

(2011) 04 GUJ CK 0189

In the Gujarat High Court

Case No : Letters Patent Appeal No. 95 of 2009 in Special Civil Application No. 126 of 2009 and Civil Application No. 909 of 2009

Creative Infocity Limited

APPELLANT

Vs

Gujarat Informatics Limited

RESPONDENT

Date of Decision : 26-04-2011

Acts Referred:

Arbitration and Conciliation Act, 1996 — Section 8

Gujarat Infrastructure Development Act, 1999 — Section 2, 21(1), 24, 24(4), 3(2)

Citation : (2011) 04 GUJ CK 0189

Hon'ble Judges : S.J. Mukhopadhaya, J;K.M. Thaker, J

Bench : Division Bench

Advocate : D.C. Dave, for the Appellant; S.N. Soparkar and Bijal Chhatrapati, for Singhi and Co., for the Respondent

Final Decision : Dismissed

Judgement

S.J. Mukhopadhaya, J.—By way of the present Letters Patent Appeal, Appellant - Creative Infocity Limited [hereinafter referred to as "the Appellant" or "CIL"], sought to question the validity of the order passed by the learned Single Judge dated 28.1.2009 in Special Civil Application No. 126 of 2009 preferred against the order passed by the 8th Additional Senior Civil Judge, Gandhinagar in respect of the application u/s 8 of the Arbitration & Conciliation Act, 1996 [hereinafter referred to as "the Arbitration Act"], being Exh. 17, filed by Respondent - Gujarat Informatics Ltd. [hereinafter referred to as "the Respondent" or "GIL"] in Regular Civil Suit No. 427 of 2008 filed by the Appellant.

2. The brief facts of the case as pleaded by the Appellant are as follows:

2.1 An agreement entitled "Concession Agreement" was executed by and between the Appellant - CIL and the Respondent - GIL, both being the Companies under the Companies Act, 1956 with one American Company in the name of "Creative IT Inc." as a confirming party thereto. As per the aforesaid Concession Agreement, the project of Infocity at Gandhinagar, Gujarat was

contemplated to be developed through the instrumentality of CIL as a Joint Venture Company of GIL and Creative IT Inc.. According to CIL, after execution of the Concession Agreement, CIL submitted the project report which was accepted by GIL. Thereafter, on 26.2.2001, an agreement under the nomenclature of "Indenture of Master Lease" [hereinafter referred to as "the Master Lease Agreement"] was executed by and between CIL and GIL with Creative IT Inc. as a confirming party thereto.

2.2 Pursuant to the aforesaid Master Lease Agreement, CIL was allotted a parcel of land at Gandhinagar on leasehold basis for a period of 32 years for the purpose of developing the Infocity thereupon. When the aforesaid project of Infocity was in progress and Phase I thereof was almost complete and functional, on 21.4.2007, GIL served upon CIL two show cause notices as to why the Concession Agreement and the Master Lease Agreement be not terminated for the reasons mentioned therein.

2.3 According to CIL, since the Master Lease Agreement did not provide for any termination prior to the period of 32 years of lease for which the same was executed, and since the Concession Agreement did not survive after coming into force of the Master Lease agreement, the writ petition was preferred by the Appellant - CIL in Special Civil Application No. 11954 of 2007 challenging the show cause notices. In the said writ petition, this Court by order dated 8.5.2007 accepted the objection raised by the Respondent - GIL that the complaint against the Respondent was at the stage of show cause notice and, thereafter, if the final decision is taken against the Appellant - CIL, the remedy lies before the Civil Court and disposed of the writ petition with a rider that if any decision is taken pursuant to the show cause notices for termination of the Concession Agreement and the Master Lease Agreement, the same would remain in abeyance for a period of three weeks to enable the Appellant - CIL to challenge the same.

Thereafter, GIL by two separate orders dated 12.8.2008 terminated the Concession Agreement and the Master Lease Agreement respectively.

2.4 Against the order of termination of the Concession Agreement and the Master Lease Agreement, CIL preferred another writ petition in Special Civil Application No. 10840 of 2009 before this Court, but it was not entertained by the Division Bench of this Court and by order dated 22.4.2008, the said writ petition was permitted to be withdrawn for resorting to an alternative remedy.

