

(2012) 12 DEL CK 0366
In the Delhi High Court
Case No : FAO (OS) 299 of 2012

General Electric Canada

APPELLANT

Vs

National Hydroelectric Power Corporation Ltd. and Another

RESPONDENT

Date of Decision : 06-12-2012

Acts Referred:

Arbitration Act, 1940 — Section 30, 33
Civil Procedure Code, 1908 (CPC) — Order 22 Rule 10, Order 22 Rule 11, Order 22 Rule 3
Limitation Act, 1963 — Section 5

Citation : (2013) 133 DRJ 551

Hon'ble Judges : Vipin Sanghi, J; Sanjay Kishan Kaul, J

Bench : Division Bench

Advocate : Sanjay Jain, Along with Mr. Trideep Pais, Mr. Ashwath Sitaraman and Ms. Prabhsahay Kaur, for the Appellant; Sachin Dutta, CGSC for the Respondent No. 1/NHPC, Mr. Rajat Navet and Ms. Prachi V. Sharma, Advocates for the Respondent No. 2/Alstom, for the Respondent

Final Decision : Allowed

Judgement

Sanjay Kishan Kaul, J.—Admit. Learned counsel for the respondents accept notice.

2. Heard learned counsel for the parties.

3. A contract was entered into on 03.02.1984 between respondent No. 1-National Hydroelectric Power Corporation Limited (hereinafter referred to as NHPC), a Government of India undertaking and three Canadian entities with respect to Chamara Hydel Project in Himachal Pradesh. One of the entities was Canadian General Electric Company Limited (CGECL). The CGECL on 01.07.1987 changed its name to General Electric Canada Inc. (GEC Inc.) The contract inter se the parties gave rise to disputes, which were referred to arbitration on 18.02.1994 and a resultant award was made on 07.05.1996. This award was ultimately filed in Court and registered as CS(OS) No. 1480/2003. We are not

getting into the history of the various proceedings, which accounted for the delay of the intermittent period, as it is not necessary for our adjudication purpose. Suffice it to say that respondent No. 1 filed objections under Sections 30 & 33 of the Arbitration Act, 1940 (hereinafter referred to as the said Act), which were dismissed and the award was made rule of the Court on 18.05.2010 with some minor modifications, including reduction of the rate of interest from 10% to 6% simple interest.

4. NHPC being aggrieved with this judgment preferred an appeal, which was registered as FAO(OS) No. 554/2010. The decretal amount was directed to be deposited in Court in the appeal filed by the NHPC, which was so deposited. It is at that stage that two applications came to be filed both under Order XXII Rules 10 & 11 of the CPC (hereinafter referred to as the said Code)-one by General Electric Canada (appellant before us), and the other by Alstom Power & Transport Canada Inc. (respondent No. 2 herein) in FAO(OS) No. 554/2010. It was during the pendency of those applications that on 25.08.2011, the two entities sought an adjournment as they had been advised to approach the learned Single Judge by filing applications under Order XXII Rule 10 of the said Code. Thereafter the said two applications were, accordingly, filed in the original suit proceedings and on 19.12.2011, the Division Bench observed in the appeal proceedings of NHPC [FAO(OS) No. 554/2010] that it would like to await the outcome of those applications filed before the learned Single Judge. The said two applications, being I.A. No. 20003/2011 filed by respondent No. 2 herein, and I.A. No. 20004/2011 filed by the appellant herein have been dismissed by the impugned order dated 30.04.2012. No appeal has been filed by respondent No. 2, but the appellant has assailed the said order in the present appeal.

5. A perusal of the impugned judgment shows that after noticing the history of the case, the learned Single Judge took note of the certificates of amendment, as also dealt with the issue qua respondent No. 2 and, thereafter, qua the plea of the appellant. NHPC objected to the application of the appellant herein on the ground that despite a number of takeovers and amalgamations during the arbitration proceedings and during the suit, no application had been brought on record to bring forth these developments.

6. The learned Single Judge thereafter drew the distinction between the provisions of Order XXII Rule 10 of the said Code as compared to Order XXII Rule 3 of the said Code and observed in paragraph 34 of the impugned order that GEC Inc. "died" legally-when by means of the PCA its assets were taken over by General Electric Canada, the appellant herein. Thus, order XXII Rule 3 came into play and an application had to be filed within the stipulated period of ninety days to bring on record the assign-the failure to do so resulting in abatement of proceedings. No application had been filed for setting aside of the abatement within the time prescribed or, thereafter, an application u/s 5 of the Limitation Act.

