
(2015) 09 MAD CK 0061
In the Madras High Court
Case No : O.P. No. 682 of 2013

S. Vaidyanathan

APPELLANT

Vs

Elysian Life Sciences Private Limited

RESPONDENT

Date of Decision : 25-09-2015

Acts Referred:

Arbitration and Conciliation Act, 1996 — Section 11(6), 9

Citation : (2015) 09 MAD CK 0061

Hon'ble Judges : T.S. Sivagnanam, J.

Bench : Single Bench

Advocate : S. Aravind Subramanian, for the Appellant; R. Senthil Kumar, for the Respondent

Final Decision : Allowed

Judgement

T.S. Sivagnanam, J.—This petition has been filed under Section 11(6) of the Arbitration and Conciliation Act, 1996 for appointment of a sole arbitrator to decide disputes/claims between the petitioner and respondent and in accordance with 16.3 of the conciliation agreement dated 21.10.2010.

2. The petitioner is a Doctorate in Chemical Engineering from IIT Mumbai stated to have possessed thirty years of industrial experience in various Multi National Corporations and said to have held Senior Positions in various companies. The respondent company conceived upon a project to be established in the Bangalore-Mysore road which was a herbal Phyto Chemical Project and it was called Green Field Project.

3. The respondent would state that the Green Field Project never came up and therefore, there was no work done by the petitioner for the said Green Field Project. Even prior to that, the parties had entered into an Consultancy Agreement dated 21.10.2010. Under the agreement, the petitioner was appointed as a Project Consultant and has been retained as a Consultant cum Technical Advisor to perform the consulting services specifically set out in Exhibit

"A" attached to the agreement which could be amended from time to time by mutual consent and the petitioner was required to render such services during the term of the Agreement and amended and that to be limited to the area of expertise described in Exhibit "A" (the Field) of the agreement which could also be amended from time to time. Further, the petitioner as Project Consultant was required to render services at such times and places as shall be mutually agreed by the company and petitioner. He was required to attend the offices or operational sites for a minimum of 10 days and in exigencies, a maximum of 15 days per month subject to a total of 120 days per 12 months.

4. In terms of clause 5.1 of the agreement, both parties understand and agree that the Project Consultant (petitioner) may perform services for others during the term of the agreement, but he shall not engage in duplicating the same activity that has a conflict of interest with the company. The agreement was to commence from 04.10.2010 and shall continue unless and until terminated in accordance with clause 7.1 of the agreement.

5. Clause 8 of the agreement deals with the compensation payable to the petitioner. In terms of clause 8.1, consulting fee for the project was fixed at Rs. 25 lakhs plus service tax, inclusive of all benefits. That apart, there was also reimbursement expenses incurred and the consultancy charges to be paid as per the payment schedule drawn in terms of clause 8.4. In terms of clause 16.3, if any question of dispute shall at any time during the terms of the agreement or thereafter, arises between the parties in respect of the validity, interpretation, implementation or alleged material breach of any of the provisions of the agreement or the rights or obligations of the parties or any question including question as to whether termination of the agreement by either party has been legitimate, the parties shall first attempt to amicably settle the disputes between them and in the event of no amicable settlement within 30 days, then such a question be referred to arbitration in accordance with the provisions of the Arbitration and Conciliation Act, 1996 to be conducted by a sole arbitrator to be appointed jointly by the parties. In the event, parties are not able to re-appoint the sole arbitrator, an arbitrator to be appointed in terms of the provisions of Act. The place of arbitration is agreed to be at Bangalore and language of arbitration to be in English.

6. At this stage, it has to be pointed out that the respondent has not contested the issue relating to the jurisdiction of this Court to entertain this petition though the venue of the arbitration has been stated to be at Bangalore.