The Appellant - CIL thereafter instituted a civil suit being Regular Civil Suit No. 427 of 2008 in the Court of the Principal Senior Civil Judge, Gandhinagar seeking for a permanent injunction restraining the Respondent - GIL, its agents, servants and subordinates from disturbing the possession of the Appellant - CIL in respect of the concerned property, referred to as "Project land/site/facilities/buildings", as per the description thereof in the Master Lease Agreement executed between CIL and GIL on 26.2.2001. It was claimed that CIL is in possession of the aforesaid land pursuant to the Master Lease Agreement executed by GIL in its

favour for leasing out the land for a period of 32 years for development thereof as per the Master Lease Agreement.

2.5 In the said suit, the Respondent - GIL moved an application u/s 8 of the Arbitration Act, being Exh. 17, contending that in view of the arbitration clause contained in the Concession Agreement by and between CIL and GIL on 1.8.2000, the trial Court had no jurisdiction to entertain the suit of CIL and, therefore, the suit of CIL is required to be disposed of accordingly for want of jurisdiction on the part of the trial Court by referring the subject matter of the said suit to arbitration. The Respondent - GIL requested the trial Court to take up the application at Exh. 17 first before taking up the application for temporary injunction. The trial Court thereafter upon hearing the parties, by judgment and order dated 27.12.2008 allowed the application preferred by GIL at Exh. 17 with a rider that for the period of 45 days there from, both CIL and GIL should maintain status quo for the purpose of enabling CIL to approach the appropriate forum pursuant to the said order u/s 8 of the Arbitration Act. Against the said order, the writ petition preferred by the Appellant - CIL having dismissed, the present appeal was preferred.

3. Mr. Dhaval Dave, learned Counsel appearing on behalf of the Appellant - CIL would contend that the orders passed by the trial Court and the learned Single Judge are illegal, they having failed to notice the relevant provisions of the Master Lease Agreement and made the following submissions.

(i) The Concession Agreement was executed on 1.8.2000 between CIL and GIL followed by subsequent execution of the Master Lease Agreement dated 26.2.2001. Clause 10 of the said Master Lease Agreement contains a specific stipulation and categorically to the effect that the provisions contained in the Master Lease Agreement shall override all the previous understandings, agreements, contracts, whether oral or in writing and, thereupon, the said Master Lease Agreement shall be the only contract governing the rights of CIL and GIL, as quoted here under:

10. The provisions of this Master Lease shall override all previous understandings, agreements, contracts whether oral or in writing and shall be deemed to be the only contract governing the rights of parties herein.

The term "override" as referred to in the aforesaid clause, as per the dictionary meaning thereof would mean "to declare null and void; set aside" as per the Universal Dictionary. The term "overriding" in P Ramanatha Ayer's Law Lexicon is defined as "subordinating all others to itself".

In view of the above, the only conclusion, which is possible there from, is to the effect that the said Concession Agreement has no existence with effect from 26.2.2001, the date on which the Master Lease Agreement was executed. The Concession Agreement being not in existence, the question of moving the application u/s 8 of the Arbitration Act (Exh. 17), as per the Concession Agreement, does not arise and the same was not maintainable. The existence of

arbitration clause is absolutely a must for invoking the application u/s 8 of the Arbitration Act, but in absence of such arbitration clause in the Master Lease Agreement and the very Concession Agreement being not in existence, the arbitration clause as stipulated in the Concession Agreement, does not survive.

(ii) Alternatively, if the Concession Agreement holds the field, as on the date, the question of invoking the application of Clause 24.4 thereof, containing an arbitration clause does not arise, for the reason that the subject matter of the said suit does not pertain to any provision contained in the Concession Agreement.

(iii) The suit preferred by the Appellant - CIL was simply based upon the settled possession of CIL which was not in dispute. For the purpose of deciding the issue in controversy of the said suit, viz. as to whether GIL is entitled to evict forcibly CIL without following the due process of law, the Civil Court would not be required to refer to any of the provisions of the Concession Agreement or even the Master Lease Agreement. What was required to be considered by the Civil Court in the said suit was the only question as to whether CIL was entitled to a limited protection in respect of its settled possession or not, on the premises that GIL has no right to dispossess CIL without following the due process of law. The provisions of the Concession Agreement or even the Master Lease Agreement were not required to be interpreted for deciding the question of possession of CIL and its right over the concerned land. The arbitration Clause 24.4 of the Concession Agreement would come into play if there exists a dispute by and between CIL and GIL concerning the interpretation or otherwise of any provisions contained in the Concession Agreement. On that count also, the application at Exh. 17 deserved to be dismissed.

