

interior Installation Vs. Boc India Limited

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Court : Kolkata Appellate

Decided On : Feb-14-2011

Judge : Dipankar Datta, J.

Appeal No. : C.O. No.3353 of 2010

Appellant : interior Installation

Respondent : Boc India Limited

Advocate for Def. : Mr. Animesh Kanti Ghoshal; Mr. Pranab Kumar Basu; Ms. Chandramala Mukherjee, Advs

Advocate for Pet/Ap. : Mr. Buddhadev Ghoshal; Mr. Sourav Sen, Advs

Judgement :

1. The petitioner is the defendant in Money Suit No.565/2008 instituted by the plaintiff/opposite party. A petition was filed by the defendant/petitioner under Section 8(1) of the Arbitration and Conciliation Act, 1996 on December 15, 2008. An objection regarding maintainability of the suit in question before the Civil Court was raised therein on the plea that in view of the agreement between the parties, their inter-se disputes and differences ought to be resolved by an arbitrator appointed on mutual agreement.

2. The plaintiff/opposite party instituted the suit on the allegation that the defendant/petitioner had committed breach of contract and was, therefore, liable for damages. 2

3. The petition of the defendant/petitioner was taken up for consideration by the learned Civil Judge (Senior Division), 6th Court, District 24 Parganas (South) at Alipore. By Order No. 14 dated June 2, 2010, the petition was dismissed on contest without order for costs. The defendant/petitioner calls in question this order of the learned Judge in this application under Article 227 of the Constitution.

4. Mr. Ghoshal, learned counsel appearing for the defendant/petitioner invited my attention to the tender notice floated by the plaintiff/opposite party dated May 26, 2006 in pursuance whereof the defendant/petitioner had offered its bid in respect of office refurbishment. In particular, he referred to clause 10 thereof which reads as under:

10. Arbitration: in the event of any dispute or difference arising or occurring between the parties in relation to anything or any matter arising out of or under this Tender, the same shall be referred for arbitration to a sole Arbitrator to be mutually agreed between the parties. The decision of the sole arbitrator shall be final and binding upon the parties. The arbitration shall be conducted at Calcutta.

5. According to him, the learned Judge on the face of such clause committed gross error of jurisdiction in not dismissing the suit and relegating the dispute and difference between the parties to arbitration.

6. In support of his contention, Mr. Ghoshal relied on several decisions of the Supreme Court as well as this Court, viz. Owners and Parties Interested in the Vessel M.V. "Baltic Confidence" v. State Trading Corpn. of

India Ltd. reported in (2001) 7 SCC 473 (A & B), Citibank, N.A. v. TLC Marketing PLC, reported in (2008) 1 SCC 481, Mahesh Agarwal v. Indian Oil Corporation Ltd. reported in 2008 (2) CLJ 279, Tata Industries Ltd. v. Grasim Industries Ltd. reported in (2008) 10 SCC 187, BSNL v. Telephone Cables Ltd. reported in (2010) 5 SCC 213, National Agricultural Coop. Marketing Federation India Ltd. v. Gains Trading Ltd., reported in (2007) 5 SCC 692, UNISSI (India) (P) Ltd. v. Post Graduate Institute of Medical Education and Research reported 3 in (2009) 1 SCC 107, and Magma Leasing & Finance Ltd. v. Potluri Madhavilata, reported in (2009) 10 SCC 103.

7. He, accordingly, prayed for relief as claimed in the petition filed before the learned Civil Judge.

8. The application was opposed by Mr. Animesh Kanti Ghoshal, learned senior counsel representing the plaintiff/opposite party. According to him, the clause in respect of arbitration quoted (supra) was only in respect of the tenders that were invited by the plaintiff/opposite party, and it is only disputes and differences arising between the parties in respect of such tenders that could have been referred to an arbitrator, to be mutually agreed upon. However, after the bid of the defendant/petitioner was accepted, a purchase order dated July 4, 2006 was issued in its favour. To such purchase order was enclosed various conditions of purchase. Attention of the Court was drawn to clause 21 of the conditions of purchase, which provides as under : 21. No suit or other legal proceedings in respect of this order shall be instituted in any Court other than the Court having jurisdiction over the place in which the Purchasers factory/unit, from where this order has been issued, is situated.

9. The purchase order, according to him, did not contain any clause for referring any dispute or difference that might arise between the parties to arbitration and, therefore, it is only the Civil Court within the territorial limits whereof the purchase order had been issued would have the jurisdiction to adjudicate. The learned Civil Judge, he contended, very rightly declined to interfere and, accordingly, the application merits outright dismissal.

