

THE HONOURABLE THE CHIEF JUSTICE ALOK ARADHE
AND
THE HONOURABLE SRI JUSTICE J. SREENIVAS RAO

+ COMMERCIAL COURT APPEAL No.20 OF 2024

% Dated 22.11.2024

PSM Energy Pvt. Ltd.

A Company incorporated under Companies Act.

Having registered office at:-

220, MIG Flats, Kautilya Apartments

Plot No.25, Sector -14, Pocket-B

Dwarka, New Delhi 110075

Through its director/Authorized Representative

Shri Ajay Vishwakarma

.... Appellant

VERSUS

\$ ZAM Engineering and Logistics Pvt. Ltd.

A Company incorporated under Companies Act.

Having its registered office at 25-12-44 & 45,

Asmagate, Godeyvari Street,

Vishakhapatnam, Andhra Pradesh

Rep. by its Managing Director, Mr. Zafar Hosain

And four others

... Respondents

! Counsel for petitioner

: Mr. Prasen Gundavaram

^ Counsel for Respondent No.1

: Ms. Manjari S. Ganu,

< GIST:

> HEAD NOTE:

? CITATIONS:

1. 2018) 15 SCC 678
2. (2021) 9 SCC 732
3. (1998) 7 SCC 184
4. (2006) 3 SCC 100
5. 2016 (6) ALD 598 (DB)

THE HON'BLE THE CHIEF JUSTICE ALOK ARADHE
AND
THE HON'BLE SRI JUSTICE J.SREENIVAS RAO
COMMERCIAL COURT APPEAL No.20 OF 2024

JUDGMENT: *(Per the Hon'ble Sri Justice J. Sreenivas Rao)*

This appeal under Section 13 of the Commercial Courts Act, 2015 read with Section 37 of the Arbitration and Conciliation Act, 1996 has been filed against the order dated 10.06.2024 passed in C.O.S.No.31 of 2021 by the Commercial Court in the Cadre of District Judge for Trial and Disposal of Commercial Disputes at Hyderabad, (for short, 'Commercial Court') by which the application filed by appellant/defendant No.1 seeking rejection of the plaint under Section 8 of the Arbitration and Conciliation Act, 1996 read with Order VII Rule 11(a) & (b) read with Section 151 of Code of Civil Procedure, 1908 (C.P.C.) was dismissed.

2. Heard Sri G. Vidya Sagar, learned Senior Counsel representing Sri Sai Prasen Gundavaram, learned counsel for the appellant, and Sri Sunil B. Ganu, learned Senior Counsel

representing Ms. Manjari S. Ganu, learned counsel for respondent No.1.

3. The appellant herein is defendant No.1 and respondent No.1 herein is the plaintiff in C.O.S.No.31 of 2021. For the sake of convenience, the parties shall be referred to in this order as per their ranking in C.O.S.No.31 of 2021.

4. BRIEF FACTS:

i) The plaintiff is a company registered under the Companies Act, 1956 and it had entered into an operational lease agreement dated 16.10.2019 with defendant No.1 company in respect of 30 nos. of Volvo FMX 460 33 Cu.M Coad Body Tippers and the said operational lease agreement was executed at Gurugram, Haryana. The defendant No.1 defaulted in payment of monthly lease rental of the Volvo Tippers from the 1st month itself and failed to pay the rents from November, 2019 to August, 2020. Subsequent thereto, the plaintiff and defendant No.1 have entered into Memorandum of Understanding (MOU) in furtherance of the operational lease agreement on 05.01.2020, whereby the original operational lease agreement was modified/revised.

As per MOU, defendant No.1 was agreed to pay the rents from 20.01.2020 along with interest @ 13% p.a. as against the rate of 18% p.a. as per the operational lease agreement dated 16.10.2019. Despite repeated demands, defendant No.1 did not perform any part of the obligations. Thereafter, defendant Nos.1 to 3 approached the plaintiff in the month of February 2020 stating that defendant No.1 was independently awarded works of contract in Odisha and proposed joint venture with the plaintiff and offered to share 50% of the profits in the revenue accrued and also to refund the working capital to the plaintiff and accordingly, the plaintiff and defendant No.1 entered into joint venture agreement dated 21.02.2020. According to the said joint venture agreement, the plaintiff is allowed to withdraw an amount of Rs.3 lakhs every month from the month of January 2020. However, defendant No.1 did not perform any part of the obligations as agreed and the joint venture agreement dated 21.02.2020 was never acted upon. As defendant No.1 failed to pay the rents from November, 2019 to August, 2020, the plaintiff filed C.O.S.No.31 of 2021 seeking a direction to the defendants to jointly and severally pay an amount of Rs.10,93,05,243/- in

