
(2012) 03 KAR CK 0045

In the Karnataka High Court

Case No : Civ. Miscellaneous P. No. 133 of 2011 & Civil Miscellaneous Petition
No. 133 of 2011

Space Infra Build (India) Pvt. Ltd.

APPELLANT

Vs

Dell International Services India Pvt. Ltd.

RESPONDENT

Date of Decision : 22-03-2012

Acts Referred:

Citation : (2012) 03 KAR CK 0045

Hon'ble Judges : S. Abdul Nazeer, J

Bench : Single Bench

Advocate : K.G. Raghavan, for M/s. Poovayya and Co, for the Appellant; Arvind Kamath, for M/s. ALMT Legal, for the Respondent

Final Decision : Dismissed

Judgement

S. Abdul Nazeer

1. The petitioner has filed this petition u/s 11(5) of the Arbitration and Conciliation Act, 1996 (for short "the Act") for appointment of a Sole Arbitrator for adjudication of the dispute that has arisen between it and Perot Systems TSI (India) Private Limited in terms of the tender document at Annexure "A". Initially, the above petition was filed against Perot Systems TSI (India) Private Limited. The said company was merged with Dell International Services India Private Limited by an order of this Court dated 29.8.2011. Therefore, the name of Perot Systems TSI (India) Private Limited has been replaced by the name of M/s Dell International Services India Private Limited in the cause title of the petition.

2. The petitioner contends that it is engaged in the business of construction and interior decoration and is also providing software service. Perot Systems TSI (India) Private Limited (hereinafter referred to as "the respondent") was approved as a co-developer of areas measuring 7.2 acres in project site situated at CHIL SEZ Park, Saravanampatti Village, Coimbatore District vide No. F.2/110/2005-EPZ dated 12.10.2007 issued by the Department of Commerce,

Ministry of Commerce and Industries, Government of India pursuant to the Special Economic Zones Act, 2005 and the Rules and Regulations made thereunder. The respondent was allotted the project site for construction of a building for utilisation as a part of CHIL. SEZ. Park. The respondent through Jones Lang LaSalle Meghraj Private Limited invited tenders for undertaking construction of the project at the project site. The petitioner applied through the requisite forms for pre-qualification and came to be pre-qualified to the bid for the project. The bid of the petitioner came to be accepted and the said acceptance was communicated to the petitioner vide e-mail dated 4.4.2009. The petitioner commenced the project immediately thereafter.

3. It is further contended that subsequent to the acceptance of its bid and the commencement of the work, the scope of the project was changed from G+6 structure to G+3 structure. Consequently, the value of the project was changed from Rs. 34.90 crores (approximately) to Rs. 26,39,80,213.50. Thereafter the petitioner and the respondent entered into a construction agreement as per Annexure "B" dated 3.6.2009. Though the petitioner commenced the construction of the project expeditiously, it was delayed entirely due to the high handed behaviour of the respondent. Although the project was to be completed by March 31st 2010, the respondent failed to provide necessary designs. Therefore, the construction could not be completed by the said date. Since the delay was solely attributable to the respondent, by an e-mail dated 13.8.2010, the respondent agreed to extend the time limit for completion of the project till 15.9.2010 for the construction of east wing of the project. The petitioner requested time till October, 2010. Therefore, negotiations being conducted and work was being carried on in full flow. The respondent invoked and received money under the performance of bank guarantee for a sum of Rs. 2,64,18,343/-. Subsequently, discussions for amicable settlement was going on and after the parties had even exchanged drafts of proposed terms of settlement, the respondent issued the notice at Annexure "C" dated 30.9.2010 purporting to terminate the agreement. It is contended that petitioner has suffered loss to the tune of approximately Rs. 10 crores on account of the illegal termination of the construction agreement. The petitioner has filed arbitration application No. 25085/2010 before the City Civil Court at Bangalore, which came to be dismissed by order dated 27.11.2010. The appeal filed by the petitioner in MFA No. 1443/2011 challenging the aforesaid order is pending adjudication before this Court. The petitioner issued notice dated 28.6.2011 to the respondent as per Annexure "D" for referring the dispute to arbitration and has nominated a retired High Court Judge as the Sole Arbitrator. The respondent has sent an untenable reply dated 13.7.2011 to the said notice. Therefore, the petitioner has filed this petition for adjudication of the disputes in terms of Clause 51 of the tender document.