(iv) When the Appellant - CIL was admittedly put in possession over the land in question pursuant to and in furtherance of the Master Lease Agreement, not on the basis of the Concession Agreement, the Court below in the suit ought to have taken into consideration the terms and conditions of the Master Lease Agreement for deciding the issue, which does not contain any arbitration clause. Even the application at Exh. 17 is based on the arbitration clause contained in the Concession Agreement and not in the Master Lease Agreement. Therefore, the Concession Agreement was not the subject matter of the suit, but the Master Lease Agreement which was required to be interpreted for deciding the issue.

4. Mr. SN Soparkar, learned senior counsel with Mr. Bijal Chhatrapati, appearing on behalf of the Respondent - GIL would refer to the factual background history. According to him, the State of Gujarat framed a policy for inviting and encouraging private sector participation in various infrastructural projects in the year 1999. In order to provide necessary legal frame work for implementation of the said policy, the State of Gujarat promulgated an Ordinance under the nomenclature "The Gujarat Infrastructure Development Ordinance, 1999". Later on, it was given the shape of "The Gujarat Infrastructure Development Act, 1999". Upon promulgation of the said Ordinance, the State of Gujarat for the

purpose of ensuring its participation in respect of the infrastructural project in the filed of Information Technology, with private sector, inter alia, decided to form a Company, fully owned by it as its instrumentality and as a result thereof, the Respondent - GIL was incorporated as a Company under the provisions of the Companies Act, 1956. Subsequently, GIL floated global tender inviting offers from the concerned Companies for undertaking a project of Infocity, near Gandhinagar, Gujarat, in joint venture with GIL by forming a "Special Purpose Vehicle" for the same, in the shape of a Joint Venture Company by and between GIL and the concerned successful bidder. In response to the said global tender, GIL decided to enter into a joint venture with Creative IT Inc. for the purpose of implementing the project of Infocity at Gandhinagar. Accordingly, in due furtherance thereof, an agreement dated 1.8.2001 under the nomenclature of "Concession Agreement" as envisaged by the provisions embodied in Section 2(b) read with Sections 4 and 7 of the Gujarat Infrastructure Development Act, 1999 came to be executed by and between the Appellant - CIL and the Respondent - GIL with the said Creative IT Inc. as a confirming party.

5. According to the Respondent - GIL, the Concession Agreement refers to the Master Lease Agreement, as one of the Schedules thereof and, therefore, the Master Lease Agreement survives as an integral part of the said Concession Agreement and hence, the arbitration clause contained in the said Concession Agreement would also apply to the said Master Lease Agreement. In support of the contention, the Respondent placed reliance upon Clause 28.3 of the Concession Agreement under the heading "Entire Agreement".

6. The learned Counsel for the Respondent would contend that the Appellant - CIL had at no point of time in the past pleaded about non-existence of the Concession Agreement, and, therefore, the Appellant cannot take such a plea at the appellate stage.

However, the aforesaid submission has been contradicted by the counsel for the Appellant who informed that such a plea was taken before this Court in the earlier writ petition.

7. The Respondent thus relying on the different provisions of the Concession Agreement and the Master Lease Agreement would contend that the Master Lease Agreement is a part and parcel of the Concession Agreement and has no separate and independent existence one being dependent on the other and, therefore, they cannot be separated and the matter cannot be decided in isolation on the basis of the Master Lease Agreement.

8. The learned Counsel for the Respondent would further contend that the Appellant - CIL has accepted the continues validity of the Concession Agreement and never disputed its existence, even after execution of the Master Lease Agreement.

Thus, the learned Counsel for the Respondent would contend that once there is an arbitration agreement between the parties, it is open to the Court to refer the

parties to the arbitration.

9. The learned Counsel for the Respondent referred to the petition filed by CIL before this Court being Special Civil Application No. 10840 of 2008 and submitted that CIL has accepted that the Concession Agreement continues to operate. Therefore, the execution of the Master Lease Agreement has not resulted in termination of the Concession Agreement.

10. We have heard the learned Counsel for the parties, noticed the rival contentions and perused the record.

11. Clause 3 of the Concession Agreement refers to the Implementation of the Project and gives an indication of the scope of the arrangement, namely Design, Finance, Bill, Market, Lease, Operate and Transfer, as quoted hereunder:

3. IMPLEMENTATION OF THE PROJECT

3.1 Design, Finance, Build, Market, Lease, Operate and Transfer.

The Concessionaire shall:

3.1.1 Develop the financing plan for the Project and carry out all necessary steps for Financial Closure as defined in Schedule 1, which shall be the sole responsibility of the Concessionaire;

3.1.2 Incorporate into its Memorandum and Articles of Association Sections specified in the Shareholders' Agreement regarding the day to day management and operation control of Concessionaire and take steps for completing and executing all other necessary Project Agreements;

