SUPREME COURT OF INDIA

Citation Info wares Ltd.

Vs.

Equinox Corporation

(V.S. Sirpurkar J.)

20.04.2009

JUDGMENT

V.S. Sirpurkar, J.

1. This is an application under Section 11 (5) of the Arbitration and Conciliation Act, 1996. The applicant M/s Citation Infowares Ltd. is a company registered under the Companies Act carrying on business in United States of America as also in Gurgaon, India through its establishment/subsidiary. The respondent Equinox Corporation is also a company registered within the appropriate laws of United States of America, having its office at 10, Corporate Park, Suit No.130, Irvine, CA- 92606, USA. The Equinox Corporation has been carrying on business in India through outsourcing. It is also carrying on business in India through its own establishment in India, Equinox Global Services Private Limited (hereinafter called `EGSPL'). The said EGSPL is a company registered under the Companies Act and has its office in Gurgaon. It is pleaded in the application that the respondent company Equinox Corporation (hereinafter called `EC') had entered into an outsourcing agreement singed in Kolkata, India with the applicant Citation Infowares Ltd (hereinafter called `CIL') on 09.02.2004 wherein the applicant was engaged as a service provider on terms and conditions contained in the agreement. It was agreed in this agreement dated 09.02.2004 that CIL which had bagged orders from its client and since it had sufficient funds, space and existing infrastructure to execute the projects and since it required expert manpower to provide service to its client and further since CIL had approached EC for providing the required number of resources to CIL as against the monthly charges at mutually agreed consideration, EC had agreed to provide resources and, hence, both the parties had, in short, mutually agreed to do the business on certain agreed terms. The terms included that the duration of the agreement was to be for three years. There was a confidentiality clause 10. Following was the clause 10: 10. Any dispute between the parties hereto to arising from this Agreement, or from an individual agreement concluded on the basis thereof, shall be finally referred to a mutually agreed Arbitrator.

2. Two more agreements were entered into, they being agreements dated 23.07.2004 and 25.01.2007 in between the parties. It is the claim of the applicant that it created infrastructure for seating capacity of 200 customized seats at Gurgaon address of the respondents and same were being utilized by the respondent. All the three agreements were signed at Kolkata, India

and the services were being provided and rendered under the said agreement by the applicant at Gurgaon, India.

3. On this backdrop, by a notice dated 09.01.2008 sent through e-mail, the respondent terminated the agreements dated 25.01.2007 w.e.f. 07.03.2008. According to the applicant, this termination of agreement was illegal and wrongful, causing it huge loss. The applicant assessed the damages to be compensated by the respondent tentatively at US $ 23,49,182. The applicant also pleads that the respondent had also failed to pay the outstanding amount of US $ 6,32,182 payable to the applicant under the contract against the invoice raised by the applicant for the period from July, 2007 to January, 2008. The applicant also claimed on this amount the interest @ 18 % per annum.

4. What is important is the agreement dated 25.01.2007 which has already been referred to. Under the said agreement clause 10.1 provided as under:

> 10.1 Governing law- This agreement shall be governed by and interpreted in accordance with the laws of California, USA and matters of dispute, if any, relating to this agreement or its subject matter shall be referred for arbitration to a mutually agreed Arbitrator

5. Thus, in between, first agreement dated 09.02.2004 and the subsequent agreement dated 25.01.2007 there was an essential difference that under the last agreement the governing law was to be that of California, USA. However, that clause did provide for arbitration in case of disputes. On the disputes arisen, the applicant invoked arbitration clause by its notice dated 08.02.2008 and further notice dated 09.02.2008 informing the respondent about appointment of Arbitrator and requested the respondent to agree to the said appointment. The respondent did not agree within the period of 30 days provided in Section 11(5) of the *Arbitration and Conciliation Act, 1996* (hereinafter called the `Arbitration Act') and, thus, parties have failed to agree to the appointment of sole Arbitrator within the time limit prescribed under that Section necessitating the present application for appointment of an Arbitrator by this Court since this happens to be an international arbitration.

6. There is no dispute between the parties that this is an international arbitration and, therefore, under the Arbitration Act, the Chief Justice or his nominee alone would have the jurisdiction to appoint the Arbitrator. There is also no dispute that there is a live dispute between the parties and there is an Arbitration Clause in case of dispute between the parties.

7. So far so good. However, the question that has arisen is whether this Court would have the jurisdiction, in the present factual scenario and on the backdrop of the fact that the parties vide the aforementioned clause 10.1 had agreed that the governing law would be that of California, USA. According to the applicant, it is only this Court which would have the jurisdiction to appoint the Arbitrator, while according to the respondent this Court does not have the jurisdiction to appoint the Arbitrator as the provisions of the Arbitration Act would necessarily stand excluded in view of the specific language of clause 10.1 of the agreement wherein the governing law would be the law of California, USA.