10. In support of his submission, Mr. Ghoshal relied on the decisions reported in P. Anand Gajapathi Raju v. P.V.G. Raju, (2000) 4 SCC 539, and Garden Finance Ltd. v. Prakash Inds. Ltd. reported in AIR 2002 Bombay 8.

11. In reply, Mr. Buddhadev Ghoshal submitted that the tender and the purchase order cannot be segregated since they form integral part of the entire process of office refurbishment for which the tenders had been floated. 4

12. He further submitted, in the alternative, that in the event the Court is not inclined to interfere, the time to file written statement may kindly be extended so as to enable the defendant/petitioner to contest the suit.

13. The only question that requires an answer is whether the terms and conditions of the tender would prevail over the conditions of purchase or not.

14. Learned counsel for the parties have been heard and the Court has considered the authorities cited at the bar.

15. It is settled law that a tender is an offer. It is something which invites and is communicated to notify acceptance (see: Tata Cellular v. Union of India reported in AIR 1996 11). Any dispute or difference between the contracting parties may be referred to arbitration, provided there is an agreement in this behalf. It is not always necessary that an arbitration agreement must come into existence before a civil action is instituted. The agreement might come into existence, even in course of pendency of a civil action and the Court, in such circumstances, may refer the dispute to arbitration [see: P. Anand Gajapathi Raju (supra)].

16. It is no doubt true that the purchase order issued in favour of the defendant/petitioner was nothing but a follow up action of acceptance of its bid by the plaintiff/opposite party. Ordinarily, without anything more and solely on the basis of the commercial terms mentioned in the tender dated May 26, 2006, it would be reasonable to hold that an arbitration would lie if any dispute or difference crops up between the parties in respect of the work put to tender because clause 10 thereof is wide enough to include the same. The

commercial terms of the tender, vide clause 11, also provided that any dispute arising out of the tender would be subject to the decision of the Court having jurisdiction over the place in which the registered office of the plaintiff/opposite party is situated.

17. On reading the terms (vide clauses 10 and 11) of the tender notice, this Court is of the view that in the event of any dispute or difference arising or occurring between the parties, they could take recourse to arbitration at the first instance in relation to anything or any matter arising out of or under the tender by mutually agreeing to appointment of an arbitrator. The option of the party to approach the Court having jurisdiction was also preserved thereby in the event of the parties failing to appoint an arbitrator, whom they mutually agree to act as such.

18. It is, therefore, necessary for a decision on this application to ascertain how and under what circumstances a party to the dispute would have the option of approaching the Civil Court direct, without exploring the avenue of resolution of dispute and/or difference by arbitration provided in the tender. This Court is of the considered view that the purchase order subsequently issued by the plaintiff/opposite party in favour of the defendant/petitioner upon acceptance of its bid must be held to be the clinching factor. If it provides for arbitration, recourse has to be taken for appointment of an arbitrator; if not, the Civil Court would have jurisdiction.

19. In course of the primary duty of the Court to trace the arbitration agreement between the parties and the subject matter thereof, if at all there is any, it appears from the conditions of purchase that there is no clause for referring any dispute or difference to arbitration. In terms of the special instructions forming part of the purchase order dated July 4, 2006 (vide no.4), the defendant/petitioner was required to confirm its agreement in respect of the other conditions laid down therein. The defendant/petitioner must have confirmed that it would work out the contract in terms of the conditions of purchase. Only upon acceptance of the terms and conditions of purchase by the defendant/petitioner, the contract between the parties must have come into existence. With the acceptance of the conditions of purchase by the defendant/petitioner, the terms of the tender in respect of adjudication of dispute and/or difference must be held to have perished altogether resulting in the arbitration clause becoming inoperative. As noticed earlier, the conditions do not provide for reference of dispute or difference to arbitration. However, in the event of any dispute or difference between the parties arising or occurring in relation to the purchase order or working out of the contract, none of them would be without a remedy. The conditions 6 specify the forum to be approached in this behalf. Even if the forum had not been specified, that would not mean ouster of the Civil Courts jurisdiction to entertain and try a civil suit. The plaintiff/opposite party appears to be within its right to invoke clause 21 of the conditions of purchase, and in instituting the suit claiming damages. The arbitration agreement between the parties was in relation to the tender and not the purchase order. There is also no apparent incorporation by reference of such agreement in the purchase order. The intention of the parties was, therefore, to approach the Civil Court having jurisdiction to decide their inter-se dispute or difference, if it arises or occurs, in respect of the contract being worked out on the basis of the purchase order. The subject matter of the arbitration agreement and the subject matter of the suit are different. The learned Judge, in the circumstances, rightly observed that the defendant/petitioner was bound by the terms of the purchase order and that the provision of Section 8 of the Act would be inapplicable in the present case.