3.1.3 Carry out detailed design and engineering of the Project (as specified in the RFP and finalized in the DPR) to be approved by the Independent Engineer and build the Project Facilities and Information Technology Infrastructure of the first phase of the Infocity (Phase-I) as described in Schedule 3 at its own cost and risk as per the provisions of RFP as finalized in the DPR;

3.1.4 Carry out marketing of the Infocity to potential users of the specified categories of IT companies ("Users") as specified in the IT Policy of the State, and also to supportive and complimentary facilities and service providers ("Supplementary Users") like bank's insurance companies, retail shopping centres and malls, hotels, restaurants, schools, day care centres, hospitals, educational fun parks, sports facilities, exhibition centres, theatre and entertainment facilities as listed in Schedule 10 and enter into contracts with the Users and Supplementary Users for lease and regular use as per prescribed policies, to generate the necessary revenues as per the rates for different facilities;

3.1.5 Carry out Operation and Maintenance of the Project Facilities in accordance with prudent standards of such operations specified in the DPR during the Concession Period unless terminated earlier in accordance with the provisions of

this Agreement; and

3.1.6 Carry out improvements on the Infocity and further extension thereof ("Phase-II") subject to and in accordance with the provisions of this Agreement, the detailed project report for Phase II and such other agreements to be entered into from time to time.

3.1.7 Transfer, at the end of the Concession Period or upon termination, the Project Assets to GIL in accordance with the provisions of this Agreement.

3.1.8 The Developer hereby agree that thought GIL may review the terms of such further agreements as the Construction Contract, the Marketing Contract, the Security Agreement, the Financing Agreements, and Operations and Maintenance Agreement and other Agreements, the Developer shall be responsible for ensuring that all the conditions agreed in those Agreements are such which enables Concessionaire to comply and fulfill the provisions of this Agreement.

12. Recognizing the joint venture participation of CIL and GIL, Clause 3.2 of the Concession Agreement is devoted to "Conditions Precedent" and requires, inter alia, vide Clause 3.2.1, the acquisition and lease to CIL by GIL of the project site as specified in Schedule 8 of the Concession Agreement. Black's Law Dictionary defined "condition precedent" as "an act or event, other than a lapse of time, that must exist or occur before a duty to perform something promised arises." Clause 3.2.4 contemplates finalization of mutually acceptable Schedules 2 to 14 to be attached with the Concession Agreement, as a Condition Precedent. Execution of the Schedules, one of which was the Master Lease Agreement, was accordingly one of the Conditions Precedent. Clause 3.2 of the Concession Agreement is reproduced here in below:

3.2 Conditions Precedent Notwithstanding anything contained in Section 2, the rights and obligations of the parties under this Agreement shall be conditional upon:

3.2.1 The acquisition and lease to Concessionaire by GIL of the project site ("Project Site") as specified in the RFP and described in Schedule 8 of this Agreement;

3.2.2 The granting of the Specified Consents ("Specified Consents") as described in the Schedule 2 by the State Government and the Central Government free from any conditions which materially affect the interests of the Concessionaire, the Lenders, the Investors or Users; and

3.2.3 Review and approval of the DPR by GIL, prepared by the Developer by appointing a competent and qualified consultant ("DPR Consultant") in accordance with the provisions of the RFP and incorporation of the terms and conditions of the DPR in this agreement and such other agreement as may be necessary from time to time.

3.2.4 Finalization of mutually acceptable Schedules 2 to 4 to be attached with this agreement.

13. The Concession Agreement also contains provisions for satisfaction of the condition precedent at Clause 3.3, as reproduced here in below:

3.3. Satisfaction of Conditions Precedent

3.3.1 Upon compliance in full of all conditions precedent set forth in Section 3.2 above the Concessionaire shall be obligated to issue to GIL, a Certificate of Compliance with Conditions Precedent (the "Certificate of Compliance"). The Concessionaire shall issue such Certificate within four (4) weeks of its determination that all conditions precedent set forth in Section 3.2 above have been complied with. In the event that the Concessionary has not issued the Certificate of Compliance within four weeks GIL can refer the matter to the Independent Engineer who shall then determine if the Certificate of Compliance can be issued or not. If the Independent Engineer is satisfied with documented evidence that a Certificate of Compliance can be issued it can issue the certificate to GIL.

3.3.2 GIL shall make best efforts to ensure that all the Conditions Precedent mentioned in 3.2 above are satisfied within a period of six months from date hereof.

