2022 LiveLaw (SC) 988

IN THE SUPREME COURT OF INDIA
CIVIL APPELLATE JURISDICTION
B.R. GAVAI; J., B.V. NAGARATHNA; J.
NOVEMBER 23, 2022
CIVIL APPEAL NO. 8818 OF 2022 (Arising out of SLP (Civil) No. 11570 of 2021)
M/s. Meenakshi Solar Power Pvt. Ltd. *versus* **M/s. Abhyudaya Green Economic Zones Pvt. Ltd. and Ors.**

Arbitration and Conciliation Act, 1996; Section 11(6) - The court at the referral stage can interfere only when it is manifest that the claims are ex facie time-barred and dead, or there is no subsisting dispute. In the context of issue of limitation period, it should be referred to the Arbitral Tribunal for decision on merits. Similar would be the position in case of disputed "no--claim certificate" or defence on the plea of novation and "accord and satisfaction". *Referred to Vidya Drolia vs. Durga Trading Corporation (2021) 2 SCC 1. (Para 17- 19)*

(Arising out of impugned final judgment and order dated 12-02-2021 in ARBA No.55/2020 passed by the High Court for the State of Telangana at Hyderabad)

For Petitioner(s) Mr. Yelamanchili Shiva Santosh Kumar, Adv. Mr. S.V.S. Chowdary, Adv. Mr. Aditya Bhat, Adv. Mr. Rudrajit Ghosh, Adv. Mr. Tarun Gupta, AOR Mr. Abhishek Sharma, Adv.

For Respondent(s) Mr. D.Narendra Naik, Adv. Mr. Talha Abdul Rahman, AOR Mr. M.Shaz Khan, Adv. Mr. Harsh Vardhan Kediya, Adv. Mr. Bilal Anwar Khan, Adv.

J U D G M E N T

NAGARATHNA, J.

Leave granted.

2. This Civil Appeal has been filed by assailing the impugned judgment and order dated 12.02.2021 passed by the High Court of Judicature for the State of Telangana at Hyderabad in Arbitration Application No. 55 of 2020 whereby the High Court dismissed the application filed under Section 11(6) of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as 'Act of 1996', for the sake of convenience) filed by the appellant herein.

3. The appellant herein- M/s. Meenakshi Solar Power Pvt. Ltd. is engaged in the business of producing power through running and operating thermal/solar/hydro power plants. The respondent No.1 – M/s. Abhyudaya Green Economic Zones Pvt. Ltd. is the owner of 4.128 MW Solar PV Power Project located in 20 acres at Kummera Village, Chevella Mandal, Ranga Reddy District, Telangana. Respondent Nos. 2 and 3 are promoters and 100% shareholders of respondent No.1 Company. Respondent No. 4- M/s. Meenakshi Power Pvt. Ltd. is an affiliate of the appellant herein and is a proforma respondent in the present case while the other three respondents are the contesting respondents.

4. Succinctly stated, the facts of the case are that the power project of respondent No.1 herein is generating power and has a twenty-year Power Purchase Agreement with Telangana State Southern Power Distribution Company Limited. The power project was partly financed by Corporation Bank, Film Nagar Branch, Hyderabad in the form of a Term Loan vide Account No. 560821000017646 and partly financed by M/s. IFCI Venture Capital Funds Limited (hereinafter referred to as 'IFCI Venture Capital') in the form of 14,68,000 Optionally Convertible Debentures of Rs.100/each at par aggregating to Rs.14,68,00,000/- (Rupees Fourteen Crore Sixty-Eight Lakhs Only) under a Venture Capital Fund for Schedule Castes. Since it was difficult for respondent No.1 to service the

debt availed from the financial institutions, respondent Nos. 2 and 3 its promoters, decided to sell the said power project. The appellant herein showed interest in buying the said power project and therefore entered into a Share Purchase Agreement dated 24.09.2018 with respondent Nos.1 to 3 wherein respondent Nos. 2 and 3 agreed to sell 100% ownership of respondent No.1 Company comprising all of its assets including land, buildings, plant, equipment along with continuity of the Power Purchase Agreement signed with Telangana State Southern Power Distribution Company Limited as a going business entity, for an irrevocably frozen Purchase Price of Rs. 29 Crores (Rupees Twenty-Nine Crores). The appellant herein agreed to purchase 100% Equity Shares and 100% Preference Shares of respondent No.1 Company by way of taking over the loans of respondent No.1 Company and paying the balance amount to the sellers i.e., respondent Nos. 2 and 3 towards net equity value.

5. Subsequently, a Tripartite Agreement was entered into by the appellant herein through its affiliate i.e., respondent No.4 (party of the third part) with respondent Nos. 2 and 3 (party of the second part) and IFCI Venture Capital (party of the first part) on 03.04.2019 recording the execution of the Share Purchase Agreement dated 24.09.2018 and payment of Rs. 50 lakhs (Rupees Fifty Lakhs) to respondent Nos. 2 and 3 in terms of the said Share Purchase Agreement.