4. The respondent has filed the objections contending that the petition is not maintainable and warrants dismissal as the agreement under which the dispute has arisen does not contain an arbitration clause. The petitioner is relying on an

arbitration clause in a tender document that has been superceded by construction agreement, which does not contain an arbitration clause. The terms of tender documents have not been expressly or impliedly imported into the construction agreement. On the other hand, construction agreement expressly excludes arbitration clause from the tender document. The respondent has also denied the other allegations made against it in the petition and prays for dismissal of the petition.

5. Sri. K.G. Raghavan, learned Senior Counsel appearing for the petitioner submits that the general conditions of the contract at Annexure "A" contains an arbitration clause. He has drawn my attention to clause 51 of the general conditions, which provides for settlement of disputes through arbitration. He has also drawn my attention to the different clauses in the construction agreement at Annexure "B" dated 3.6.2009 and in particular clause (d) of the terms and conditions and submits that the tender conditions in Annexure "A" forms part of the construction agreement. If that is so, clause 51 of the tender conditions enabling the parties for settlement of the disputes through arbitration forms part of the construction agreement. He further submits that clause 51 of Annexure "A" is not inconsistent with any of the conditions of construction agreement at Annexure "B" Relying on the decision of the Apex Court in *Alimenta S.A. Vs. National Agricultural Co-operative Marketing Federation of India Ltd. and Another*, he submits that the arbitration clause in the tender agreement at Annexure "A" by reference is incorporated into the construction agreement. Clause 51 in the tender document is neither repugnant nor inconsistent with the conditions of construction agreement. It is his further submission that the intention of the parties as to whether the arbitration clause has to be incorporated in the subsequent agreement or not has to be gathered from the various clauses in the construction agreement. In this connection, he has relied on the decision of the Apex Court in *The Owners and Parties Interested in the Vessel M.V. Baltic Confidence and Another Vs. State of Trading Corporation of India Ltd. and Another*, He has also relied on the decision of the Apex Court in *National Insurance Co. Ltd. Vs. Boghara Polyfab Pvt. Ltd.*, in support of his contention that when there is a provision for arbitration, the Chief Justice/his designate exercising his jurisdiction u/s 11 has to consider as to whether there was really accord and satisfaction or discharge of the contract by performance. By the very same reasoning, this Court can also direct the Arbitrator to decide as to whether there exists an arbitration clause or not. Since the matter requires an enquiry, this Court cannot summarily decide the said question in this petition.

6. On the other hand, Sri. Aravind Kamath, learned Counsel appearing for the respondent submits that the petition is not maintainable as the agreement under which disputes have arisen between the parties does not contain an arbitration clause. The petitioner is relying on an arbitration clause contained in the tender document which has been superceded by construction agreement at Annexure "B" which does not contain an arbitration clause. The terms and conditions contained in Annexure "A" have not been imported into the construction

agreement either expressly or by necessary implication. The agreement at Annexure "B" expressly excludes the arbitration clause contained in the tender document. He submits that the intention of the parties to refer the dispute to arbitration has to be gathered from the cumulative reading of different clauses in the agreement. In the instant case, reading of different clauses in the agreement would clearly suggest that it was never the intention of the parties to refer the dispute to arbitration. On the contrary, the parties have expressly excluded the arbitration clause in the construction agreement and conferred exclusive jurisdiction on the Courts to resolve the dispute. He further submits that this Court has the power to decide the existence or otherwise of an arbitration clause in an agreement. In this connection, he has relied on the decisions of the Apex Court in *S.B.P. and Co. Vs. Patel Engineering Ltd. and Another*, *National Insurance Co. Ltd. Vs. Boghara Polyfab Pvt. Ltd.*, He has also relied on the decision of the Apex Court in *Bharat Rasiklal Ashra Vs. Gautam Rasiklal Ashra and Another*, in support of his submission that whether there is an arbitration agreement or not has to be decided only by the Chief Justice or his designate and should not be left to the decision of the arbitral Tribunal.