7. The learned Single Judge, referring to the various amalgamations, which had

taken place, relied upon the various judicial pronouncements of the Supreme Court and of the learned Single Judge of this Court in CS(OS) No. 675/1999 titled M/s Bank Kreiss AG Vs. Mr. Ashok K. Chauhan & Ors, decided on 23.10.2007, to conclude that where there is an amalgamation of a transferor company into a transferee company, the transferor company ceases to exist as a consequence of the amalgamation and, thus, the provisions of Order XXII Rule 3 of the Code would apply. No such application having been filed by the appellant, the application of the appellant under Order XXII Rule 10 of the said Code was dismissed.

8. The submission of learned senior counsel for the appellant is in very limited compass. The appellant refers to a Partnership Contribution Agreement (PCA) dated 28.03.2004 between the appellant and GEC Inc. to advance the plea that the appellant is the assign of GEC Inc. in respect of the rights arising from the Award in question. The submission of the appellant is based on the reading of the PCA as, according to his submission, this document has not been correctly construed by the learned Single Judge. He submits that GEC Inc. did not cease to exist upon execution of the PCA. He concedes that if the appellant entity would have ceased to exist, the consequence would have been as has been set out by the learned Single Judge. However, that was not so.

9. The learned counsel for respondent No. 1 has also drawn our attention to the said PCA. In order to appreciate the effect of this PCA, it is necessary to reproduce some of the terms & conditions of this PCA. This PCA begins with a background, which is as under:

BACKGROUND :

A. The Transferor is a partner in the Partnership.

B. The Transferor carries on the Business.

C. The Transferor has agreed to contribute the Business and all of the property, assets and undertaking of the Transferor, other than the Excluded Assets, to the Partnership on a tax-deferred basis on the terms and conditions set forth in this Agreement.

(emphasis supplied)

10. Article 1 of the PCA has the heading "Definitions and principles of interpretation". Some of the definitions, which are relevant for the purpose of construing this agreement in the context of submissions of learned counsel for the parties are as under:

"Claims" includes claims, demands, complaints, actions, suits, causes of action, assessments or reassessments, charges, judgments, debts, liabilities, expenses, costs, damages or losses, contingent or otherwise, including loss of value, professional fees, including fees of legal counsel on a solicitor and his or her own client basis, and all costs incurred in investigating or pursuing any of the

foregoing or any proceeding relating to any of the foregoing.

x x x

"Excluded Assets" means the property and assets of the Transferor listed in Schedule A;

"Excluded Liabilities" means the liabilities and obligations of the Transferor listed in Schedule B;

x x x

"Transferred Assets" means the Goodwill and all of the assets, property and undertaking of the Transferor, including any securities issued by other Persons or interests in other Persons, other than the Excluded Assets;

"Transferor" means General Electric Canada Inc., a company governed by the laws of the Province of Nova Scotia, its successors (including any successor by amalgamation) and permitted assigns; and

"Unit" means a unit of interest of a partner in the Partnership."

(Emphasis supplied)

11. Article 2 has the heading "transfer of assets" and the relevant clause reads as under:

2.1 Transfer of Transferred Assets

Subject to the terms and conditions thereof, the Transferor hereby agrees to contribute the Transferred Assets to the capital of the Partnership at the Effective Time, by assigning, transferring and conveying the Transferred Assets to the Partnership.

2.2 Consideration

(a) The consideration for the transfer of the Transferred Assets to the Partnership shall be equal to the Fair Market Value of the Transferred Assets as at the Effective Time.

(b) The consideration for the Transferred Assets shall be paid and satisfied by the issuance by the Partnership of 99,997 additional Units in the Partnership to the Transferor and by the assumption by the Partnership of the Assumed Liabilities.

12. The PCA has Schedule A and Schedule B. Schedule A deals with excluded assets, while Schedule B deals with excluded liabilities. These are the assets which are excluded from transfer from GEC Inc. to the appellant. Schedule A reads as under:

"SCHEDULE A

EXCLUDED ASSETS

The following are the Excluded Assets:

- (a) any Units of the Partnership;
- (b) shares in the capital of General Electric Nova Scotia #1 Company;
- (c) any partnership interest in General Electric Canada Holdings;
- (d) shares in the capital of General Electric Nova Scotia #2 Company;
- (e) shares in the capital of GE Capital Vehicle and Equipment Leasing Inc.;
- (f) any interest in GESM Canada Japan Investments NK;
- (g) shares in the capital of GE Specialty Materials Nova Scotia Company; and
- (h) shares in the capital of GEM Polymers Ltd.

