

HIGH COURT OF DELHI AT NEW DELHI

FAO (OS) No. 52/2007

Reserved on:- 22nd May, 2008

Date of Decision: May 30th, 2008

#Punjab State Industrial Development
Corporation Ltd.

..... Appellant.

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Through Mr. Mukesh Anand, Advocate

Versus

\$Triveni Engineering Industries Ltd.
and Others

..... Respondent

Through Mr. Sanjeev Anand, Advocate

CORAM:

* HON'BLE MR. JUSTICE MANMOHAN SARIN

* HON'BLE MR. JUSTICE MANMOHAN

1. Whether Reporters of local papers may be allowed to see the judgment?
2. To be referred to the Reporter or not? Yes.
3. Whether the judgment should be reported in the digest? Yes.

J U D G M E N T

MANMOHAN , J :

1. Present appeal has been filed under Section 37 of the Arbitration and Conciliation Act, 1996 against the judgment and order dated 20th January, 2006 passed in Civil Suit (OS) No. 2708/-A/1996 and I.A. Nos. 5243, 5655 of 1997 whereby the Single Judge has

dismissed the objections to the Arbitration Award dated 30th September, 1996 and made the said Award rule of the Court.

2. Mr. Mukesh Anand, learned Counsel for the Appellant submits that the Arbitration Award and the Impugned Judgment are liable to be set aside on the short ground that there was no arbitration agreement between the Appellant and Respondent No. 1, and the agreement executed between Respondent No. 1 and Respondent No. 2 containing an arbitration agreement was not assigned. In this connection Mr. Mukesh Anand relied upon the initial agreement dated 27th April, 1991 executed between Respondent No. 2 and Respondent No. 1. The relevant portions of the said agreement are reproduced hereinbelow for ready reference :-

“This AGREEMENT made at Chandigarh on the 27th Day of April One thousand nine hundred and ninety one between The Dasuya Co-operative Sugar Mills Ltd, Dasuya. Distt. Hoshiarpur Registered under the Punjab Co-operative Societies Act, 1961 (hereinafter referred to as the Purchaser which expression shall, unless repugnant to the subject or context, include its successors and assignees) represented by Shri S.C. Sethi Managing Director of the ONE PART and M/s.The Triveni Engineering Works Ltd. a company registered under the Companies Act, having its registered office at Kailash Building, 2nd floor, 26, Kasturba Gandhi Marg, New Delhi – 110001 (hereinafter referred to

as the “Seller” which expression shall, unless repugnant to the subject or context, include its legal representative, administrators, successors or permitted assignees represented by Shri A. Barik, Manager (Marketing) of the Triveni Engineering Works Ltd. New Delhi of the other part.....

17. BANK GUARANTEE

17.1 The Seller shall furnish to the Purchaser at its own cost, five guarantees as specified below in the form of the Purchaser.....

20. ARBITRATION

20.1 If at any time there should be any question, dispute or difference between the parties in respect of any matter arising out of or in relation to this Agreement, either party may give to the other party notice in writing of the existence of such question, dispute or difference and the same shall be referred to the arbitration of a single arbitrator.....”

3. Mr. Mukesh Anand then referred to an agreement dated 24th June, 1993 executed between Respondent No. 2, Appellant and Punjab State Federation of Cooperative Sugar Mills. He, in particular, referred to Clause 12 of the agreement to submit that the Appellant would be entitled only to continue the erection and construction work through the contracts already executed. However, in the event of contractors, like Respondent No. 1, not agreeing to execute the work or the Appellant not willing to get the work executed through them, the

contractors, like Respondent No. 1, shall only be entitled to remove unpaid materials, operational materials etc. belonging to them and lying at site. The relevant Clause 12 is reproduced hereinbelow for ready reference :-

“12. That the PSIDC shall be entitled to continue the erection construction of work through the contracts already executed by accepting the liabilities thereon. However, in the event of contractor(s) not agreeing in work or the PSIDC not willing to get work executed through them the contractor(s) shall be entitled to remove unpaid materials, operational materials, tools and tackles belongs to them and lying at site.....”