7. Having regard to the contentions urged, the first question for consideration is whether it is permissible for this Court to direct the Arbitrator to decide as to existence or otherwise of the arbitration clause in the agreement? It is not in dispute that petitioner had filed an arbitration application No. 25085/2010 before the 4th Additional City Civil and Sessions Judge, Mayo Hall, Bangalore, u/s 9 of the Act for restraining the respondent from appointing/engaging/entering into any contract with any third party to undertake construction of the remaining portion of the project on the project site pending execution of the arbitral award and for certain other reliefs. In the said case, the respondent has contended that the construction agreement does not contain an arbitration clause. Therefore, the application is not maintainable. The court below has dismissed the application holding that the applicant has failed to prove the subsistence of the arbitration agreement between the parties. The contention of the learned Senior Counsel for the petitioner is that in order to record a finding as to the existence or otherwise of an arbitration clause, it is necessary to hold an enquiry. Since it is a mixed question of law and fact, the same can be referred to the Arbitrator.

8. In *SBP COMPANY (supra)*, a Constitution Bench of the Hon'ble Supreme Court has held that while appointing an Arbitrator u/s 11(6) of the Act, the Chief Justice/his designate has to issue notice to the opposite party. Notice to the opposite party cannot be considered to be merely an intimation to that party of the filing of the arbitration application and the passing of an administrative order appointing an arbitrator or an arbitral tribunal. It is really the giving of an opportunity of being heard. The Chief Justice has to necessarily apply his mind as to the existence of the arbitration agreements when in fact such existence is strongly disputed by the other side, who appears on issuance of the notice. In case where controversies are raised as to whether the claim that is sought to be put forward comes within the purview of the concerned arbitration clause at all

should also be kept in mind before coming to the conclusion one way or the other or before proceedings to appoint an arbitrator or declining to appoint an arbitrator. It has been further held thus:

Therefore, a decision on jurisdiction and on the existence of the arbitration agreement and of the person making the request being a party to that agreement and the subsistence of an arbitrable dispute require to be decided and the decision on these aspects is a prelude to the Chief Justice considering whether the requirements of sub-section (4), sub-section (5) or sub-section (6) of Section 11 are satisfied when approached with the request for appointment of an arbitrator. It is difficult to understand the finality referred to in Section 11(7) as excluding the decision in his competence and the locus standi of the party who seeks to invoke his jurisdiction to appoint an arbitrator. Viewed from that angle, the decision on all these aspects rendered by the Chief Justice would attain finality and it is obvious that the decision on these aspects could be taken only after notice to the parties and after hearing them.

It has been further held thus:

Once we arrive at the conclusion that the proceeding before the Chief Justice while entertaining an application u/s 11(6) of the Act is adjudicatory, then obviously, the outcome of that jurisdiction is a judicial order. Once it is a judicial order, the same, as far as the High Court is concerned would be final and the only avenue open to a party feeling aggrieved by the order of the Chief Justice would be to approach to the Supreme Court under Article 136 of the Constitution of India.

The Apex Court has further held that the power exercised by the Chief Justice of the High Court or the Chief Justice of India u/s 11(6) of the Act is not an administrative power. It is a judicial power. The Chief Justice or the designated Judge will have the right to decide his own jurisdiction, to entertain the request, the existence of a valid arbitration agreement, the existence or otherwise of a live claim, the existence of the condition for the exercise of his power and on the qualifications of the arbitrator or arbitrators.