13. As far as Schedule B is concerned, suffice it to say that it specifies the excluded liabilities, which continue to vest in GEC Inc.

14. In our considered view, there is force in the contention of learned senior counsel for the appellant that this document has not been correctly construed by learned Single Judge while deciding the application filed by the appellant. The background shows that there is GEC Inc., which is the transferor and is a partner in the appellant before us, which is a partnership entity. GEC Inc. as a transferor has agreed to contribute to the business of the partnership all of the properties, assets, undertakings of the transferor "other than excluded assets", which were to vest in the partnership. Thus, General Electric Canada Inc. continued to exist holding the excluded assets, apart from consideration, which it was to receive under the PCA. The remaining assets were transferred to the partnership, i.e., the appellant before us. The definition of excluded assets specifies that the same are as per Schedule A, which has been reproduced hereinabove. Similarly, there are excluded liabilities set out in Schedule B, which continued to be the liabilities of GEC Inc. This clearly implies that, other than what was excluded in the form of assets & liabilities, the remaining assets and liabilities continue to vest with GEC Inc., while what was transferred vested in the appellant before us. As to what constitutes "transferred assets" has also been defined, but it is an extensive definition as it refers to "all of the assets, property and undertaking" and only excludes what has been categorized as "excluded assets". It is these transferred assets, which are vested in the partnership-which is the appellant before us, as per Clause 2.1.

15. In terms of Clause 2.2, a consideration is prescribed for such transferred assets, being the fair market value of the transferred assets to be paid by issuance, by the partnership, of specified additional units in the partnership to GEC Inc. As on the date of execution of the PCA, the award had already come into being against the respondent No. 1.

16. There is nothing in the PCA to even remotely suggest that GEC Inc. was being wound up or being merged into the appellant. Winding up, or merger of a

corporate body into another is governed by the law of the country where the corporate body is incorporated. It cannot be done by a mere private agreement. The learned Single Judge has proceeded to assume that GEC Inc. had "died" because it had transferred all its assets. But, even that assumption is not correct, as GEC Inc. continued to retain several of its assets, i.e., the excluded assets and was vested with further assets in the form of units in the appellant. It continued to shoulder its several liabilities, i.e., the excluded liabilities. We are, thus, unable to agree with the conclusion of the learned Single Judge that there is obliteration of GEC Inc. Actually, what has happened is that GEC Inc. continues to exist and a part of its business & assets stand transferred to the partnership, which is the appellant before us.

17. Learned counsel for the respondent No. 1 sought to rely upon the definition of "Claims" in the PCA to contend that since the award was already rendered, the amount due under the award was only a claim. In the definition of "transferred assets", "claims" and contracts had specifically not been mentioned. It is, thus, his submission that the claim under the award did not stand transferred to the partnership entity.

18. We did put learned counsel for the respondent No. 1 to notice that, were we to accept this contention of the learned counsel, it would only imply that claims under the contract/award continued to vest in GEC Inc., who was, in any case, the original entity before the learned Single Judge. This would imply that there would be no need to substitute the appellants in those proceedings as the execution proceedings/recovery could be perused by GEC Inc. itself. To that extent, the argument would be self-defeating. However, the answer of learned counsel for the respondent No. 1 was that, be that as it may, the appellant would not be entitled to be substituted in place of GEC Inc.

19. The fact, however, remains that even this plea of learned counsel for the respondent No. 1 is not acceptable to us for the reason that claims are neither specifically included under the definition of the "transferred assets" nor in the definition of "excluded assets". The definition of excluded assets is exhaustive as per the Schedule A. On the other hand, the definition of "transferred assets" defines certain items and is inclusive, and includes everything "other than the excluded assets". Thus, what does not form part of "excluded assets" is actually "transferred assets". Not only that, even if the definition is read as it is, it has used a wide expression "all of the assets", which would encompass even claims. We, thus, find no force in the contention of learned counsel for the respondent No. 1, especially as this does not impinge on the invalidity of the order, which is based on the finding that GEC Inc. ceased to exist.

20. Another plea advanced by respondent No. 1 is that the documents placed on record show that there has been prior amalgamations. These documents were filed as objections to the application filed by the appellant before the learned Single Judge. However, a reading of the documents shows that different entities have amalgamated into GEC Inc. from time to time. These facts are, thus, not

relevant for the purpose of determining the question of the continuation of the proceedings by the GEC Inc. We are unable to accept the plea of learned counsel for the respondent No. 1 that the result of those amalgamations is that when the entities amalgamated, each of them stood obliterated, including GEC Inc. even if GEC Inc. was the transferee company and even though the business continued to be carried on as GEC Inc. Since GEC Inc., in fact, was the transferee company in all such amalgamations, while the other entities merged into it, who were the transferor companies, the identity and continuity of GEC Inc. remained intact.