3.3.3 Notwithstanding anything contained in Section 3.2 to the contrary, either party may expressly waive, in writing, any of the conditions precedent set forth in Section 3.2 above in its sole discretion, provided, however, that the Concessionaire shall have been granted or obtained all Specified Consents that are required to be obtained prior to commencement of the construction and; provided further that no such waiver shall be constructed as a waiver by either party of any of its rights under this Agreement.

3.3.4 If the Conditions Precedent are not satisfied within a period of twelve months from the date of execution of this Agreement Either Party shall be entitled to terminate the agreement pursuant to the provisos of Section 21.1 of this Agreement.

3.3.5 Notwithstanding anything contained in this Section, the Developer shall provide all assistance and shall be under an obligation to provide such assistance to the Concessionaire to design, finance, market, build, lease and operate the Project so that the latter can comply with the provisions of this Agreement. The Developer acknowledges that as a confirming party to this Agreement, GIL, shall have the right to proceed against the Developer in respect of non-compliance by the Concessionaire of its obligation relating to performance of payment as the case may be.

14. Subsequently, on 26.2.2006, as per Clause 3.2.4 of the Concession Agreement, the project site (admeasuring 116 acres) was leased to CIL by GIL by executing an agreement, under the nomenclature of the "Indenture of Master

Lease Agreement", being Schedule 13 to the Concession Agreement.

15. Clause 4.1 of the Concession Agreement provides rights to CIL, by way of lease of the project site, to develop, design, finance, construct, complete and market the project facilities in accordance with the RFP and the approved DPR and sub-lease project facilities or portion of project site for the benefit of the users and the supplementary users, which reads as follows:

4. Grant of concession and vacant possession

4.1 GIL hereby grants the Concessionaire by way of lease of the Project site, the exclusive right to develop, design, finance, construct and complete and market the Project Facilities in accordance with the RFP as finalized in the DPR and sub-lease the Project Facilities or portion of Project Site, for the benefit of the Users and the Supplementary Users, and operate and maintain the same, and transfer at the end of the Concession Period to GIL, the Project Assets in accordance with the terms and conditions of this Agreement for the duration of the Concession.

Clause 4.6 of the Concession Agreement contemplates the period of the Concession Agreement ("Concession Period") which would commence on the day of execution of the agreement and would be for a period of 32 years commencing from that day, which reads as follows:

4.6 Notwithstanding anything contained in this Agreement the period of the Concession ("Concession Period") shall commence on the day of execution of this Agreement and shall be for a period of thirty two (32) years commencing from that date. Upon completion of the Concession Period all rights and obligations under this Agreement shall lapse unless renewed in accordance with this Agreement.

16. Clause 6.1.3 of the Concession Agreement contemplates lease in favour of CIL of the Project Site under a valid and binding Lease Agreement, to be duly executed and specifying the rates as stated in Schedule 7 to the Concession Agreement as lease rental in respect to the land specified for each activity. Relevant portion of Clause 6.1.3 of the Concession Agreement is reproduced hereunder:

6.1.3 Lease of Project Site

(a) GIL shall lease to Concessionaire the Project Site under valid and binding lease agreement (the "Project Site Lease Agreement"). The said Project Site Lease Agreement shall be duly executed and registered with the competent authorities. The lease of the land specified for each activity shall be as per the final land use plan agreed in the DPR, at rates stated in the RFP, and as stated in Schedule 7 to this Agreement. The Concessionaire shall abide by the final agreed land use plan and accordingly carry out the development of Common Area, leased at a concessional rate, as specified in the RFP as finalized in the DPR.

(b)

(c)

17. Clause 28.3 stipulates that the Concession Agreement including the Schedules, the finally agreed Technical Bid, RFP as finalized in the DPR, LOI represent the entire understanding between the parties, which reads as follows:

28.3 Entire Agreement This Agreement, including the Schedules, the finally agreed Technical Bid, RFP as finalized in the DPR, LOI represents the entire understanding between the parties in relation to the subject matter hereof and superseded any or all previous agreements or arrangements between the parties in respect of the Project (whether oral or written).

18. In case of any conflict with any other agreement, the Concession Agreement would prevail. This will be evident from Clause 24.9 of the Concession Agreement, as quoted herein below:

24.9 In case of any conflict with any other agreement, unless otherwise agreed between the Concessionaire and GIL, this Agreement would take priority.

Clause 24.4 of the Concession Agreement provides for arbitration, as quoted here in below:

24.4 Arbitration

(b) Any dispute, controversy or claim referred to the Arbitration Panel in accordance with 24.4.(a) above shall be considered a commercial dispute arising under the Indian Arbitration and Conciliation Act, 1996.

