SUPREME COURT OF INDIA

Geo-Group Communications Inc.

Vs.

IOL Broadband Ltd.

Arbitration Petition No. 9 of 2009

(J.M.Panchal J.)

17.11.2009

ORDER

J.M. Panchal, J.

1. By filing the instant application under Section 11(6) of the Arbitration and Conciliation Act, 1996, the applicant Company has prayed to appoint Mr. Justice D.R. Dhanuka (a retired Judge of Bombay High Court) as Sole Arbitrator for adjudicating the disputes that have arisen between the applicant and the respondent Company under the Share Subscription and Shareholders Agreement dated December 1, 2005.

2. The facts emerging from the record of the case are as under:

> "The applicant, i.e., Geo-Group Communications, Inc., is a company incorporated under the laws of Delaware USA, having its principal office at USA. It is engaged in business of providing telecommunication services. The respondent, i.e., IOL Broadband Limited is a company registered under the Companies Act, 1956. It is a commercial Metro Ethernet Fiber Network Infrastructure company and is engaged in delivery of broadcast-quality television/video signals to subscribers over a broadband connection using the Internet Protocol (IPTV). The applicant entered into a Share Subscription and Shareholders Agreement (for short 'SHA') dated December 1, 2005 with Exatt Technologies Private Limited (for short 'Exatt'), which was a Company registered under the provisions of the *Companies Act, 1956*. Under the terms of SHA dated December 1, 2005 the applicant agreed to supply certain CISCO equipments to Exatt equivalent to US$ 400,000. It was further provided under the said Agreement that in lieu of supply of CISCO equipments, Exatt would issue equity shares to the applicant aggregating to 6.50% of the then paid-up equity share capital of Exatt on terms and conditions set out in the said Agreement. Pursuant to the said Agreement, the applicant Company supplied CISCO equipments, delivery of which was acknowledged by Exatt without any demur as to quantity or quality. As per the arrangements made between the parties under the Agreement, the Exatt should have issued 6920 equity shares of Rs. 10/- each to the applicant. But Exatt issued a Xerox

copy of Share Certificate bearing No. 6 dated December 31, 2006. The applicant has produced Xerox copy of the Share Certificate at Annexure A-2 to the application, which indicates that the applicant Company was treated as the registered holder of 6920 equity shares of Rs. 10/- each numbered from 1,00,001 to 1,07,000 both inclusive in Exatt subject to provisions of Memorandum and Articles of Association and a sum of Rs. 3,600/- had been paid up upon each of the said shares. However, the record does not indicate that original Share Certificate allotting 6920 equity shares of Rs. 10/- each was issued by Exatt to the applicant Company. Therefore, the name of the applicant Company was not mentioned as one of the members in the Register of Members maintained by Exatt.

In the year 2007, Exatt entered into a Scheme of Amalgamation (for short 'Scheme') with the respondent Company, which was previously known as IOL Broadband Limited. The previously known Company was listed on the Bombay Stock Exchange and National Stock Exchange. The Scheme of Amalgamation was approved by the High Court bf Judicature at Bombay. vide order dated November 23, 2007. A copy of the Scheme is produced by the applicant at Annexure A-3 to the application. The applicant has claimed that it being a body corporate based in USA was not aware of the Amalgamation of Exatt with the respondent Company pursuant to order dated November 23, 2007 passed by the Bombay High Court. On perusal of some of the provisions of the Scheme, it becomes evident that in terms of Clause 1.8(b) all the debts, liabilities, contingent liabilities, duties, obligations and guarantees of the Exatt Company stood transferred to the respondent Company. Thus the liabilities, duties, obligations and guarantees of the Exatt Company under SHA dated December 1, 2005 stood transferred to the respondent Company and this is not disputed by the respondent Company at all. Clause 9 of the Scheme further provided that the shareholders of Exatt shall be entitled to equity shares of the respondent Company in the ratio of 25:1, i.e., 25 equity shares of face value of Rs. 10/- each of the respondent Company for every one equity share held in Exatt. The applicant claims that on the sanction of the Scheme, it was entitled to be allotted 1,73,000 equity shares of the respondent Company as a shareholder of Exatt. The Scheme came into effect on January 15, 2008. However, the shares to which the applicant was entitled to, were never issued or allotted to it by the respondent Company. The applicant Company claims that it made various requests and representations to the respondent Company but the shares of the respondent Company were never issued. What is claimed by the applicant is that after sanction of the claim the prices of the shares of the respondent Company skyrocketed on the stock exchanges and each share was quoted at Rs. 510/-. The grievance made by the applicant is that if the shares of the respondent Company had been duly issued, the applicant Company would have the opportunity to sell them at the price quoted on the stock exchanges and Would have received price of Rs. 8,82,30,000/- (1,73,000 IOL shares x Rs. 510/- per share) equivalent to US$ 21,00,715. The applicant has, therefore, asserted that the respondent Company, being the transferee/successor of Exatt is bound and liable to pay an amount of Rs. 8,82,30,000/-to the applicant Company. The record would indicate that the applicant Company called upon the respondent on various occasions to honour the terms of