8. Both the sides have extensively canvassed the rival contentions. Shri S.K. Bagaria, Learned Senior Counsel appearing on behalf of the applicant contended that this question is no more res integra and stands concluded by the judgment of this Court in *Indtel Technical Services Private Ltd. Vs. W.S. Atkins Rail Limited*[1]. He further pointed out that the said judgment exclusively place reliance on other judgment of this Court in *Bhatia International Vs. Bulk Trading S.A.*[2]. The Learned Senior Counsel also made a reference to another judgment in *Venture Global Engineering Vs. Satyam Computer Services Ltd.*[3]. It was pointed out that in the first mentioned decision, the Learned Single Judge (Hon'ble Altamas Kabir, J.) of this Court, while interpreting the clause identically worded as Clause 10.1 (quoted supra), came to the conclusion and recorded his findings in para 36 and 37 of that judgment and ultimately held that the provisions of Part I of Arbitration and Conciliation Act, 1996 would be equally applicable to international commercial arbitrations held outside India unless any of the said provisions are excluded by agreement between the parties expressly or by implication. The Learned Judge also found that this question of the applicability of the Part I of *Arbitration and Conciliation Act, 1996* to the international agreements, even where the governing law was to be a foreign law, was concluded by the decision in *Bhatia International Vs. Bulk Trading S.A.*[4] (cited supra).

9. As against this, Shri Krishnan Venugopal, Learned Senior Counsel appearing on behalf of the respondent urged from the language of the clause that where the governing law is agreed between the parties, say foreign law, then essentially, the question of appointment of arbitrator also falls in the realm of the said foreign law and not within the realm of Arbitration and Conciliation Act. The Learned Senior Counsel further urged that in the wake of language of Clause 10.1, it was very clear that the agreement was to be governed by and interpreted in accordance with the Laws of California and further in continuation of the earlier words, it was provided that the matters of dispute relating to the agreement or its subject matter, would be referred to arbitration to a mutually agreed arbitrator. The Learned Senior Counsel, therefore, urged that considering the positive language of Clause 10.1, it was clear that the parties had specifically agreed that the matter of appointment of arbitrator would also be governed by the Laws of California. The Learned Senior Counsel urged that, therefore, there was a clear cut agreement between the parties to that effect and as such, as held in *Bhatia International Vs. Bulk Trading S.A.*[5] (cited supra), parties had expressly excluded the provisions of Part I of the Arbitration and Conciliation Act, 1996. The Learned Senior Counsel very heavily relied on the last part of Para 32 of the judgment in case of Bhatia International (cited supra). The learned Senior Counsel, therefore, urged that even if judgment in case of Bhatia International (cited supra) was held applicable, it was in fact, liable to be read in favour of the respondent and not the applicant. The Learned Senior Counsel also invited our attention to another judgment of this Court in *National Thermal Power Corporation vs. Singer Company Anr.*[6] *and Sumitomo Heavy Industries Limited vs. ONGC Limited*[7]. Apart from these judgments, the Learned Senior Counsel relied on a decision of the House of Lords in case of *James Miller Partners Ltd. Vs. Whitworth Street Estates Ltd.*[8] in support of the proposition that where the parties have agreed that the governing law would be a foreign law, normally the question relating to Arbitral Tribunal would also be governed by such foreign law. The other decision relied upon by the Learned

Senior Counsel is the decision of Privy Council in *Bay Hotel and Resort ltd. Vs. Cavalier Construction Co. Ltd.*[9] and the decision of Queen's Bench (Commercial Court) in case of ABB Lummus Global Ltd. Vs. Keppel Fels Ltd. reported in 1999(2) Lloyds Law Report 24. The Learned Senior Counsel also painstakingly took us through the provision of California Code of Civil Procedure and more particularly, in Chapter II and III thereof. Judgments of Bombay High Court and Gujarat High Court were also relied upon.

10. On these conflicting claims, it is to be found as to whether it would be for this Court to appoint the arbitrator under Section 11(5) of the Arbitration and Conciliation Act, 1996.

11. There can be no dispute that such appointment can be made by this Court only and only if Part I of the Arbitration and Conciliation Act is applicable to the present arbitration proceedings.