respect of the Lease Agreement dated 16.10.2019 along with future interest @ 13% per annum from the date of suit till realisation and sought another relief directing defendant No.1 to pay an amount of Rs.33,41,069/- being amounts refundable by them towards initial capital investment and other expenses in respect of the joint venture agreement dated 21.02.2020 along with future interest @ 13% per annum from the date of suit till realisation.

ii) In the said suit, defendant No.1 filed an application in I.A.No.73 of 2022 under Section 8 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as 'the Act') read with Order VII Rule 11(a) and (b) of C.P.C. to reject the plaint on the ground that as per the arbitration clause in the joint venture agreement dated 21.02.2020, the Commercial Court is not having jurisdiction to adjudicate the dispute as well as bar under Section 8 of the Act as there is valid arbitration clause in the agreement existing between the parties and also on the ground of cause of action.

iii) The Commercial Court dismissed the said application, by its order dated 10.06.2024. Aggrieved by the same, defendant No.1 filed this appeal.

5. Submissions of learned counsel for defendant No.1/appellant:

5.1. Learned Senior Counsel contended that the plaintiff and defendant No.1 were entered operational lease agreement dated 16.10.2019 and MOU dated 05.01.2020 as well as joint venture agreement dated 21.02.2020. In the joint venture agreement, there is a specific clause enumerated that if any dispute arises between the parties, the said dispute has to be resolved through arbitrator. The plaintiff instead of invoking arbitration clause filed suit in C.O.S.No.31 of 2021 before the Commercial Court and the same is not maintainable under law and also there is no cause of action to institute the suit. In such circumstances, the Commercial Court ought to have rejected the plaint.

5.2. He further submitted that as per the provisions of Section 8 of the Act, the Commercial Court ought to have

rejected the plaint and directed the plaintiff to invoke the proceedings under the Act by virtue of specific arbitration clause enumerated in the joint venture agreement dated 21.02.2020 and the Commercial Court is not having jurisdiction to adjudicate the suit proceedings.

5.3. In support of his contention, he relied upon the following judgments:

1. **Ameet Lalchand Shah and others v. Rishabh Enterprises and another¹;**
2. **Sanjiv Prakash v. Seema Kukreja and others²; and**
3. **Order passed by the Division Bench of this Court in C.R.P.No.348 of 2024 dated 22.07.2024.**

6. Submissions of learned counsel for the plaintiff/respondent No.1:

6.1. *Per contra*, learned counsel for the plaintiff submitted that the operational lease agreement dated 16.10.2019 and the joint venture agreement dated 21.02.2020 are not interconnected and both are different agreements. He further

¹ (2018) 15 SCC 678

² (2021) 9 SCC 732

submitted that the operational lease agreement dated 16.10.2019 was executed between the plaintiff and defendant No.1, whereunder the plaintiff leased out 30 Volvo Tippers to defendant No.1 for a period of 34 months and MOU dated 05.01.2020 was executed between the parties modifying the terms of operational lease agreement dated 16.10.2019, whereunder defendant No.1 agreed to pay the rents from 20.01.2020. Insofar as joint venture agreement dated 21.02.2020 is concerned, it is an independent agreement in respect of works which were already awarded to defendant No.1 at Lakhanpur, Odisha at the Mines of Mahanadi Coal Fields.

6.2. He also submitted that operational agreement and the MOU do not contain arbitration clause and only joint venture agreement contains an arbitration clause. Pursuant to the said clause, defendant No.1 filed Arbitration Application No.419 of 2022 before the High Court of Delhi seeking appointment of Sole Arbitrator to resolve the dispute between the parties and the said arbitration application was allowed, by its order dated 12.08.2024 referring the dispute under

joint venture agreement dated 21.02.2020 and referred to arbitration. Aggrieved by the same, defendant No.1 filed S.L.P. (Civil) Diary No.39966 of 2024 before the Hon'ble Supreme Court of India and the same was dismissed as withdrawn on 18.11.2024.