6. Thereafter, an addendum to the Share Purchase Agreement was signed on 10.04.2019 between respondent Nos.1 to 3 and respondent No.4 wherein the latter agreed to remit an amount of Rs. 1.65 Crores to respondent Nos. 1 to 3 to regularize the loan with the Corporation Bank and facilitate the transfer of the project company.

7. Disputes arose between the appellant and the respondents and the appellant herein filed an application before the Commercial Court, City Civil Court, Hyderabad vide COP No.27 of 2020 under Section 9 of the Act of 1996, seeking to restrain the respondents from alienating their shares in the Company. The Commercial Court was pleased to grant an ad-interim injunction restraining the respondents from alienating their shares vide order dated 19.06.2020.

8. The appellant herein sent a letter dated 22.06.2020 invoking the arbitration clause as a means of dispute resolution in terms of Clause 10 of the Share Purchase Agreement and called upon respondent Nos. 1 to 3 to settle the disputes through arbitration. The appellant herein appointed one Dr. P.V. Amarnadha Prasad, Engineer and Techno Legal Consultant, Hyderabad as its arbitrator and vide such letter requested respondent Nos. 1 to 3 to appoint their nominee arbitrator and to constitute an Arbitral Tribunal of three members to adjudicate upon the dispute between the parties. On receiving no response to the aforesaid notice, the aggrieved appellant herein filed an application under Section 11(6) of the Act of 1996 which came to be dismissed vide impugned judgment and order passed by the High Court.

9. Aggrieved by the dismissal of the aforesaid application, the appellant has approached this Court by way of the present appeal.

10. We have heard Ms. Meenakshi Arora, learned Senior Counsel duly instructed by her instructing counsel, appearing for the appellant herein and Sri D. Narendra Naik, learned counsel for the respondent Nos.1 to 3 and perused the material on record.

11. Learned Senior Counsel for the appellant stated that the High Court has grossly erred in dismissing the application under Section 11(6) of the Act of 1996 and that the judgment and order passed by the High Court needs consideration by this Court. The submissions of learned Senior Counsel for the appellant are summarised as under:

11.1 That the High Court erred in giving a finding of implied/deemed novation while adjudicating on an application under Section 11 of the Act of 1996 and failed to comprehend the nature of limited judicial intervention under the said provision.

11.2 That the High Court erred in venturing to examine complicated questions of facts and documents and has essentially performed the function of an Arbitral Tribunal before whom novation ought to have been pleaded and proved as a preliminary issue in case the same arose.

11.3 That the High Court has failed to examine the ingredients for novation and has given an erroneous finding in that regard by superficially dealing with the said issue. The High Court failed to comprehend that the Tripartite Agreement was entered into with the sole purpose and intent to act as a recovery mechanism for IFCI Venture Capital and cannot by any stretch of imagination be called as an act to substitute and novate the Share Purchase Agreement dated 24.09.2018.

11.4 That the High Court failed to consider that the Tripartite Agreement and the Addendum to the Share Purchase Agreement was for a limited purpose of satisfying IFCI Venture Capital as regards the dues payable and the same cannot be said to have substituted the Share Purchase Agreement. Both the Tripartite Agreement and the Addendum make no mention to novate or substitute the Share Purchase Agreement dated 24.09.2018. There are clauses being substituted or subsequent modification of clauses between the Share Purchase Agreement when viewed alongside with the Tripartite Agreement.

11.5 It is reiterated that the Tripartite Agreement with the IFCI Venture Capital was meant only to protect the interests of the financier so that it does not act coercively against respondent No.1. The Tripartite Agreement had no clauses in it to deal with the inter-se rights and obligations of appellant herein and its affiliate respondent No.4 and respondent Nos. 1 to 3 and was therefore incapable of substituting the Share Purchase Agreement dated 24.09.2018.

11.6 That the High Court erred in not attempting to appreciate the composite intention of both the parties, the nature and purpose of the commercial transaction, the documents and material on record, the conduct and correspondence of the parties.

12. *Per contra*, learned counsel appearing for respondent Nos.1 to 3 supported the judgment and order passed by the High Court and contended that no interference of this Court is required. The submissions of the learned counsel for the respondent No.1 to 3 are epitomized as under:

12.1 That the appellant herein failed miserably in making complete payment of the purchase of shares from respondent Nos. 2 and 3 and in fulfilling its obligation before the expiry of the Share Purchase Agreement i.e., as on 10.11.2018, when the Share Purchase Agreement lapsed and stood terminated by operation of Clause 8 of the Share Purchase Agreement.