12. Shri Bagaria, learned senior counsel appearing on behalf of the petitioner heavily relied on the Bhatia International (cited supra) and pointed out that the law on this subject is no more res integra as it was concluded by the judgment of this Court in Indtel Technical Services' case (cited supra) Learned counsel pointed out that in the said judgment of Indtel Technical Services' case (cited supra), the earlier judgments in Bhatia International (cited supra) and even National Thermal Power Corporation' case (cited supra) have been considered. Learned counsel pointed out that the clause of arbitration which fell for consideration was as follows:

> "Although the matter has been argued at great length and Mr. Tripathi has tried to establish that the decision of this Court in Bhatia International's Case is not relevant for a decision in this case, I am unable to accept such contention in the facts and circumstances of the present case. It is no doubt true that it is fairly well settled that when an arbitration agreement is silent as to the law and procedure to be followed in implementing the arbitration agreement, the law governing the said agreement would ordinarily be the same as the law governing the contract itself. The decisions cited by Mr. Tripathi and the views of the jurists referred to in NTPC's case support such a proposition. What, however, distinguishes the various decisions and views of the authorities in this case is he fact that in Bhatia International this Court laid down the proposition that notwithstanding the provisions of Section 2(2) of the Arbitration and Conciliation Act, 1996 indicating that Part I of the said Act would apply where the place of arbitration is in India, even in respect of international commercial agreements, which are to be governed by the laws of another country, the parties would be entitled to invoke the provisions of Part I of the aforesaid Act and consequently the application made under Section 11 thereof would be maintainable."
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> (emphasis supplied)

13. Again in paragraph 37 the Court expressed that the decision in Bhatia International's case has been rendered by a Bench of three Judges and governs the scope of application under Section 11, thereby expressing the binding nature of the judgment. It was specifically held

that unless language of the provisions of Part I are excluded by agreement between the parties either expressly or by implication, Part I of the Act including Section 11 would be applicable even where the international commercial agreements are governed by the clause of another country. It is not, therefore, necessary to consider the argument of Shri K.K. Venugopal, learned Senior counsel to the effect that the law laid down in National Thermal Power Corporation's case (cited supra) .would govern the field. Even otherwise it is difficult to accept the contention that National Thermal Power Corporation's case (cited supra) can clinch the issue.

14. In paragraph 23 thereof the Court undoubtedly expressed that the proper law of arbitration is normally the same as the proper law of contract and it is only in exceptional cases that it is not so, even where the proper law of contract is expressly chosen by the parties. The Court further expressed about the presumption arising that the law of the country where arbitration is agreed to be held is the proper law of arbitration. This presumption was heavily relied on by Shri K.K. Venugopal. In my opinion the scope of the expressions in paragraph 23 must be held to be limited. There may be presumption where the parties have agreed to hold arbitration in a particular country. In that circumstance, the presumption would arise that the law of the country where the arbitration is agreed to be held would apply as a law of contract. Where there has been no specific expression about the law of contract, the situation is otherwise. In this way the law of contract is agreed upon as the Californian law.

15. However, there is no agreement in respect of the law governing the procedure of arbitration. Again in paragraph 25 the Court expressed that the party had the freedom to choose the law governing international agreement of choosing substantive law of arbitration agreement as well as the procedural law governing the conduct of the arbitration. It is then the choice to be exercised by the parties or by implication, except to such situations where there is no express choice of the law governing the contract as a whole or the arbitration agreement in particular. There is, in absence of any contrary intention, a presumption that the parties have intended that the proper law of contract as well as the law governing arbitration agreement are the same as the law of the country in which the arbitration is agreed to be held. Here again the stress is on the agreement about the country where the arbitration is agreed to be held and precisely this situation is absent in the present case. Here the substantive law of contract governing the contract is specifically agreed upon. However, the place where arbitration would be held is not to be found in the language of Clause 10.1.

Therefore, the situation in National Thermal Power Corporation's case (cited supra) was not applicable to the present case.

16. The Court undoubtedly further goes on to say that where the proper law of contract is expressly chosen by the parties such a law must, in the absence of unmistakable intention to the contrary, govern the arbitration agreement which, though collateral or ancillary to the contract, is nevertheless a part of the contract. It is this expression which has been heavily relied upon by the learned senior counsel for the respondent.

17. However, in Bhatia International (cited supra), duly considered in Indtel Technical Services' case (cited supra) is apart from the fact that the provisions of the Arbitration and Conciliation Act, 1996 were not applicable either in Singer's case or even in Sumitomo Heavy Industries' case (cited supra). The issue regarding the applicability of Part I of the 1996 Act to international commercial arbitration also did not fall for consideration in these cases. It may be that the Arbitrator might be required to take into account the applicable laws which may be the foreign laws but that does not effect the jurisdiction under Section 11 which falls for Part I which has been specifically held applicable in Bhatia International (cited supra).

18. The learned Judge, deciding the Indtel Technical Services' case (cited supra) also has taken into consideration this aspect and has expressed in Paragraph 36 as follows:

> “The decisions cited by Mr. Tripathi and the views of the jurists referred to in NTPC's case support such a proposition. What, however, distinguishes the various decisions and views of the authorities in this case is he fact that in Bhatia International this Court laid down the proposition that notwithstanding the provisions of Section 2(2) of the Arbitration and Conciliation Act, 1996 indicating that Part I of the said Act would apply where the place of arbitration is in India, even in respect of international commercial agreements, which are to be governed by the laws of another country, the parties would be entitled to invoke the provisions of Part I of the aforesaid Act and consequently the application made under Section 11 thereof would be maintainable.”