20. One decision cited by Mr. Buddhadev Ghoshal provides a complete answer to the issue raised herein. The Supreme Court in BSNL (supra) was considering a reverse situation where the tender documents provided for adjudication of dispute by the Civil Court having jurisdiction and the purchase order ordained that in case of a dispute or difference between the parties arising therefrom, the dispute or difference would be referred to arbitration. Some of the paragraphs being relevant are quoted below:

24. As per the scheme of the bid documents, there is a clear division of the terms that will govern the tender process, and the terms that will govern the contract, when the bids are accepted. One part regulated the tender process that led to placing of purchase orders. That part contained a provision as to what should be

the forum of dispute resolution, if there was a dispute at the tender or bidding stage. The other part stipulated the terms and conditions which will govern the contract, if and when purchase orders were placed. That part also contained a provision as to what should be the forum if there was a dispute after the contract was entered into. Clause 30 of the instructions to bidders makes it clear that in regard to tender stage disputes, the forum will be civil courts. Clause 20 of the general conditions on the other hand was intended to operate when contracts were made and it specified that if disputes arose in regard to the contracts, the forum for dispute resolution will be the Arbitral Tribunal.

25. Clause 1 of the general conditions of contract (Section III) makes it clear that the general conditions of contract contained in Section III of the document shall apply in contracts made by the purchaser for the procurement of goods. Clause 20 of Section III, that is the arbitration clause makes it clear that arbitration is available in regard to any question, dispute or difference arising under this agreement or in connection therewith. Therefore, it is evident that the general conditions of contract (Section III) and Clause 20 therein providing for arbitration, will not apply in regard to any dispute in regard to the tender or bid, or non-placing of a purchase order, but will apply only in regard to any contract awarded by BSNL by placing a purchase order.

26. A contract is entered in pursuance of the bid, when a purchase order is placed by BSNL on a bidder [vide Clauses 1(f) and 28 of Section II instructions to bidders]. When a purchase order is not placed, there is no contract or agreement and if there is no contract or agreement, the terms of the general conditions including the arbitration clause do not come into existence. In other words there is no arbitration agreement at all. BSNL intended to have arbitrations only where it had entered into contracts and there were disputes relating to such contracts. It did not intend to have arbitrations in regard to tender stage disputes or pre-contract differences, at a stage when there was no privity of contract.

27. It is also very significant that Section II (instructions to bidders) and Section IV (special conditions) which are relevant at the bid stage do not contain any arbitration clause providing that if there is any dispute between BSNL and a bidder in regard to the bid/tender process, the dispute will be settled by arbitration. On the other hand, the instruction to bidders contains a specific provision that if there is a dispute or claim arising out of the tender till (issue of authorisation for) placement of the purchase order, only courts will have jurisdiction. Of course, as and when the appellant placed a purchase order on a bidder, the purchase order contained a term that the general conditions of contract, forming part of the bid documents would be a part of the contract documents, and consequently the arbitration clause applied to the contracts entered into between BSNL and the bidders.

30. In this case, the dispute raised is in regard to a claim for Rs 10,61,28,000 as damages on account of BSNL not placing a purchase order, that is loss of profit @ Rs 200 per CKM for a quantity of 5.306 LCKM. Obviously the respondent cannot invoke the arbitration clause in regard to that dispute as the arbitration agreement was non-existent in the absence of a purchase order.

32. To constitute an arbitration agreement for the purpose of Sections 7 and 11 of the Act, two requirements should be satisfied. The first is that there should be an arbitration agreement between the parties to the dispute. The second is that it should relate to or be applicable to the dispute in regard to which appointment of an arbitrator is sought [see *Yogi Agarwal v. Inspiration Clothes & U*, (2009) 1 SCC 372]. For the foregoing reasons, we hold that in the absence of an arbitration agreement, the application under Section 11 of the Act was not maintainable. (italics in original)

21. The other decisions cited by him have been duly considered. Each and every decision need not be dealt with individually. Suffice it to observe that the said decisions were 8 rendered in the special facts and circumstances prevailing in the cases at hand, which bear no similarity to the facts and circumstances of the present case and the declaration of law therein hardly supports the contentions of the petitioner/defendant. The said decisions being distinguishable have no application here.

22. There is no merit in this application. The application stands dismissed, but without order for costs.

23. It is however made clear that if the defendant/petitioner files written statement within three weeks from date, the same shall be accepted by the Trial Court. Urgent photostat certified copy of the order, if applied for, be given to the parties at an early date.

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