9. In BHARAT RASIKLAL ASHRA (supra), the Apex Court has again considered as to where the arbitration agreement between the parties is disputed by the respondent, whether the Chief Justice or his designate, in exercise of the power u/s 11 of the Act, can appoint an arbitrator without deciding the question whether there was an arbitration agreement between the parties, leaving it open to be decided by the Arbitrator? It has answered the question as under:

9. It is clear from the said two decisions that the question whether there is an arbitration agreement has to be decided only by the Chief Justice or his designate and should not be left to the decision of the arbitral tribunal. This is because the question whether there is arbitration agreement is a jurisdictional issue and unless there is a valid arbitration agreement, the application u/s 11 of the Act will not be maintainable and the Chief Justice or his designate will have

no jurisdiction to appoint an arbitration u/s 11 of the Act. This Court also made it clear that only in regard to the issues shown in the second category, the Chief Justice or his designate has the choice of either deciding them or leaving them to the decision of the arbitral tribunal. Even in regard to the issues falling under the second category, this Court made it clear that where allegations of forgery or fabrication are made in regard to the documents, it would be appropriate for the Chief Justice or his designate to decide the issue. In view of this settled position of law, the issue where there was an arbitration agreement ought to have been decided by the designate of the Chief Justice and only if the finding was in the affirmative he could have proceeded to appoint the Arbitrator.

It has been further held as under:

12. The learned Counsel for the first respondent next submitted that if the Chief Justice or his designate is required to examine the allegations of fabrication and forgery made by a party in regard to the contract containing the arbitration agreement, before appointing an arbitrator u/s 11 of the Act, the proceedings under the said Section will cease to be a summary proceedings, and become cumbersome and protracted, necessitating recording of evidence, thereby defeating the object of the Act. In our considered view, this apprehension has no relevance or merit. Existence of a valid and enforceable arbitration agreement is a condition precedent before an arbitrator can be appointed u/s 11 of the Act. When serious allegations of fraud and fabrication are made, it is not possible for the Court to proceed to appoint an arbitrator without deciding the said issue which relates to the very validity of the arbitration agreement. Therefore, the fact that the allegations of fraud, forgery and fabrication are likely to involve recording of evidence or involve some delay in disposal, are not, grounds for refusing to consider the existence of a valid arbitration agreement.

13. The apprehension that such contentions are likely to be raised frequently to protract the proceedings u/s 11 of the Act or to delay the arbitration process, thereby defeating the purpose of Section 11 of the Act is also without basis. Where agreements have been performed in part, such a contention will not be entertained. It is only in a very few cases, where an agreement which had not seen the light of the day is suddenly propounded, or where the agreement had never been acted upon or where sufficient circumstances exist to doubt the genuineness of the agreement, the Chief Justice or his designate will examine this issue. This Court has repeatedly held that on the ground of termination, performance or frustration of the contract, arbitration agreement cannot be avoided. The legislature has entrusted the power of appointment of an arbitrator to the holders of high judicial officers like the Chief Justice or Judge of the Supreme Court/High Court, with a view that they can identify and effectively deal with false or vexatious claims made only to protract the proceedings or defeat arbitration. If a party is found to have falsely contended that the contract was forged/fabricated, the Chief Justice or his designate may subject such part to heavy costs so that such false claims are discouraged. Be that as it may.

10. It is thus clear that the power exercised by the Chief Justice of the High Court or his designate u/s 11(6) of the Act is not an administrative power. It is a judicial power. The Chief Justice cannot designate a non-judicial body or authority to exercise the said power nor can he designate the District Judge to exercise the said power. Whether there is an arbitration agreement or not has to be decided only by the Chief Justice or his designate and should not be referred to the decision of the arbitral tribunal. Whether there is an arbitration agreement or not is a jurisdictional issue and unless there is a valid arbitration agreement, the application u/s 11 of the Act will not be maintainable.