4. Mr. Sanjeev Anand, learned Counsel for the Respondent on the other hand contended that the initial agreement dated 27th April, 1991 executed between Respondent Nos. 1 & 2 clearly defined Respondent No. 2 to include its successors and assignees. Mr. Sanjeev Anand further contended that on a reading of the subsequent tripartite agreement dated 24th June, 1993 executed between Respondent No. 2 and Appellant, it would be apparent that Appellant was an assignee of Respondent No. 2. The relevant extracts of the agreement dated 24th June, 1993 are reproduced hereinbelow for ready reference :-

“This Agreement made at Chandigarh 24th day of the month of June One Thousand Nine Hundred

Ninety Three, between the Dasuya Cooperative Sugar Mills Ltd. a society registered under the Punjab Cooperative Societies Act, 1961 having its registered office at Dasuya through its Managing Director (hereinafter referred to as 'the sugar mill' which expression shall unless repugnant to the context shall include its successors and assigns) of the one part and the Punjab State Industrial Development Corporation Ltd., a company registered under the Companies Act with its registered office at Udyog Bhawan, 18, Himalaya Marg, Sector-17, Chandigarh (hereinafter referred to as 'the PSIDC' which term shall include its successors and assigns) of the second part and the Punjab State Federation of Cooperative Sugar Mills Ltd. a society registered under the Punjab Cooperative Societies Act 1961 with its registered office at Bhogpur (hereinafter referred to as 'the Sugarfed', which term shall include its successors and assigns) of the third part.

Whereas the sugarfed had obtained letters of Intent to setting up three sugar mills at Amloh, Patran and Dasuya in the cooperative sector and an amount of Rs. 39 crores was obtained from the State Government as share capital for setting of three sugar mills.....

Whereas finding that the Financial Institutions are not likely to finance these projects, the matter was considered by the High Powered Committee under the Chairmanship of Hon'ble Chief Minister, Punjab, wherein it was decided to transfer the sugar mills along with the letters of intent to the PSIDC for setting up these sugar mills in the joint/assisted.

Whereas in pursuance to the decisions taken, the sugar mill by way of resolution dated 29.03.93 had passed a resolution in its general body meeting to transfer the letter of intent along with the assets and liabilities on "As is where is" basis on the date of transfer, including advances to the cane growers

and other contingent liabilities of the sugar mills at book value to PSIDC...

NOW THEREFORE IT IS HEREBY AGREED BETWEEN THE PARTIES AS FOLLOWS:-...

2. That in consideration of the payment by the PSIDC from the date of agreement, the PSIDC shall be entitled to the takeover/transfer of assets and liabilities along with its undertakings, rights, securities whatsoever and wherever situated and shall thence forward be entitled to complete the sugar mill, whether in joint or assisted sector in terms of the decisions taken in the meeting dt. 13.10.92 held under the chairmanship of Chief Minister, Punjab...

9. That the PSIDC shall be responsible for all the liabilities in connection with the implementation of the 'project', and would also meet any undisclosed liability like the enhancement of compensation towards acquisition of land etc. and the sugarfed and Sugar Mill shall be indemnified and kept indemnified by PSIDC.....

14. That the Sugar Mill shall transfer all their licenses of whatsoever nature in favour of PSIDC including contracts pertaining to machinery supply and erection thereof by way of assignment or otherwise of contract agreements or documents relating to supply and erection of machinery entered into with M/s Triveni Engineering Works and M/s. Engg. And Technical Services Limited i.e. the supplier of the machinery and erection contractor.

15. That the Sugarfed/Sugar Mill shall get the benefit of bank guarantee executed in favour of the sugar Mill securing the advance payment given to Triveni Engineering Works by way of assignment or substitution in favour of PSIDC or is/shall also get the debt of Rs. 5,39,666.35 (Rupees Five Lacs

Thirty Nine Thousand Six Hundred Sixty Six and paise thirty five only) acknowledged from the debtors with an assurance that the amount would repaid to the PSIDC by debtors.....”

