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Court : Mumbai

Decided On : Jan-04-2013

Judge : The Honourable Dr. Justice D.Y. Chandrachud & a.a. Sayed

Appeal No. : Appeal No.13 of 2012 In Arbitration Petition No.314 of 2007

Appellant : Edifice Developers and Project Engineers Ltd.

Respondent : Essar Projects (India) Ltd.

Judgement :

Oral Judgment: (Dr. D.Y. Chandrachud, J.)

This Appeal arises from a judgment of a Learned Single Judge dated 11 November 2011 on a challenge under Section 34 of the Arbitration and Conciliation Act 1996 to an award of a sole Arbitrator dated 15 January 2007.

2. Before the Arbitrator an objection was raised by the Respondent on the ground that there was no arbitration agreement. The Arbitrator by an order dated 29 August 2003 overruled the objection. Admittedly four separate contracts were entered into between the Appellant and the Respondent. These contracts were for (i) Construction of Plant 'C' building for the EOL refinery at Jamnagar; (ii) Construction of EOL township at village Baid, Jamnagar; (iii) Construction of a fire water basin pump house; and (iv) Construction of a fire water basin for the EOL refinery at Jamnagar. There is no dispute about the fact that there was an arbitration agreement in respect of the contracts entered into between the parties

for the construction of the Plant 'C' building and for the construction of an EOL township (i and ii above). There is no dispute about the factual position that there was no arbitration agreement as such in the contracts that were entered into for the construction of the fire water basin pump and for the construction of the fire water basin for the EOL refinery (iii and iv above). An objection to the jurisdiction of the Arbitrator was raised by the Respondent on the ground that the Arbitrator had no jurisdiction in respect of the contracts for the construction of the fire water basin pump house and in respect of the contract for the construction of the fire water basin for the EOL refinery at Jamnagar.

3. The Arbitrator in his order dated 29 August 2003, held on the basis of certain letters which were adverted to in paragraph 7 of the order that the parties were "ad idem in treating all the said works including the said two works under one head to which the General Conditions of Contract applied" and which incorporated an arbitration agreement. The Arbitrator also accepted the alternate submission of the Respondent that even assuming that there was no arbitration agreement governing the two contracts in question, the order of this Court dated 24 January 2003 referring disputes to arbitration would have to be construed as an arbitration agreement.

4. While setting aside the arbitral award the Learned Single Judge has held that in the absence of an arbitration agreement in the two contracts in question at the highest, the Appellant could have sought to establish a separate arbitration agreement on the basis of the correspondence or documents on the record. However, none of the letters referred to in paragraph 7 of the order of the Arbitrator dated 29 August 2003 would spell out an arbitration agreement in writing. As regards the alternate finding of the sole Arbitrator, the Learned Single Judge has held that sub-section (2) of Section 16 clearly enunciates that a party is not precluded from raising a plea of jurisdiction merely by his appointment of an Arbitrator or participating in the appointment of an Arbitrator. Consequently the Respondent was held not to be estopped from raising an objection to jurisdiction on merely agreeing to the appointment of an Arbitrator.

5. Learned Senior Counsel appearing on behalf of the Appellant submits that the general terms and conditions governing the other two contracts viz. (i) Construction of Plant C building for the EOL refinery; and (ii) Construction of the EOL township would make it clear that they applied to the entire Essar Oil refinery project. The expression 'project', it was submitted, was defined to mean the setting up of the 9 million tonne petrochem refinery. Hence, though the work orders pertaining to the two subject contracts for the construction of the fire water basin pump house and for the construction of the fire water basin for the EOL refinery did not incorporate the general conditions of contract, that it was urged, would not make any difference. Learned counsel submitted that all the work pertained to the refinery.

6. On the other hand, it was urged on behalf of the Respondent that admittedly four separate contracts were entered into between the parties and the two contracts to which the award in the present case relates did not contain an arbitration agreement. Moreover, it was submitted that admittedly the general conditions of contract pertaining to the other two contracts were not incorporated in the subject contracts. Finally, learned counsel urged that the view which was taken on the alternative hypothesis was clearly contrary to Section 16(2).

7. There is no dispute before this Court in regard to two factual positions. The first is that admittedly four separate contracts were entered into between the parties. Secondly, in relation to the two contracts to which the dispute relates in the present case (the contracts pertaining to the construction of the fire water basin pump house and the construction of the fire water basin for the EOL refinery), no arbitration agreement has been incorporated. This being the position it would have been open to the Appellant to establish within the meaning of Section 7(4) that an arbitration agreement in writing was contained in an exchange of letters or other means of correspondence which provide a record of the agreement. The Learned Single Judge has noted that none of the letters adverted to in paragraph 7 of the order of the Arbitrator dated 29 August 2003 evince an arbitration agreement. This finding has not been questioned by counsel for the Appellant in the course of the hearing of the Appeal. It has been urged that the general conditions of contract in relation to the two other contracts would indicate that they pertain to the work of

the entire oil refinery and that the work under the subject two contracts also pertained to the same refinery

On this ground it has been submitted that the general conditions of contract in the other two contracts which contain an arbitration agreement must necessarily apply to the subject two contracts. Such an inference cannot be drawn for the simple reason that once parties entered into four separate contracts, that would be indicative of the fact that their rights and obligations were to be construed with reference to the specific conditions of each of the four contracts. The general conditions of contract in relation to another contract cannot be read into the present contracts unless they find a specific incorporation therein. The order of the sole Arbitrator holding that there is an arbitration agreement proceeded on the basis that parties treated the work under all the four contracts under one head, but this would not result in bringing into existence an arbitration agreement. The alternate submission which found favour with the Arbitrator was similarly misconceived. Sub-section (2) of Section 16 stipulates that a party shall not be precluded from raising a plea of jurisdiction before the Arbitral Tribunal merely because he has appointed or participated in the appointment of an Arbitrator. Consequently, the mere fact that in the proceedings under Section 11 of the Arbitration and Conciliation Act 1996 the Respondent had agreed to the appointment of a sole Arbitrator to decide upon the disputes would not have foreclosed the Respondent from raising an objection as to jurisdiction. Section 16(2) makes that position abundantly clear.

8. In the absence of an arbitration agreement between the parties governing the two contracts in question, the learned Single Judge was therefore, in our view, justified in setting aside the arbitral award in the petition filed under Section 34. We therefore do not find any merit in the Appeal. The Appeal is accordingly dismissed.

There shall be no order as to costs.

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