6.3. He further contended that before the Hon'ble Supreme Court, defendant No.1 specifically raised a ground that even before execution of joint venture agreement dated 21.02.2020, the plaintiff and defendant No.1 were carrying out the joint business by utilisation and operationalisation of the equipment/vehicles/ tippers which are the subject matter of the operational lease agreement. Defendant No.1 further raised a ground that the High Court of Delhi had erroneously held that there is no connection between the subject matter of the operational lease agreement read with MOU and the joint venture agreement as recorded in its previous order dated 21.03.2023 is contrary to law and the said grounds were not accepted by the Hon'ble Supreme Court of India and S.L.P. was dismissed and defendant No.1 is not entitled to raise the very same ground in the present appeal.

6.4. He further submitted that by virtue of the orders dated 12.08.2024 passed by the High Court of Delhi in Arbitration Application No.419 of 2022, the plaintiff is not pressing the relief of recovery of an amount of Rs.33,41,069/- in C.O.S.No.31 of 2021. He also submitted that the Commercial Court has rightly dismissed the application filed by defendant No.1.

Analysis:

7. This Court considered the rival submissions made by the respective parties and perused the material available on record. The record discloses that the plaintiff filed suit in C.O.S.No.31 of 2021 in the month of April, 2021 against the defendants for recovery of an amount of Rs.10,93,05,243/- along with interest @ 13 % per annum basing on the operational lease agreement dated 16.10.2019 and MOU dated 05.01.2020 and also for recovery of Rs.33,41,069/- along with interest @ 13% per annum, which was paid to defendant No.1 pursuant to the joint venture agreement dated 21.02.2020. The plaintiff specifically pleaded in the plaint that the plaintiff is having 30 Volvo Tippers and the

representative of defendant No.1 had approached the plaintiff and agreed to purchase the said Volvo Tippers and the plaintiff and defendant Nos.2, 3 and 5 met at Park Hyatt Hotel at Hyderabad on 04.10.2019 and negotiations were taken place and the plaintiff offered to sell the Volvo Tippers for Rs.65 lakhs per Tipper excluding Goods and Services Tax (for short, 'GST') and defendant No.2 approached the finance company for funding and the finance company did not come forward to finance and defendant No.2 suggested to enter into operational lease agreement and the same was entered into on 16.10.2019 between the plaintiff and defendant No.1 and the plaintiff agreed to lease 30 nos. Volvo Tippers for a lease period of 34 months and defendant No.1 agreed to pay the monthly lease/rent of Rs.77,58,621/- excluding GST as per the schedule annexed to the operational lease agreement dated 16.10.2019 and the physical possession of the Volvo Tippers were handed over to defendant No.1 on 17.10.2019 and defendant No.1 defaulted in payment of monthly lease rental and requested the plaintiff to defer the commencement of payment by two months i.e., with effect from 05.01.2010 and subsequently MOU was entered on 05.10.2020 and

defendant No.1 agreed to pay the rents from 20.01.2020 and in spite of the same, defendant No.1 failed to pay the lease rentals as assured.

8. The plaintiff further averred that defendant Nos.1 to 3 have approached the plaintiff in the month of February, 2020 stating that defendant No.1 was awarded works contracts in Odisha and defendant No.1 proposed for joint venture agreement with the plaintiff and offered to share 50% of the profits and allowed the plaintiff to withdraw Rs.3,00,000/- every month from January, 2020 and accordingly the parties entered into joint venture agreement on 21.02.2020 and further pleaded that plaintiff paid an amount of Rs.25,00,000/- to defendant No.1 towards contribution of the working capital and other amounts. However, defendant No.1 failed to take steps for complying with the obligation under the joint venture agreement dated 21.02.2020 and also payment of monthly lease rentals from January, 2020 onwards and the plaintiff has withdrawn from the proposed joint venture. Thereafter, several communications were

addressed to defendant No.1 and it is also pleaded that the joint venture agreement was never acted upon.