12.2 That a fresh Tripartite Agreement was entered into, after four months from the date when the Share Purchase Agreement stood terminated, with an intention to help the appellant to recover an amount of Rs.50 lakhs paid by it to the respondents. Pursuant to the Tripartite Agreement, an Addendum was entered into between the parties wherein it was agreed that the consideration for sale of the power project shall be remitted within timelines stipulated under the terms and conditions of the Tripartite Agreement. The Addendum makes no mention of the compliance with any term of the Share Purchase

Agreement dated 24.09.2018 and rightly so since the Tripartite Agreement executed on 03.04.2019 had novated the same.

12.3 That the Share Purchase Agreement and the Tripartite Agreement are two distinct and independent agreements executed between completely different parties with different terms and conditions, however the subject matter i.e., the sale consideration and the number of shares being transferred are the same in both the agreements. The Tripartite Agreement has superseded the Share Purchase Agreement. The substantial shift from terms, conditions and timelines in the Share Purchase Agreement show that the parties departed from the same to the Tripartite Agreement and the Share Purchase Agreement stood novated.

12.4 That the High Court has acted completely within its jurisdiction under Section 11 of the Act of 1996 and has not stepped into the role of an Arbitral Tribunal. Reference to ***Vidya Drolia vs. Durga Trading Corporation (2021) 2 SCC 1*** was made in this regard. The respondents further relied on ***Indian Oil Corporation Ltd. vs. NCC Ltd. 2022 SCC OnLine SC 896*** to hold that there is no bar under the Act of 1996 for a Court to look beyond the bare existence of the arbitration clause to cut the deadwood. The High Court in the present case was well within its jurisdiction in examining the existence of the Arbitration agreement and by arriving at a conclusion that the Share Purchase Agreement was novated and superseded by the Tripartite Agreement.

12.5 That the arbitration clause being a part/component of Share Purchase Agreement falls within it and perishes along with it and the Tripartite Agreement provides for no provision for arbitration. The High Court was right in holding that owing to novation, the invocation of arbitration under Share Purchase Agreement was untenable. This Court has clearly set out the principle that an agreement will be novated with the introduction of new parties by mutual agreement. The respondents relied on the case of ***Union of India vs. Kishorilal Gupta and Bros. (1960) 1 SCR 493***, ***Young Achievers vs. IMS Learning Resources Pvt. Ltd. (2013) 10 SCC 535 and M.B.S Impex Pvt. Ltd. vs. Minerals and Metals Trading Corporation (2020) 5 ALD 185***.

12.6 That the High Court has rightly comprehended the intention behind the two agreements and the contention of the appellant that the Tripartite Agreement was a recovery mechanism is untrue and thus unsustainable. Moreover, the Tripartite Agreement governing the transaction makes no mention of the lapsed Share Purchase Agreement intentionally. The appellant was replaced by respondent No.4 in the Tripartite Agreement and IFCI Capital Venture was added as a party and was also given a right to invoke the agreement. Thus, the Tripartite Agreement is a completely different and new agreement between different parties containing different terms and conditions and does not have an arbitration clause.

13. Having heard the learned counsel appearing for the respective parties, the following points would arise for our consideration:

(a) Whether the judgment and order of the High Court calls for any interference or modification by this Court?

(b) What order?

14. The plea taken by the respondent herein is that owing to novation of share purchase agreement, the arbitration clause no longer existed so as to resolve the dispute between the parties through arbitration. On the other hand, the plea of the appellant is that there was no such novation of the share purchase agreement and the arbitration clause was

very much available and hence, the High Court ought to have referred the matter to arbitration. In this regard, it would be useful to refer to the following dicta of this Court:

a) In ***National Insurance Co. Ltd. vs. Boghara Polyfab Pvt. Ltd. (2009) 1 SCC 267***, a Bench of this Court elucidating on ***SBP & Co. vs. Patel Engineering Ltd. (2005) 8 SCC 618*** has identified and segregated the issues that could be considered in an application filed under Section 11(6) of the Act of 1996 into three categories. They are enumerated as under:

(i) issues which the Chief Justice or his designate is bound to decide;

(ii) issues which he can *also* decide, that is, issues which he may choose to decide or leave it to the Arbitral Tribunal to decide; and

(iii) issues which would be left to the Arbitral Tribunal todecide, and thereafter had enumerated them as under:

"*22.1*. The issues (first category) which the Chief Justice/his designate will have to decide are:

(a) Whether the party making the application has approached the appropriate High Court.

(b) Whether there is an arbitration agreement and whether the party who has applied under Section 11 of the Act, is a party to such an agreement.

22.2. The issues (second category) which the Chief Justice/his designate may choose to decide (or leave them to the decision of the Arbitral Tribunal) are:

(a) Whether the claim is a dead (long-barred) claim or a live claim.