19. The situation therefore is identical in the present matter. Shri K.K. Venugopal, however, contended that if the parties intended specifically in this case that the law governing the contract was Californian law, as expressed in Bhatia Internation as well as in Indtel Technical Services' case (cited supra), an implied exclusion of Part I should be presumed. I am afraid it is not possible to read such an implied exclusion.

20. Seen the striking similarity between Clause 10.1 and Clauses 13.1 and 13.2 which have been quoted above and further the view expressed by learned Judge in Indtel Technical Services' case (cited supra) regarding the exclusion, it is only possible to read even distantly such an implied exclusion of Part I. It cannot be forgotten that one of the contracting parties is the Indian party. The obligations under the contract were to be completed in India. Further considering the nature of the contract, it is difficult to read any such implied exclusion of Part I in the language of Clause 10.1. That argument of learned senior counsel for the respondent therefore must be rejected.

21. Learned senior counsel for the respondent invited attention of this Court to paragraphs 32 and 34 of Bhatia International (cited supra) and again reiterated that the implied exclusion must be read in the language of Clause 10.1. I have already however, held that considering the various factors, such exclusion cannot be read and, therefore, Bhatia International (cited supra) will have to be held applicable.

22. Identical view has been taken even in Venture Global Engineering's case (cited supra) where the Court took the view that even the foreign award could be challenged under Section 34 of the Act. This is a judgment by Two Judges Bench. The observations made in paragraphs 31, 35 and 37 are extremely apposite and binding. The comments against this judgment that it does not consider the question of implied exclusion would be of no consequence in view of the findings which have earlier been referred to. In the present matter it cannot be said that there was any implied exclusion of the provisions of Part I. The law laid down, therefore, is clearly binding.

23. Similarly the language of Clause 10.1, it is suggested was expressly agreed between the parties that the procedural law would be that of California. The suggestion given by the learned senior counsel for the respondent that since the provision about the arbitration is included in the same sentence the intention must be presumed that the parties intended only the Californian law even to govern the procedure. As I have said, that by itself it cannot be the way to read the said Cause as the decision in Bhatia International (cited supra) was available on the date when the agreement was signed.

24. This means that the contentions raised based on the three foreign cases by Shri K.K. Venugopal James Miller Partners' case (cited supra), Bay Hotel and Resort' case (cited supra) and ABB Lummus Global's case (cited supra) need not be considered in view of the binding nature of the three aforementioned decisions in Bhatia International (cited supra), Venture Global Engineering's case (cited supra), and Indtel Technical Services' case (cited supra). However, since those cases are actively relied upon the same are considered as follows.

25. In the first mentioned case, the question was as to the applicable law of contract and not the applicable law of arbitration where the parties had specifically agreed on the law of contract. The factual situation was, therefore, different. The relied on observations at page 616 of the decision are more in the nature of obiter.

26. In so far as the Bay Hotel and Resort' case (cited supra) is concerned the reliance is placed on paragraph 35 of the said decision to the following effect: Two points in the speech of Lord Wilberforce are notable here. First, he said that in the normal case where the contract itself is governed by English law, any arbitration would be held under English procedure. Secondly, he said that the mere fact that the arbitrator was to set either partly or exclusively in another part of the United Kingdom, or, for that matter, abroad, would not lead to a different result; the place might be chosen for many reasons of convenience or be purely accidental; a choice so made should not affect the parties' rights. The passage in his speech is at page 616 of the report.

These observations apply to the normal case which is not a case here.

27. As regards the third decision in ABB Lummus Global's case (cited supra) the relied upon passage again does not clinch the issue. What is stated there is that where the parties chose

the curial law of arbitration they would be taken to chose the place and sitting of arbitration. In my opinion the observations are not apposite to the present controversy.

28. In the result the application must succeed. Accordingly, I appoint Hon'ble Mr. Justice R.C.Lahoti (Ex.CJI) as the sole Arbitrator to arbitrate upon the disputes which have arisen between the parties hereto as set out in the present application. The sole Arbitrator would be entitled to decide upon the procedure to be followed in the arbitration proceedings, sittings of the proceedings as also to settle his fees in respect thereof. However, the law governing the contract would be the Californian Law.

29. The application is accordingly allowed.

[1] *2008(10) SCC 308*
[2] *2002 (4) SCC 105*
[3] *2008(4) SCC 190*
[4] *2002 (4) SCC 105*
[5] *2002 (4) SCC 105*
[6] *1992 (3) SCC 551*
[7] *1998(1) SCC 305*
[8] *1970 AC 583*
[9] *2001 UKPC 34/2001 WL 825663*