9. During pendency of the suit in C.O.S.No.31 of 2021, defendant No.1 filed Arbitration Application No.419 of 2022 before the High Court of Delhi on 25.03.2022 under Section 11 of the Act to refer the dispute to the arbitrator. The said Arbitration Application was allowed on 12.08.2024 referring the dispute in respect of joint venture agreement dated 21.02.2020 to arbitrator. Aggrieved by the said order, defendant No.1 filed S.L.P. (Civil) Diary No.39966 of 2024 before the Hon'ble Supreme Court of India and the same was dismissed as withdrawn, by its order dated 08.11.2024.

10. The record further reveals that during pendency of the Arbitration Application No.419 of 2022 before High Court of Delhi, defendant No.1 filed I.A.No.73 of 2022 invoking the provisions of Section 8 of the Act read with Order VII Rule 11(a) and (b) read with Section 151 of C.P.C. on 20.07.2022 to reject the plaint in C.O.S.No.31 of 2021 on the ground of arbitration clause enumerated in joint venture agreement dated 21.02.2020, as such the Commercial Court is not

having jurisdiction to entertain the suit and also on the ground of cause of action.

11. It is relevant to extract the arbitration clause mentioned in the joint venture agreement dated 21.02.2020 here under:

“Settlement of Disputes by Arbitration:

26. In case of any disputes, question of controversy arises between the JV Partners to this Agreement and the same could not be resolved amicably, then in every case, the matter in dispute shall be resolved and finally settled in accordance with the provisions of the Arbitration & Conciliation Act 1996 as may be amended from time to time over its re-enactment. The arbitrator shall be mutually appointed by both parties. The arbitration shall be taken place at Gurgaon, Haryana, India. All questions concerning the construction, validity and interpretation of this Agreement will be governed by the laws of India, and the courts at New Delhi, India, shall have exclusive jurisdiction.”

12. Pursuant to the above said clause, defendant No.1 has filed Arbitration Application No.419 of 2022 before the High Court of Delhi and the same was allowed on 25.03.2022 referring the dispute arose out of a joint venture agreement dated 21.02.2020 to the arbitrator and also held that there is

“no connect” between the subject matter of the operational lease agreement read with MOU and joint venture agreement and the said order has become final.

13. It is pertinent to mention that the plaintiff filed suit for recovery of an amount of Rs.10,93,05,243/- against the defendants basing upon the operational lease agreement dated 16.10.2019 and MOU dated 05.01.2020 and the said documents do not contain arbitration clause and basing upon the arbitration clause enumerated in the joint venture agreement dated 21.02.2020, defendant No.1 is not entitled to seek rejection of the plaint, especially the operational lease agreement, MOU and joint venture agreement are not interconnected and they are different.

14. Insofar as the relief (b) sought by the plaintiff in C.O.S.No.31 of 2024 for recovery of an amount of Rs.33,41,069/- arising out of joint venture agreement dated 21.02.2020 is concerned, the plaintiff filed Memo dated 02.11.2024, *vide* USR.No.106135 stating that by virtue of the order of the High Court of Delhi in Arbitration Application No.419 of 2022 referring the dispute between the parties in

respect of joint venture agreement dated 21.02.2020 to the arbitrator, the plaintiff is not pressing the relief sought in the suit in C.O.S.No.31 of 2021 for recovery of Rs.33,41,069/-.

15. In **Ameet Lalchand Shah** (supra), the Hon'ble Supreme Court held that where multiple agreements are interconnected and form part of a single commercial transaction, the presence of an arbitration clause in one or more agreements can justify referring all disputes, involving all agreements and parties, to arbitration. This is true even if some agreements lack an arbitration clause or some parties are non-signatories, provided the agreements are integrally connected to achieving the overall purpose of the transaction. Courts should interpret such commercial arrangements with a sense of "business efficacy" and not be restricted by technicalities or allegations of fraud, unless substantial grounds exist. The Apex Court also held that the averments in the plaint also *prima facie* indicate that all the four agreement are interconnected.