SHA dated December 1, 2005 as a transferee Company of Exatt. It is claimed by the applicant that various meetings took place between the representatives of the applicant and the respondent through their advocates for an amicable settlement of the disputes that have arisen under SHA dated December 1, 2005, but no amicable resolution of the disputes could be arrived at. Under the circumstances the applicant, by its advocates' notice dated July 31, 2008 invoked arbitration clause No: 11.7, contained in the SHA dated December 1, 2005, and called upon the respondent Company to resolve the disputes by concurring in the appointment of Sole Arbitrator. The applicant nominated Mr. Justice D.R. Dhanuka (retired Judge of Bombay High Court) as its Sole Arbitrator and Mumbai was specified as venue. The notice dated July 31, 2008 was duly received by the respondent Company. The advocate of the applicant Company received letters dated August 29, 2008 and September 8, 2008 respectively from the advocate of the respondent Company stating that the claims of the applicant did not arise out of the SHA dated December 1, 2005 and, therefore, disputes could not be referred to arbitrator under Clause 11.7 of the SHA. As the respondent Company disputed the claim of the applicant and did not concur in the appointment of the Sole Arbitrator, the applicant has filed the instant application and claimed the relief referred to above.

3. The application was placed for preliminary hearing and after hearing the learned Counsel for the applicant, notice was ordered to be issued to the respondent. On service of notice the respondent has filed reply controverting the averments made in the application. In the reply it is mentioned that the respondent Company has, in compliance with the Scheme of Amalgamation and the orders of High Courts of Bombay and Bangalore, allotted shares to those members of the Exatt whose names were borne in the register of members of the said Exatt and the question of allotting shares to the applicant did not arise at all as the name of the applicant was not borne in the register of members of the Exatt. What is stated in the reply is that the alleged claim of the applicant that the respondent Company did not allot 1,73,000 shares of the Company to the applicant pursuant to the Scheme of Amalgamation is a subject-matter of the said Scheme, which is governed by the provisions of Companies Act, 1956. According to the respondent, the claim advanced by the applicant does not arise out of the purported SHA dated December 1, 2005 and any issue arising out of the Scheme of Amalgamation has to be addressed to the Company Court that has sanctioned the Scheme of Amalgamation. It is mentioned in the reply that the arbitration clause relied upon by the applicant is one contained in the purported agreement between the applicant and the Exatt and brings within its ambit only those transactions which are contemplated in the purported agreement and as 6920 equity shares were allotted to the applicant by Exatt under SHA dated December 1, 2005, the said Agreement was fully performed by the parties and, therefore, there is no scope for any dispute under the purported agreement to be referred to Sole Arbitrator for adjudication. According to the respondent the purported Share Subscription and Shareholders Agreement dated December 1, 2005, relied upon by the applicant, is a document which is described at' the foot of the said document as "preliminary and tentative draft for discussion purpose only", but thereafter no further and/or other document was executed between the applicant and Exatt and, therefore, the said Agreement is not enforceable at law. It is also claimed by the respondent that the document dated December 1,

2005 is unstamped and is, therefore, devoid of legal effect. What is asserted in the reply is that to be eligible for allotment of shares of respondent Company as per the Scheme a member must be registered member of Exatt and his name should be entered in the register of members of Exatt, but the applicant was not a member of Exatt as borne out by the register of members of the said Company and, therefore, question of allotment of shares under the Scheme of Amalgamation does not arise at all. It is further mentioned in the reply that SHA document dated December 1, 2005 defines "closing" to mean consummation of the transactions contemplated in the agreement and "closing date" means the date on which the closing of transaction occurs, which shall be in no event later than 1st September, 2005, which is a date preceding the date of document, i.e., December 1, 2005 and is incapable of implementation as well as void. It is further mentioned in the reply that as per Article 2 of SHA subscription to shares by the applicant and issue thereof by the Exatt is subject to the applicant obtaining an approval from appropriate regulatory and statutory authorities including approval of FIPB for subscription of shares before the closing date and the applicant providing certified copy of such approval to Exatt as well as satisfying Exatt that the applicant is permitted to subscribe, but Article 2 of the SHA is not complied with by the applicant and, therefore, the instant application deserves to be dismissed.