7. The respondent vide communication dated 03.02.2011 stated that the petitioner's service has been terminated with immediate effect as per clause 7 of the agreement dated 21.10.2010, namely, the consultancy agreement stating that petitioner was bound by the confidentiality clause as per clause 12 of the agreement and was directed to return all material data. On receipt of the same, the petitioner through his counsel had sent a notice dated 28.02.2011 setting out various factual averments and called upon the respondent to pay a sum of Rs. 10

lakhs towards balance consultation fee within 15 days from the date of receipt of a copy of the notice, failing which the petitioner would take appropriate legal proceedings. It appears that the respondent received a legal notice but did not chose to send a reply. Thereafter, the petitioner by another notice dated 19.08.2013 invoked the arbitration clause and directed the respondent to appoint an arbitrator. Though the petitioner stated that he gave the respondent only 15 days time to respond this application has been filed well after 30 days of the receipt of the notice.

8. The learned counsel for the petitioner reiterated the averments made in the petition and submitted that there was a valid and binding arbitration agreement between the parties and inspite of the respondent being put on notice by the petitioner, the respondent did not exercise the power to agree upon an arbitrator or initiate arbitration proceedings and therefore, the petitioner has approached this Court.

9. The learned counsel for the respondent elaborately referred to various e-mail correspondence between the parties and submitted that the Consultancy Agreement dated 21.10.2010 is only pertaining to the Green Field Phyto project and it has got nothing to do with the Brown Field project for which certain amount of work was extracted for which a sum of Rs. 7 lakhs have already been settled and that the Green Field Phyto project did not take off and there is no separate agreement for Brown Field Project and therefore, the Arbitration clause and the Consultancy Agreement dated 21.10.2010 for the Green Field project cannot be relied on for referring the matter to arbitration. By relying upon the averment made by the petitioner in the affidavit filed in support of O.A. No. 3071/2011 (Application under Section 9 of the Act), it is submitted that the petitioner had admitted that the consultancy agreement itself pertains to Green Field project. Thus, it is submitted that this admission coupled with the e-mail correspondence will clearly show that there was no agreement for the Brown Field project and the consultancy agreement for the Green Filed project is not applicable to the petitioner's claim and as such the question of referring the matter to arbitration does not arise. In support of his contention, the learned counsel relied on the decision of the Hon"ble Supreme Court in the case of Bharat Rasiklal Ashra Vs. Gautam Rasiklal Ashra and Another, and the decision of this Court in the case of The Board of Trustees of Chennai Port Trust Vs. Chennai Container Terminal Private Ltd., Hon"ble Mr. Justice R.C. Lahoti, Former Chief Justice of India, Presiding Arbitrator, Hon"ble Mr. Justice R. Jayasimha Babu, Former Judge, Madras High Court, (Arbitrator) and Hon"ble Mr. Justice S.A. Kader, Former Judge, Madras High Court, Arbitrator, .

10. I have elaborately heard the learned counsels for the parties and perused the materials placed on record.

11. The short issue which falls for consideration is as to whether the arbitration clause contained in the Consultancy Agreement dated 21.10.2010, in clause 16.3, is applicable to the case as projected by the petitioner and as to whether

the matter has to be referred for arbitration.

12. The respondent would contend that this consultancy agreement does not relate to the work which was done by the petitioner for the respondent. As the consultancy agreement was for a Green Field project which did not take off, but the petitioner had done some work for the Brown Field project which was a lower budget project and whatever was due under the said project has been paid. Therefore, it is stated that there is no money payable to the petitioner and the question of referring the matter to arbitration does not arise as there is no agreement or any arbitration contemplated.

13. The Consultancy Agreement dated 21.10.2010 retains the petitioner as a Project Consultant and he has to act as a Consultant cum Technical Advisor to perform the consultancy services and the project has not been specifically defined under the agreement and scope of services alone finds place in Exhibit "A" attached to the agreement. Thus, the terms of the consultancy agreement are very broadly couched and it is apparent that the respondent company retained the petitioner as a Consultant-cum-Technical Advisor and under the terms and conditions of the agreement, the petitioner was bound over to perform the work of consultant in terms of the Exhibit "A" attached to the agreement which was liable for amendment from time to time and shall continue to render services to the respondent.