11. The decision relied on by Sri. Raghavan, learned Senior Counsel in NATIONAL INSURANCE CO. LTD.'s case (supra) has no application to the facts of this case. In the said case, the Apex Court has held that where the Chief Justice or his designate is satisfied prima facie that the discharge voucher was not issued voluntarily and the claimant was under some compulsion or coercion and that the matter deserved detailed consideration, he may instead of deciding the issue himself, refer the matter to the arbitral tribunal with a specific direction that the said question should be decided in the first instance. In the instant case, the question for consideration is as to whether the Chief Justice or his designate can direct the arbitrator to decide as to whether there is an arbitration agreement between the parties or not. This question has been answered by the Apex Court in SBP COMPANY's case (supra). Therefore, question of directing the arbitrator to decide as to the existence of an arbitration agreement does not arise.

12. That brings me to the next question as to whether there is an arbitration agreement between the parties for resolution of the dispute in the instant case. The contention of the petitioner is that clause 51 of the tender document at Annexure "A" is a part of the construction agreement at Annexure "B" It is well established that the arbitration clause to an earlier contract by reference can be incorporated into the latter contract provided it is not repugnant to or inconsistent with the terms of the contract in which it is incorporated {See ALIMENTA's case (supra)}. It is also equally settled that while considering the above question, the intention of the parties while entering into the agreement should also be kept in mind {See OWNERS AND PARTIES s case (supra)}. Clause 51 of the tender document at Annexure "A" provides for settlement of disputes by arbitration. It also states that the notice inviting tender will form part of the tender document and the document executed by the successful tenderer. It is also relevant to notice some of the clauses of the construction agreement at Annexure-B dated 3.6.2009 which are as under:

WHEREAS, Perot Systems has been given development rights over the Site (as defined hereinafter), [which is part of the area notified as a special economic zone ("SEZ") vide approval notification No. F.2/110/2005-EPZ dated October 12th 2007] issued by [the Department of Commerce, Ministry of Commerce and Industry, Government of India] pursuant to the SEZ Regulations;

WHEREAS, Perot Systems had on 11th March, 2009, by way of notice inviting

tender, invited bids for the execution of the Works (as defined hereinafter) for the Project at CHIL SEZ Park, Saravanampatti village, Coimbatore District, Tamil Nadu, as morefully set out in the scope of Works;

WHEREAS, the Contractor in response to the said notice inviting tender, submitted a revised proposal to Perot Systems on 25th May, 2009;

WHEREAS, Perot Systems, being induced by the: (i) representations, warranties, covenants, undertakings and commitments made by the Contractor; and (ii) the Contractor agreeing to comply with the terms and conditions of this Agreement, had agreed to award the Works to the Contractor and has issued a letter of intent on mutually agreed basis.

WHEREAS, Perot Systems wishes the Contractor to execute the Works and the Contractor has agreed to execute the same in accordance with the terms and conditions set out in this Agreement.

NOW, THEREFORE, in consideration of the premises and the mutual covenants here contained, and other good and valuable consideration, the receipt and sufficiency which is hereby acknowledged, the Parties hereto, intending to be legally bound, hereby agree as follows:

A. Definitions:

Capitalised terms used in this Agreement, unless defined elsewhere in this Agreement, shall have the respective meanings ascribed to them in Section 1.1 of the Conditions of Contract annexed hereto.

B. Terms and Conditions

The terms and conditions mentioned in the following documents shall be deemed to form and read as an integral part of this Agreement:

- (a) Conditions of Contract;
- (b) Schedules A through Schedule L;
- (c) Change Orders; and
- (d) Any other document forming part of this Agreement or which may form part of this Agreement in the future, as mutually agreed between the Parties.

C. xxxxx xxxxx xxxxx

D. xxxxx xxxxx xxxxx

E. Entire Understanding

This Agreement contains the entire agreement between the Parties hereto with respect to the subject matter hereof, and supersedes any and all prior written and oral agreements, proposals, negotiations, and understanding pertaining to the subject matter hereof provided that any undertakings given by the

Contractor or representations or warranties made by the Contractor pursuant to the tender prior to the execution of this Agreement shall survive, to the extent not inconsistent with this Agreement.