(c) Any award by the Arbitration Panel shall be final and binding on the parties.

(d) The parties shall bear their respective costs of Arbitration.

19. The Concession Agreement contemplates the Master Lease Agreement as one of its Schedules. CIL and GIL entered into the Master Lease Agreement on 26.2.2001 which defines, inter alia, lessor, lessee, sub-lessee, development, detailed project report and other terms. The sub-lessee is defined by Clause 1.3 of the Master Lease Agreement to mean various users and supplementary users who have been granted sub-lease in respect of the whole or part of the project site/land/facilities/building or premises in accordance with the provisions of the Concession Agreement date 1.8.2000 entered into between CIL and GIL and DPR. The Master Lease Agreement is Schedule 13 to the Concession Agreement. The Master Lease Agreement consequently forms part of the Concession Agreement and represents, alongwith the Concession Agreement and other documents executed between the parties, the entire understanding between the parties.

20. It appears that GIL issued notices of termination of the Concession Agreement and the Master Lease Agreement alleging various breaches, like, inter alia:

(i) commercial exploitation of more than 39 acres;

- (ii) violation of land use plan;
- (iii) violation of construction scheduled and requirements;
- (iv) failure to provide development security in the format provided in the RFP;
- (v) Revenue sharing with GIL;
- (vi) outright sale of Infocity property;
- (vii) non-payment of project development expenses; and
- (viii) failure to appoint independent Engineer and independent Auditor in consultation with the GIL.

Before issuing the termination notices, GIL has issued a notice in respect of the Concession Agreement and a termination notice in respect of the Master Lease Agreement, providing an opportunity to CIL to cure and remedy the breaches within 60 days.

21. It has already been stated that the notices were originally challenged by CIL before this Court which was withdrawn and subsequently CIL filed the suit being Regular Civil Suit No. 427 of 2008 before the Civil Judge (Senior Division), Gandhinagar, for a permanent injunction restraining GIL, its servants and agents from disturbing CIL's position of the project land/site/facilities/buildings as per the discretion thereof in the Master Lease Agreement and from obstructing CIL, its servants and agencies in carrying on activities thereat and collecting rent and other amounts from the sub-lessees and providing facility to them.

22. Clause 22 of the Concession Agreement provides effect of termination of the Concession Agreement:

(i) CIL shall transfer the Project Assets to GIL or to its designee within fourteen days of the termination date (the "Transfer Date") as required by application law and to the satisfaction of GIL.

(ii) The Shareholder's Agreement between GIL and Developer with respect to the Concessionaire shall lapse on and from the Termination Date and the shares held by GIL in the Concessionaire shall be required to be transferred to Creative IT Inc., and forthwith; Creative IT Inc. shall pay to GIL the book value for 9,47,0758 equity shares of face value of Rs. 10 each in CIL. CIL is called upon to execute the necessary transfer forms in this regard, stamp duty for which shall be to the account of CIL. CIL is called upon to take the necessary corporate action to facilitate this transfer.

(iii) From the Termination Date until the Transfer Date, GIL shall have the right to cause, and CIL and permit, independent consultants, retained by it at its expense, to enter the Project Site at reasonable times, and upon reasonable notice, to perform such inspections, studies and tests as are necessary or appropriate to enable GIL to assess the condition of the site and/or the Infocity.

23. According to the Respondent - GIC, Clause 22.2.2 of the Concession Agreement required that the Project Assets are transferred "free and clear of all charges, mortgages, pledges, security interest, encumbrances or other liens", as also that the Appellant - CIL transfers to GIL all representations and warranties which had been provided to CIL in relation to the Project Assets. Consequently, GIL required CIL, vide its Termination Notice dated 12.8.2008 to execute the following documents, drafts of which were enclosed, namely -

- (i) A termination and release agreement with respect of the Concession Agreement;
- (ii) A deed of surrender with respect to the Master Lease Agreement;
- (iii) A termination and release agreement with respect to the Shareholder's Agreement;
- (iv) A letter of attornment to be circulated to all sub-lessees.

The termination notice also listed the Project Assets which were required to be transferred to CIL to GIL. The Respondent - GIL, by way of abundant caution, terminated the Master Lease Agreement as well, though it was a schedule and, therefore, a part of the Concession Agreement, by its termination notice of even date and called for transfer of the Project Assets. Considering that the termination was essentially under the Concession Agreement which contained a provision for arbitration and since the Master Lease Agreement is merely a schedule/part of the Concession Agreement, GIL moved an application on 4.9.2008 u/s 8 of the Arbitration Act, seeking reference of the disputes between the parties to arbitration.