14. The consultancy fee was fixed at Rs. 25 lakhs in terms of clause 8.1 of the agreement. It is not in dispute that the Consultancy Agreement dated 21.10.2010 contains an arbitration clause in terms of which the place of arbitration is at Bangalore and the arbitration to be done by the sole arbitrator by mutual consent or by a sole arbitrator appointed in accordance with the provisions of the Act. Thus, when the terms and conditions of the consultancy agreement are such widely couched, it is not tenable on the part of the respondent to contend that the petitioner was retained only for the Green Field project and this inference cannot be drawn by relying on certain e-mail details.

15. So far as the affidavit filed in support of the petition in O.S. No. 3071/2011, though the petitioner would state that he was appointed as a consultant for the proposed new Green Field project between Bangalore-Mysore road, it is an accepted fact that this project did not take off. Thus, the company utilised the services of the petitioner in respect of the Brown Field project which was also project of the respondent company. The parties did not have any separate agreement and the parties were bound by the agreement dated 21.10.2010. This is evident from the notice of termination dated 03.2.2011. While issuing such notice, the respondent has referred to the Consultancy Agreement dated 21.10.2010 and it was notified to the petitioner that pursuant to their E-mails dated 13.01.2011, 01.02.2011 and 02.02.2011, the services of the petitioner was terminated with immediate effect in terms of clause 7 of the agreement. Thus, the respondent accepted the fact that there is no other agreement except the agreement dated 21.10.2010 and the power of termination as conferred

under clause 7 of the agreement was used to terminate the contract between the petitioner and the respondent. Thus, the respondent has fully understood that the consultancy agreement with the petitioner is the Consultancy Agreement dated 21.10.2010 which admittedly, contains an arbitration clause. Hence, in my view, the dispute between the parties has to be settled by arbitration.

16. The decision relied on by the learned counsel for the respondent in the case of Bharat Rasiklal Ashra Vs. Gautam Rasiklal Ashra and Another, (cited supra) , states that an arbitrator can be appointed only if there is an arbitration agreement with regard to the contract made. On facts before this Court, it is seen that there is only one contract agreement i.e., 21.10.2010 and the parties have operated based on the said agreement and the said agreement has an arbitration clause. Therefore, on facts, the decision of the Hon''ble Supreme Court does not in any manner advance the case of the respondent. The decision in the case of The Board of Trustees of Chennai Port Trust Vs. Chennai Container Terminal Private Ltd., Hon''ble Mr. Justice R.C. Lahoti, Former Chief Justice of India, Presiding Arbitrator, Hon''ble Mr. Justice R. Jayasimha Babu, Former Judge, Madras High Court, (Arbitrator) and Hon''ble Mr. Justice S.A. Kader, Former Judge, Madras High Court, Arbitrator, in fact supports the case of the petitioner.

17. This Court while interpreting as to what is to be determined by the Court or Arbitral Tribunal, pointed out that to understand the contract with reference to its object and intent and put the parties to the actual bargain, without enabling either of them to gain any undue advantage, the whole of the contract has to be gone into. This interpretation if applied to the case on hand leads to the irresistible kua conclusion that the parties are bound by the arbitration agreement and the consultancy agreement dated 21.10.2010.

18. For the foregoing reasons, this Court is inclined to appoint Mr. Kukkaje Ramakrishna Bhat, (retired District Court Judge), No. 116/5-1, 2nd Floor, 11th Cross, below Margosa Main Road, Malleshwaram (opposite Mangalore Stores), Bangalore - 560 003, Ph: +91 9845971202, as the Sole Arbitrator to enter upon the reference and after issuing notice to the parties and upon hearing them, pass an award as expeditiously as possible. The learned Arbitrator is at liberty to fix the remuneration and other incidental expenses, which shall be borne by the parties equally.

19. The original petition is, accordingly, allowed, leaving the parties to bear their own costs.