5. Mr. Sanjeev Anand also drew our attention to the Appellant's letter dated 28th September, 1993 written to the Manager, Union Bank of India invoking the bank guarantee issued by Respondent No. 1 to Respondent No. 2. In this letter Appellant submitted that the bank guarantee executed in favour of Respondent No. 2 could be encashed by Respondent No. 2's assignee also. In another letter dated 11th October, 1993 to the Manager, Union Bank of India, the Appellant claimed that as Respondent No. 1 had failed to supply the machinery as stipulated in the initial agreement, Appellant being an assignee of Respondent No. 2 was entitled to invoke the said bank guarantee. The relevant extract of Appellant's letter dated 11th October, 1993 is reproduced hereinbelow for ready reference :-

“...M/s. Trivani Engineering Works Ltd. have failed to supply the machinery as stipulated in the agreement and has thus committed breach of contract which entitles the undersigned as beneficiary being assignees of the Dasuya Coop. Sugar Mills Ltd., Dasuya to invoke guarantee executed in their favour by you. Therefore, in terms of the breach of guarantee we invoke the guarantee and request you to pay a sum of Rs. 82,50,000/-

(Rs. eighty two lacs fifty thousand only) immediately on receipt of this letter unless the same is executed.

Thanking you,

Yours faithfully,

*For PUNJAB STATE INDUSTRIAL
DEVELOPMENT CORPORATION LTD.”*

6. Mr. Sanjeev Anand also referred to two orders of this Court dated 12th December, 1994 and 9th July, 1997. By virtue of the first order under Section 20 of the Arbitration Act, 1940 an Arbitrator had been appointed to resolve the disputes between various parties including the Appellant and Respondent No. 1. Mr. Sanjeev Anand submitted that in view of reference order having been made by this court, the Appellant was estopped from urging that there was no arbitration agreement between the parties. In this connection he relied upon judgment of Supreme Court in ***Union of India Vs. L.K. Ahuja & Company reported in AIR 1988 SC 1172.*** Mr. Sanjeev Anand further submitted that an arbitration Clause will bind a valid assignee of a contract unless and until it is based on a personal qualification. In this regard he relied upon the following judgments :-

- i) **M/s. Hindustan Steel Works Construction Ltd. Vs. Bharat Spun Pipe Co. reported in AIR 1975 Calcutta 8.**

- ii) **Shri Patanjali and Another Vs. M/s. Rawalpindi Theaters Private Ltd. Delhi reported in AIR 1970 Delhi 19.**
- iii) **Messrs. Mc Kenzies, Ltd. Vs. Messrs. Sulleman and Co. reported in AIR 1933 Sindh 75**
- iv) **M.R. Desa Vs. Messrs. Giridharilal Ghanshamdas reported in AIR 1932 Sindh 128**

7. In our view, the initial agreement dated 27th April, 1991 specifically defines Respondent No. 2 to include its successors and assignees. The subsequent tripartite agreement dated 24th June, 1993 leaves no doubt that the Appellant is an assignee of Respondent No. 2. The Appellant is also estopped from arguing to the contrary in view of the admissions contained in the letter dated 11th October, 1993 referred to hereinabove.

8. Moreover, in view of the settled legal position that if a contract is capable of being assigned and is actually assigned, then the arbitration clause in the initial agreement would also bind the assignee.

9. In fact in view of a reference order by this Court, we are of the view that it is too late in the day for the Appellant to contend that there was no arbitration clause between it and Respondent No. 1. It is also pertinent to mention that the Single Judge had rejected the Appellant's submission on the ground that Appellant had never raised this issue before the Arbitrator and further had not only willingly participated in the arbitration proceedings and contested the claim of the Respondent No. 1 but also had preferred its own counter-claim.

10. Consequently, the present appeal being devoid of merits is dismissed but with no order as to costs.

[MANMOHAN]
Judge.

[MANMOHAN SARIN]
Judge.

May 30th, 2008
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