21. In view of our aforesaid finding, the reliance placed by respondent No. 1 on the judgment of the learned Single Judge of this Court in M/s Bank Kreiss AG (supra) is of no avail, as it deals with the obliteration of the transferor entity and, consequently, the provisions of Order XXII Rule 3 of the said Code were held to come into play, and not Order XXII Rule 10 of the said Code.

22. We may note that an ancillary plea advanced by learned counsel for the respondent No. 1 that, even during the suit proceedings an objection was raised by respondent No. 1 herein about the continuation of GEC Inc. on 25.09.2008, and despite the same no steps were taken and, in fact, a statement was made that GEC Inc. continues to exist. This, according to learned counsel for the respondent No. 1, amounts to misrepresentation before the Court. We are unable to accept this plea, as there was no misrepresentation as GEC Inc., in fact, continues to exist though it may have assigned its rights to the partnership, i.e., the appellant before us.

23. Learned senior counsel for the appellant has relied upon the observations of the Supreme Court in Amit Kumar Shaw and Another Vs. Farida Khatoon and Another, , to contend that an application under Order XXII Rule 10 is not circumscribed by the limitation prescribed for moving an application under Order XXII Rule 3 of the said Code. Such an application can even be made at an appellate stage, even though the same had not been moved during the pendency of the proceedings before the trial Court. The relevant paragraphs are as under:

11. The application under Order 22 Rule 10 can be made to the appellate court even though the devolution of interest occurred when the case was pending in the trial court....

12. Under Order 22 Rule 10, no detailed inquiry at the stage of granting leave is contemplated. The Court has only to be prima facie satisfied for exercising its discretion in granting leave for continuing the suit by or against the person on which the interest has devolved by assignment or devolution. The question about the existence and validity of the assignment or devolution can be considered at the final hearing of the proceedings. The court has only to be prima facie satisfied for exercising its discretion in granting leave for continuing the suit.

24. The aforesaid pronouncement leaves no manner of doubt that the application under Order XXII Rule 10 of the said Code can be filed even during the appeal proceedings even when the assignment has taken place during the pendency of

the matter before the trial Court and, thus, applies on all fours to the facts of the present case.

25. Learned counsel has also made a reference to the judgment in AIR 1944 137 (Nagpur) , where an application was sought to be filed by the husband under Order XXII Rule 10 of the CPC for being substituting as a respondent in the case of his wife on the basis of a gift deed. The gift deed was anterior in point of time to the filing of the appeal. In that context, it was observed that an assignee pendente lite is not bound to file an application during the pendency of the suit if his interest is protected. It is only when he finds that his interest is in jeopardy and not likely to be protected by the assignor that it is necessary to apply for leave to continue the suit by or against him. Since estranged relations had developed between the husband and the wife, such an application was held maintainable. The court also took note of Alagar Raja and Another Vs. Narayana Raja and Another, , wherein it was held that the term suit in Order XXII Rule 10 of the said Code includes appeal and second appeal following the decree and, thus, the expression "the suit may, by leave of the Court, be continued" would equally apply to such appeal proceedings. No doubt, such an application cannot be made as a matter of right but as a matter of discretion of the Court.

26. In view of the aforesaid facts & circumstances, we are of the view that we are unable to agree with the direction taken by the learned Single Judge in coming to the conclusion in the impugned order that GEC Inc. had died, as it is predicated on an incorrect finding as to the effect of the PCA. The said entity continues to exist and had only assigned the right to pursue the decree in favour of the partnership, General Electric Canada-who is the appellant before us and, thus, the appellant was well within its right to move the application under Order XXII Rule 10 of the said Code before the learned Single Judge, when it sought to withdraw the amount deposited by respondent No. 1 in the appellate Court, and in response objection was taken to such withdrawal by the respondent No. 1. The impugned order qua the appellant is, accordingly, set aside and I.A. No. 20004/2011 filed by the appellant in CS(OS) No. 1480/2003 is allowed. The appeal is, accordingly, allowed, leaving the parties to bear their own Costs.

C.M. No. 11657/2012 (for stay)

In view of the aforesaid order, the application does not survive. The same stands disposed of accordingly.