(b) Whether the parties have concludedthe contract/transaction by recording satisfaction of their mutual rights and obligation or by receiving the final payment without objection.

22.3. The issues (third category) which the Chief Justice/his designate should leave exclusively to the Arbitral Tribunal are:

(i) Whether a claim made falls within the arbitration clause (as for example, a matter which is reserved for final decision of a departmental authority and excepted or excluded from arbitration).

(ii) Merits or any claim involved in the arbitration."

15. As far as the issues in the first category are concerned, the Chief Justice or his designate is bound to decide. With regard to the issues falling under the second category, when they are raised in an application under Section 11 of the Arbitration Act, the Chief Justice or his designate may decide them or may leave it open with a direction to the Arbitral Tribunal to decide the same. But if the Chief Justice or his designate chooses to examine the issue and decides it, the Arbitral Tribunal cannot re-examine the same issue. As far as the issues which arise in the third category are concerned, they have to be dealt with exclusively by the Arbitral Tribunal such as excepted or excluded matters. It would also include merits of any claim involved in arbitration.

16. In ***Vidya Drolia (supra),*** it has been further observed in relation to the aforesaid three categories in ***Boghara Polyfab Pvt. Ltd. (supra).*** The first category of issues, namely, whether the party has approached the appropriate High Court, whether there is an arbitration agreement and whether the party who has applied for reference is party to such agreement would be subject to a more thorough examination in comparison to the

second and third categories/issues which are presumptively, save in exceptional cases, for the arbitrator to decide. In the first category, the question or issues are relating to whether the cause of action relates to action *in personam* or *rem*; whether the subject-matter of the dispute affects third-party rights, have *erga omnes* effect, requires centralised adjudication; whether the subject-matter relates to inalienable sovereign and public interest functions or by necessary implication non-arbitrable as per mandatory statutes. On the other hand, issues relating to contract formation, existence, validity and non-arbitrability would be connected and intertwined with the issues underlying the merits of the respective disputes/claims. They would be factual and disputed and for the Arbitral Tribunal to decide.

17. Further, this Court observed that the court at the referral stage can interfere only when it is manifest that the claims are ex facie time-barred and dead, or there is no subsisting dispute. In the context of issue of limitation period, it should be referred to the Arbitral Tribunal for decision on merits. Similar would be the position in case of disputed "no-claim certificate" or defence on the plea of novation and "accord and satisfaction".

18. It would be also useful to refer to another decision of this Court in ***Damodar Valley Corporation vs. K.K. Kar (1974) 1 SCC 141*** wherein it has been observed as under:

(1) an arbitration clause is a collateral term of a contract as distinguished from its substantive terms; but nonetheless it is an integral part of it;

(2) however comprehensive the terms of an arbitration clause may be, the existence of the contract is a necessary condition for its operation; it perishes with the contract;

(3) the contract may be *non est* in the sense that it never came legally into existence or it was *void ab initio*;

(4) though the contract was validly executed, the parties may put an end to it as if it had never existed and substitute a new contract for it solely governing their rights and liabilities thereunder;

(5) in the former case, if the original contract has no legal existence, the arbitration clause also cannot operate, for along with the original contract, it is also void; in the latter case, as the original contract is extinguished by the substituted one, the arbitration clause of the original contract perishes with it; and

(6) between the two falls many categories "of disputes in connection with a contract, such as the question of repudiation, frustration, breach, etc. In those cases, it is the performance of the contract that has come to an end, but the contract is still in existence for certain purposes in respect of disputes arising under it or in connection with it. As the contract subsists for certain purposes, the arbitration clause operates in respect of these purposes.

Even if the performance of the contract has come to an end, the contract can still be in existence for certain purposes in respect of disputes arising under it or in connection with it.

19. In view of the aforesaid discussion, we find that High Court was not right in dismissing the petition under Section 11(6) of the Act of 1996 filed by the appellant herein by giving a finding on novation of the Share Purchase Agreement between the parties as the said aspect would have a bearing on the merits of the controversy between the parties. Therefore, it must be left to the Arbitrator to decide on the said issue also. Hence, the impugned judgment and order passed by the High Court has to be set-aside.

20. In the result, the appeal filed by the appellant is allowed and the impugned judgment and order passed by the High Court is hereby quashed and set aside.

21. As requested before this Court for appointment of a sole Arbitrator, Hon. Sri Justice R. Subhash Reddy, Former Judge, Supreme Court of India, [email id – rsubhashreddy5157@gmail.com] is appointed as the sole Arbitrator to arbitrate the dispute between the parties. The Registry is directed to send a copy of this order to the learned sole Arbitrator.

22. All contentions of both sides are left open to be raised by the respective parties before the Arbitral Tribunal in accordance with law.

23. Pending application(s), if any, shall stand disposed of in the above terms.

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