24. The Master Lease Agreement is admittedly merely a Schedule to the Concession Agreement, the execution of the Master Lease Agreement being one of the conditions precedent of the Concession Agreement. The fact that this is an admitted position will be evident from the letter of CIL to GIL dated 24.1.2005, the relevant portion of which reads as under:

January 24, 2005 Exh. 39/13

.... As you are aware Schedule No. 1 is the definition as mentioned in the concession agreement. Schedule No. 3 is the specification and standards which is already submitted to you earlier. Schedule No. 11 is "Performa Direct Agreement" the capacity of which is also sent to you earlier. Schedule No. 13 I the Master Lease Agreement whereas Schedule No. 14 is Detail Project Report which has already been approved by your

Thus, being a part of the Concession Agreement, if any dispute arises under the Master Lease Agreement, such dispute would be governed by the arbitration provision contained in the parent agreement, namely the Concession Agreement.

25. As per Clause 24.9 of the Concession Agreement, in case of any conflict with any other agreement, unless otherwise agreed between the Concessionaire and

GIL, the Concession Agreement would take priority. Such agreement having received between the parties, in case of any conflict between the Concession Agreement and the Master Lease Agreement, the Concession Agreement would take priority over the Master Lease Agreement, which is a Schedule to the Master Lease Agreement.

26. In that view of the matter, the plea taken by the Appellant - CIL that the Concession Agreement has no existence with effect from the execution of the Master Lease Agreement cannot be accepted. We hold that the Concession Agreement is still binding between the parties. Once there is an arbitration clause in such Concession Agreement between the parties, the Court was bound to refer the parties to arbitration.

27. The Appellant - CIL has accepted the continuous validity of the Concession Agreement, which will be evident from the following facts:

There are letters from CIL to GIL regarding the Development Security Deposit, which is contemplated in the Concession Agreement. The relevant portion of the said letters are reproduced hereunder:

13th June, 2001 In this context, we would like to draw your kind attention to sub para 4 of para 6.2.4 of the concessions Agreement. As per the sub Para, if CIL has provided any guarantee to Bank or Financial Institution, proportionate reduction will be made from the amount of irrevocable Guarantee to be provided to GIL. ...

8th August, 2001 Concession Agreement should be thoroughly looked into and such ambiguity should be corrected. We can provide legal opinion to support our above-mentioned position. ...

The Appellant - CIL in its letter dated 12.6.2001 has clearly stated that the Concession Agreement is followed by the Master Lease Agreement and both the parties would fully abide by all the terms and conditions mentioned in the Concession Agreement and Master Lease Agreement and fully support the promotion and marketing of Infocity. The relevant portions of the said letter are reproduced herein below:

12th June, 2001 You are aware that Concession Agreement followed by Master Lease Agreement have already been executed between CIL & GIL. The Government has also issued resolution for granting of land to Infocity against the Share Capital Money equivalent to land cost of Rs. 9.36 Crores. The construction of Tower 1 & 2 is already in progress and it is anticipated that First Tower will be completed in all respects by September, 2001. The marketing of the space and plots of Infocity is also going on in full swing and it has been responded well by the IT Companies. ...

.... The Government of Gujarat will fully abide by all the terms and conditions mentioned in Concessionaire Agreement as well as Master Lease Agreement and fully support the promotion and marketing of Infocity. ...

Further more, in the year 2002, vide letter dated 14.2.2002, CIL has admitted that the project is to be completed within the time limit as per Schedule 4 of the Concession Agreement, relevant portion of which is reproduced herein below:

14th February, 2002 We are making best efforts to complete the project within the time schedule as per the schedule 4 of the Concession Agreement subject to satisfaction of the condition precedent and market trend and demand. ...

The Appellant - CIL had submitted vide letter dated 15.2.2002 the extension of bank guarantee of Rs. 80 lacs in compliance with the provisions of the Concession Agreement, as evident from the following portion of the said letter:

... In compliance of the provision of the Concession Agreement, we are enclosing herewith extension of Bank Guarantee of Rs. 80,00,000/- (Rupees eight lac) issued by you vide letter No. CIL/SEC/2002/317 dated 7.11.2001. ...

Even after the execution of the Master Lease Agreement, whenever there was any dispute, CIL always referred to the clauses of the Concession Agreement and always wanted to resolve the disputes according to the Concession Agreement. The aforesaid fact is evident from the letter of CIL dated 8.5.2002 wherein the dispute of the removal of the PWD store from the Infocity site was contemplated under the Concession Agreement.