16. In C.R.P.No.348 of 2024, this Court held that petitioner No.1 and respondent No.1 entered into two sub-lease

agreements, one of which contained an arbitration clause. Instead of opting for arbitration, petitioner No.1 filed a suit seeking the recovery of Rs.3,24,74,899/-. In response, Respondents No.1 and 2 submitted an application under Section 8 of the Arbitration and Conciliation Act, which the Commercial Court accepted. The petitioners challenged this decision, arguing there was no written agreement. The Court, after examining Clause 11 of the sub-lease agreement, upheld the Commercial Court's decision, ruling that the dispute should be resolved through arbitration as per the agreed terms. The Court found no error in the Commercial Court's decision, dismissing the revision petition.

17. In **Sanjiv Prakash** (supra), the Hon'ble Supreme Court held that in this case the disputes arose regarding a Shareholders' Agreement (SHA) and a prior Memorandum of Understanding (MoU) between family members and Reuters, which included arbitration clauses. The MoU was claimed to have been superseded by the SHA, which contained a novation clause (i.e., Clause 28). When disputes regarding share transfer pre-emptive rights emerged, the appellant

invoked the arbitration clause in the MoU. The respondents argued that the MoU was void post-1996 due to novation by the SHA. The Delhi High Court dismissed the Section 11 petition for appointing an arbitrator. On appeal, the Supreme Court held that the doctrine of kompetenz-kompetenz and Section 11(6-A) of the Arbitration and Conciliation Act, 1996, which limits judicial interference at the referral stage to verifying the existence of an arbitration agreement, leaving issues of validity and scope to the arbitral tribunal. The Court emphasized that the novation of a contract affects its arbitration clause only if explicitly stated, and any deeper examination of such issues falls under the tribunal's jurisdiction.

18. The judgements and order in C.R.P.No.348 of 2024 relied upon by the learned counsel for defendant No.1 are not applicable to the facts and circumstances of the case on the ground that in the subject matter operational lease agreement dated 16.01.2019 and joint venture agreement dated 21.02.2020 are not interconnected. The operational lease agreement is pertaining to leasing of 30 x Volvo FMX 460

Tipperis (33 CUM coal body) for an amount of 91,57,161/- and for a term of 34 months and whereas the joint venture agreement dated 21.02.2020 in respect of works which were awarded to defendant No.1 in Lakhanpur, Odisha at the Mines of Mahanadi Coal Fields.

19. Insofar as the other ground raised by defendant No.1 that there is no cause of action and jurisdiction to file suit before the Commercial Court, Hyderabad, is concerned, the plaintiff specifically pleaded at paras 29 and 30 of the plaint that negotiations between the plaintiff and defendants for entering into operational lease agreement took place on 04.10.2019 at Park Hyatt Hotel, Hyderabad and Clause 25 of the operational lease agreement dated 16.10.2019 provides for Hyderabad as the place of jurisdiction to initiate legal proceedings in case of disputes between the parties. Basing on the said pleadings, the Commercial Court has entertained the suit.

20. In **Raptakos Brett & Co. Ltd. v. Ganesh Property**³ and **Mayar (H.K.) Ltd. v. Vessel M.V. Fortune Express**⁴, the

³ (1998) 7 SCC 184

Hon'ble Apex Court held that though in an application under Order VII Rule 11 of C.P.C., the Court has to look into the averments made in the plaint and the documents filed along with the plaint alone. The Court cannot at that stage look into the written statement or the documents filed along with the written statement.

21. In **Mustigulla @ Namaswamy Hemanth Kumar v. Abhaya Infrastructure Pvt. Ltd. And others**⁵, the Division Bench of erstwhile High Court for the States of Telangana and Andhra Pradesh held that rejection of plaint on the ground of *res judicata*, cause of action, under valuation, limitation have to be decided on trial but the same cannot be a ground for rejection of plaint, especially when the parameters of Order VII Rule 11 of C.P.C. are not satisfied.

22. For the foregoing reasons as well as the plethora of judgments, this Court does not find any illegality or irregularity or jurisdictional error in the impugned order dated 10.06.2024 passed by the Commercial Court in

⁴ (2006) 3 SCC 100

⁵ 2016 (6) ALD 598 (DB)

dismissing the application filed by defendant No.1 to reject the plaint filed by the plaintiff.

23. Accordingly, the Commercial Court Appeal is dismissed.

No costs.

Miscellaneous petitions, pending if any, shall stand closed.

ALOK ARADHE, CJ

J.SREENIVAS RAO, J

Date: 22.11.2024

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