope and intent of section 7(5) of the Act may therefore be summarized thus:

(i) An arbitration clause in another document, would get incorporated into a

contract by reference, if the following conditions are fulfilled: (i) The contract should contain a clear reference to the documents containing arbitration clause, (ii) the reference to the other document should clearly indicate an intention to incorporate the arbitration clause into the contract, (iii) The arbitration clause should be appropriate, that is capable of application in respect of disputes under the contract and should not be repugnant to any term of the contract.

(ii) When the parties enter into a contract, making a general reference to another contract, such general reference would not have the effect of incorporating the arbitration clause from the referred document into the contract between the parties. The arbitration clause from another contract can be incorporated into the contract (where such reference is made), only by a specific reference to arbitration clause.

(iii) Where a contract between the parties provides that the execution or performance of that contract shall be in terms of another contract (which contains the terms and conditions relating to performance and a provision for settlement of disputes by arbitration), then, the terms of the referred contract in regard to execution/performance alone will apply, and not the arbitration agreement in the referred contract, unless there is special reference to the arbitration clause also.

(iv) Where the contract provides that the standard form of terms and conditions of an independent Trade or Professional Institution (as for example the Standard Terms & Conditions of a Trade Association or Architects Association) will bind them or apply to the contract, such 14 standard form of terms and conditions including any provision for arbitration in such standard terms and conditions, shall be deemed to be incorporated by reference. Sometimes the contract may also say that the parties are familiar with those terms and conditions or that the parties have read and understood the said terms and conditions.

(v) Where the contract between the parties stipulates that the Conditions of Contract of one of the parties to the contract shall form a part of their contract (as for example the General Conditions of Contract of the Government where Government is a party), the arbitration clause forming part of such General Conditions of contract will apply to the contract between the parties.

The observations of the Apex Court in the above paragraph, makes it clear that, the arbitration clause from any contract can be incorporated into contract only by special reference to the arbitration clause and not otherwise.

Mr. Sen, in this regard, placed reliance upon the decision of the Apex Court in *Chloro Controls (I) P. Ltd. Vs. Severn Trent Water Purification Inc. and Others*, . The Apex Court, in this case, was considering the scope and purport of Section 45 of the said Act which deals with the powers of judicial authority to refer parties to arbitration. The provisions of Section 45 falls in Part II of the said Act, which is applicable to certain foreign awards. There is difference in wordings of Section 45 and Section 11 of the said Act. The provisions of Section 11 can be

invoked by party to domestic arbitration agreement. u/s 45 of the said Act, one of the party or any person claiming through or under him can apply to judicial authority to refer the dispute to arbitration. This decision of the Apex Court is, therefore, not applicable to the facts and circumstances of the present case.

10. Mr. Sen relied upon following arbitration agreements:

1. Clause 18 of partnership deed dated 1st July, 2002.
2. Agreement dated 5th July, 2002 between PAJV and AAP in view of recital "K" thereof.
3. Clause 5 of the MOU dated 24th November, 2004.
4. The arbitration agreement arrived between the parties by way of exchange of correspondence.
- 5 The arbitration agreement recorded by this Court in Order dated 9th December, 2011, in petition u/s 34 of the said Act.

As far as appellant's alleged reliance on agreement dated 5th July, 2012, is concerned. I have already held that by virtue of recital "K" thereof, the arbitration clause in agreement dated 23rd August, 2001, cannot said to have been incorporated in agreement dated 5th July, 2002. So far as arbitration agreement contained in clause 5 of the MOU dated 24th November, 2004, is concerned, it refers to the dispute between ex-partners of AAP Construction Company only. The earlier arbitrator considered the correspondence between the parties and held that scope of reference was limited to the dispute between the partners of AAP. Now, therefore, in these circumstances, it is required to be seen which disputes are referred to the Arbitrator. This question will have to be decided in the light of arbitration agreement in Clause 18 of the partnership deed dated 1st July, 2002 and arbitration agreement recorded between the parties by this Court in order dated 9th December, 2011. Admittedly, the appellant and respondents are the partners of AAP by virtue of partnership deed dated 1st July, 2002 (AAP). PAJV is not concerned with this partnership deed. Therefore, the dispute between PAJV and AAP cannot be referred to the arbitration under arbitration clause of this partnership deed dated 1st July, 2002.

11. This takes me to consider, which disputes are referred to arbitration by virtue of agreement recorded by this Court in order dated 9th December, 2011. PAJV was not a party to the petition u/s 34 filed by the present appellant. The petition was filed by the appellant against respondent Nos. 1 & 2 in their capacity as partners of AAP. The contentions of the appellant that, since the said respondents were party and thus even PAJV was represented, cannot be accepted. A joint venture is an association of two or more parties, who have come together to undertake an activity to earn profit. Joint venture is, therefore, in the nature of a partnership. The respondents have formed a joint venture. They were also partners in AAP. But the capacity in which they were the partners is completely different from the capacity in which they are parties to the joint venture. Merely

because PBA and Atlanta were parties to the petition u/s 34 as partners of AAP, would not mean that, claims which AAP or one of its partner may allegedly have against PAJV can be referred to arbitration.

12. In my view, in the absence of arbitration agreement in sub contract dated 5th July, 2002 between PAJV and AAP, this Court, could have referred the dispute arising out of the said agreement by consent of the parties, provided PAJV was party to the petition u/s 34. I have already observed that PAJV was not a party to Section 34 petition, though PBA and Atlanta were parties to the said petition in their capacity as partners of AAP. In the circumstances, the order of this Court dated 9th December, 2011 cannot be interpreted to mean that disputes between PAJV and AAP arising out of sub-contract dated 5th July, 2002, are also referred to arbitration.

13. Mr. Sen also submitted that the claims in paragraph 41 of the Statement of Claim merely sets out various relevant factors which are required to be taken into account in finalising the accounts of the said firm and claims made in Paragraphs 42 to 44 are also required to be taken into account in finalizing the accounts of the said firm. He also submitted that the claims made by the appellant and factors set out in Paragraph 41 of the Statement of Claim are receivables which must necessarily be taken into account in settling the accounts of a firm on the retirement of a partner. Similar submission was made before learned Arbitrator, however, it was not accepted on the ground that claims of damages which one partner may have against others do not become receivables, if the same are denied or disputed and in order, the claim to be considered receivables, it must be an admitted claim or it must be accepted by all partners to be receivable by the firm. The learned arbitrator held that one of the partners, and that also after retirement cannot decide on his own that certain claims are receivables. No fault can be found in the said finding of the learned Arbitrator. Taking into consideration the above facts and circumstances, I am not inclined to interfere with the impugned order. The appeal is, accordingly, dismissed.