The Appellant - CIL requested the Respondent - GIL to resolve other difficulties of the Appellant such as GUDA approvals, vacant possession of land, water connection in Infocity, etc. under the provisions of the Concession Agreement vide its letter dated 23.11.2002, relevant portion of which reads as follows:

... Further as per the same Concession Agreement's Clause No. 3, 4 and 5, GIL is also under certain obligations of helping the developer with various aspects of project, which includes:

GUDA approvals

Vacant possession of Land (Removal of PWD Store)

Water connection to Infocity.

Provision for additional 50 acres of land as per the RFP.

Transfer of land in the name of Creative Infocity Limited.

Tree cutting from Infocity Land, etc.

Seriousness of the situation is evident from the fact that although Info Tower I is now complete but it has been rendered unmarketable due to non-availability of GUDA Approval and BU Certificate. Also the Approach Road Permission from National Highway and Auto Mall approval from GUDA are still pending and hampering the overall progress of the project....

28. Reference to several letters dated 24.12.2002, 6.2.2003, etc. also shows that CIL always relied on the Concession Agreement for making any claim and deriving advantage.

29. In the writ petition, CIL sought for the following reliefs:

33.(A) That this Hon''ble Court be pleased to issue a writ of mandamus and/or any other appropriate writ, order or direction, commanding the Respondent to annul the aforesaid termination notices dated 12th August, 2008, the copies whereof figure at Exhibit "N" Collectively to the present petition and, thereupon, be pleased to hold that the aforesaid Concession Agreement and the Master Lease Agreement continue to operate and hold the field.

The said prayer conclusively established that CIL maintained the continuance of the Concession Agreement, for where it to be otherwise, CIL would have questioned the termination of the Concession Agreement by simply contending that no question for termination arose, on the ground that the Concession Agreement stood terminated on the execution of the Master Lease Agreement. On the contrary, CIL actually prayed that this Hon''ble Court be pleased to hold that the Concession Agreement continued to operate.

30. The learned Counsel for the Respondent also referred to the memo of the writ petition wherein in Grounds B, C, D and G, all the time the Appellant - CIL referred to Section 24.4 of the Concession Agreement and claimed right on the basis of the same.

31. Even recently, the CIL by its letter dated 20.12.2007 reported the GIL in relation to the notice of termination of the Master Lease Agreement and informed that it is in the best interest of Infocity project that it is open for any further discussion which may lead to amicable and mutually acceptable solution to any of the issues that GIL deems fit. By recent letter dated 26.3.2008, CIL informed GIL that CIL has opted for amicably and mutually settling the matter under the provisions of Section 24 of the Concession Agreement, the relevant portion of which reads as follows:

... Otherwise we can consider resolving under the shelter provided u/s 24 of the Concession Agreement. This can lead to amicable settlement agreeable and binding to both of us. Section 24 provides wide scope for all such matter where either of the party has some dispute, misunderstanding or the case of interpretation. Having achieved the goal of the "Infocity Project" visualized by GOG let us now resolved all such problems through various possibilities and joining hands as real co-partners....

From the other letters issued recently including the letter dated 4.8.2008 wherein they relied on Clause 24.2. of the Concession Agreement, which related to amicable settlement, the relevant portion of which reads as follows:

... Due to what is stated above, there are disputes, controversy, claims and counter claims between the parties making it necessary to invoke the provisions

of Clause 24.2 (Amicable Settlement) of the Concession Agreement.

Regarding your contention that Clause 24.2 does not provide about appointment of third person who has no connection whatsoever with the respective party, as a member of consultation Panel, we submit that CIL has proposed Third Party for the simple reason that the outsider may have a fresh and independent vision to the issues, suggestion given and the solutions.

Thus, it will be evident that execution of the Master Lease Agreement has not resulted in termination of the Concession Agreement. Once an arbitration clause exists in the agreement reached between the parties, the provisions of the Arbitration and Conciliation Act, 1996 will be attracted and Section 8 of the said Act leads the only conclusion that Civil Court can refer the parties to arbitration.

32. We find no illegality in the order as passed by the Civil Judge (Senior Division), Gandhinagar in Exh. 17 in Regular Civil Suit No. 427 of 2008, as preferred by the Appellant and if the said order has been affirmed by the learned Single Judge by the impugned judgment dated 28.1.2009 in Special Civil Application No. 126 of 2009, no interference is called for. In absence of any merit, the appeal and the Civil Application both are dismissed, but there shall be no order as to costs.