(underlining is by me)

The above construction agreement also contains the dispute resolution clause, which is as under:

18. Dispute Resolution

18.1 Informal Dispute Resolution

18.1.1. Each Party shall designate in writing to the other Party a representative who shall be authorized to resolve any disagreement, dispute, controversy or claim arising out of, under, in connection with or relating to this Agreement or the breach, interpretation, termination or validity thereof (a "Dispute"), and, unless otherwise provided herein, to exercise the authority of the Parties to make decisions by agreement. Each Dispute shall be initially referred to such designated representatives for resolution. If the designated representatives are unable to resolve any such Dispute within fifteen (15) days of such referral, such Dispute shall be referred by such representatives to a senior officer designated by Perot Systems and the Contractor, respectively and such senior officers shall attempt to resolve such Dispute within a further period of ten (10) days.

18.1.2 The Parties agree to use their best efforts to attempt to resolve all Disputes promptly, equitably and in good faith, and further agree to provide in a timely manner each other with reasonable non-privileged records, information and data pertaining to any such Dispute.

18.1.3 When a Party has determined it has exhausted its opportunities to settle any such Dispute in accordance with Sections 18.1.1 and 18.1.2 (or if a Party fails to designate its representatives or senior officer, as required pursuant to Section 18.1.1 within five (5) days of a written request from the other Party) such disputes may be submitted by either Party to Courts of competent jurisdiction in Coimbatore.

18.2 Continuation of Performance

Pending final resolution of any Dispute, the Parties shall continue to perform their respective obligations under this Agreement.

18.3 Governing Law and exclusive jurisdiction

This agreement shall be governed by and construed in accordance with the laws of India. The Parties hereby agree to submit to the exclusive jurisdiction of the Courts in Coimbatore for settling any Disputes hereunder.

18.4 Survival

The provisions of this Article 18 shall survive termination of expiry of this

Agreement.

13. It is clear from the aforesaid agreement that it was entered into in pursuance of the tender that was floated by the respondent. The said agreement was meant to be the entire understanding between the petitioner and the respondent and it superseded any and all prior written and oral agreements, Proposals, negotiations and understandings pertaining to the project. The time was the essence of the construction agreement. The petitioner had to complete the project within 270 days of entering into the agreement. The timeline for completion of the project was decided after taking into consideration the setback, which the petitioner might have faced. The project had to be completed by the end of February, 2010. The respondent had released a mobilization advance of Rs. 2,64,18,300/- in favour of the petitioner and ensured that all the drawings for the project were released well within time. In lieu of the mobilization advance, the petitioner furnished a performance bank guarantee for a like amount. The terms of the tender document have not been expressly or implied merged into the construction agreement. On the other hand, the construction agreement expressly excludes the arbitration clause from the tender document. The construction agreement at Annexure "B" does not contain an arbitration clause. With the signing of the construction agreement at Annexure "B" all prior agreements and understandings between the petitioner and the respondent came to an end. Clauses from the previous agreements and understandings would survive only to the extent not inconsistent with the construction agreement. The dispute resolution clause in the construction agreement clearly states that parties agree to submit to the exclusive jurisdiction of the Courts in Coimbatore for settling any disputes under the agreement. The dispute resolution clause in the construction agreement is inconsistent with the arbitration clause in the tender document. Therefore, the arbitration clause in the tender document does not survive with the execution of the construction agreement. A cumulative reading of different clauses in the construction agreement would clearly establish that it was never the intention of the parties to refer the dispute under the said agreement to the arbitration. On the contrary, parties have expressly excluded the arbitration clause in the construction agreement and conferred exclusive jurisdiction on the Courts in Coimbatore to resolve the disputes. It is thus clear that there is no arbitration agreement between the parties. Unless there is a valid arbitration agreement, the application u/s 11 of the Act is not maintainable and the Chief Justice or his designate have no jurisdiction to appoint an arbitrator. Therefore, the petition is not maintainable. It is accordingly dismissed reserving liberty to the parties to avail the other remedies available to them in law for adjudication of the dispute. No costs.