4. The applicant has filed affidavit in rejoinder reiterating the averments made in the application. It is pointed in the rejoinder that the interest of Exatt under the SHA is devolved upon the respondent pursuant to the orders passed by the High Courts of Bombay and Bangalore sanctioning the Scheme of Amalgamation under Sections 391 and 394 of the Companies Act, 1956 and as the liabilities of Exatt stood transferred to the respondent Company, the respondent Company is liable to issue shares to the applicant Company as per the terms and conditions incorporated in the SHA. It is asserted that from the correspondence between the parties and the conduct of Exatt as well as the respondent, it is clear that as SHA is signed and acted upon by the parties, which stood affirmed by reason of conduct of the parties and, therefore, it is wrong to say that the said Agreement was preliminary and tentative, draft for discussion purpose only. After referring to Clause 4.3 of the SHA, it is stressed that the said Clause stipulates that if the closing does not occur on the closing date or on a date extended under Clause 4.2, the Exatt would have the option of purchasing CISCO equipment from the applicant for a consideration of US$ 400,000 and forwarding of Xerox copy of the Share Certificate dated December 31, 2006 to the applicant indicates that while acting under the terms of the SHA the said Xerox copy of the Share Certificate was issued to the applicant. It is mentioned in the rejoinder that since Exatt neither paid the amount for CISCO equipment that was due to the applicant under the SHA nor returned the same to the applicant nor allotted the shares as stipulated in the SHA, the issues raised by the respondent in reply affidavit can be decided only by the Arbitrator and, therefore, the application should be accepted.

5. This Court has heard the learned Counsel for the parties at length and in detail. This Court has also considered the documents forming part of the application. From the record of the case it is evident that pursuant to SHA dated December 1, 2005 the applicant had supplied CISCO equipment to Exatt delivery of which was acknowledged without any demur as to quantity or quality. There is no manner of doubt that under the SHA Exatt was under an

obligation to issue and allot 6920 equity shares of Rs. 10/- each to the applicant and in discharge of said purported obligation the Exatt had issued a Xerox copy of the Share Certificate No. 6 dated December 31, 2006 mentioning that 6920 equity shares of Rs. 10/- each of the Exatt were issued and allotted to the applicant. Further, it is an admitted position that the applicant was never issued original Share Certificate by Exatt indicating that 6920 equity shares of Rs. 10/- each of Exatt were issued and allotted to the applicant Company. As the shares were not issued and allotted to the applicant Company, the name of the applicant Company was never mentioned in the register of members of Exatt. There is also no manner of doubt that under the Scheme of Amalgamation all the debts, liabilities, contingent liabilities, obligations and guarantees of Exatt stood transferred to the respondent Company.

6. After emphasizing that it is admitted by the applicant in paragraph (4) of notice dated July 31, 2008 that in terms of S.H.A., the Exatt issued and allotted 6920 equity shares of Rs. 10/- each to the applicant, it was argued on behalf of the respondent that the only dispute referred by the applicant to the respondent in terms of Section 21 of the Act is that the respondent failed to allot 1,73,000 shares under the scheme of amalgamation, which does not arise under S.H.A. and, therefore, no question of appointing an arbitrator arises at all. While dealing with this contention, the Court finds that the assertion made on behalf of the applicant that the Exatt had not issued and allotted shares to the applicant in terms of the S.H.A., is well founded. What was dispatched by the Exatt to the applicant was Xerox copy of share certificate bearing No. 6 dated December 31, 2006 mentioning that the applicant-company was treated as the registered holder of 6920 equity shares of Rs. 10/- each. There is no manner of doubt that the respondent company is successor-in-interest of the Exatt. No document could be produced by the respondent to show that in fact 6920 equity shares were issued and allotted by the Exatt to the applicant company. If, in fact, 6920 equity shares had been issued and allotted by the Exatt to the applicant, the name of the applicant company would have found place in the Register of Members of the Exatt. However, it is in no uncertain terms admitted by the respondent company in paragraph 4.1 of its counter affidavit that "the question of allotting shares to the applicant did not arise at all as applicant was not a member of the said Exatt as evidenced by the Register of members of the said Exatt". In the light of these glaring facts, the so called admission made by the applicant in its notice dated July 31, 2008 will have to be viewed. The admission sought to be relied upon by the respondent company reads as under:

> 4. In terms of the arrangement embodied in the SHA, Exatt issued and allotted 6920 equity shares of Rs. 10 each to GCI under a share certificate No. 6 dated 31.12.2006. The name of GCI seems to have been entered in the Register of Members at Folio No. 6. A copy of the original share certificate was forwarded to GCI, however, the original share certificate was not provided to GCI.
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> "A reasonable reading of the above quoted admission makes it clear that the applicant stated that in terms of the arrangement embodied in the S.H.A., Exatt issued and allotted 6920 equity shares of Rs. 10/- each because a copy of share certificate No. 6 dated December 31, 2006 was forwarded by the Exatt to the applicant. The applicant was not sure whether the name of the applicant was entered in the Register of

Members of Exatt and, therefore, it was stated that the name of the applicant seems to have been entered in the Register of Members at Folio No. 6. The applicant had, in terms, stated that the original share certificate was not provided to it. It is well settled that admission previously made can be allowed to be explained in order to show that it was erroneous. The maker of the admission can very well show that the facts admitted are not correct. In the present case, the applicant company has not only explained the so called admission to show that it was erroneous but has successfully demonstrated that the facts admitted are not correct. Therefore, the applicant company cannot be non-suited on the basis of so called admission made in paragraph 4 of the notice dated July 31, 2008. There is no manner of doubt that a dispute has arisen between the parties regarding entitlement of applicant Company for allotment of 6920 equity shares of Rs. 10/- each under the SHA as well as further allotment of shares under the Scheme of Amalgamation sanctioned by the High Courts of Bombay and Bangalore under Sections 391 and 394 of the Companies Act, 1956. The dispute raised by the applicant is in respect of non-transfer of shares of Exatt by the respondent to the applicant under SHA dated December 1, 2005. This dispute is an arbitrable dispute because of Clause 11.7 of the SHA. This is not a dispute which arises under the Scheme of Amalgamation and, therefore, the contention that the present issue, which arises out of Scheme of Amalgamation, should be addressed to the Company Court that sanctioned the Scheme of Amalgamation, or that the applicant should approach the Company Tribunal under Section 111A of the Companies Act, is devoid of merits.

7. The plea that the SHA dated December 1, 2005 was preliminary and tentative draft for discussion purposes only and, therefore, the relief claimed in the application should be refused, has no substance. The assertion made by the applicant Company that it had supplied CISCO equipment worth US$ 400,000 could not be demonstrated to be untrue. There is no reason for this Court to refuse to believe the claim advanced by the applicant Company that it supplied CISCO equipment to Exatt, delivery of which was acknowledged by the said Company without any demur as to quantity or quality. The correspondence referred to by the applicant in the rejoinder affidavit would indicate that the SHA dated December 1, 2005 was fully acted upon and the parties, i.e., applicant and Exatt thereafter never contemplated execution of further documents. It is relevant to mention that a Xerox copy of the SHA dated December 1, 2005 is produced by the applicant at Annexure A-1 along with the instant application. It indicates that it was signed by Mr. K. Bhavnani on behalf of the applicant Company pursuant to the resolution passed by the Board of Directors of the applicant Company whereas it was signed by Mr. Parind Parekh on behalf of the Exatt Technologies Private Limited pursuant to the resolution passed by the Board of Directors of the said Company. This Court finds that SHA dated December 1, 2005 was further acted upon when Xerox copy of the Share Certificate No. 6 dated December 31, 2006 indicating issuance and allotment of 6920 equity shares of Rs. 10/- each to the applicant Company was forwarded by the Exatt to the applicant Company. On the facts and in the circumstances of the case it is difficult to uphold the contention of the respondent that SHA dated December 1, 2005 was preliminary and tentative draft for discussion purpose only and, therefore, the applicant is not entitled to the relief claimed in the application.

8. The plea that the Arbitration Agreement is not duly stamped and, therefore, the application should be dismissed has no merit at all. Section 2(1)(b) of the Arbitration and Conciliation Act, 1996 defines the term "arbitration agreement" to mean an agreement referred to in Section 7. Sub-section (2) of Section 7 further provided that an arbitration agreement may be in the form of an arbitration clause in a contract or in the form of a separate agreement. Here the facts of the case make it very clear that the Arbitration Agreement is in the form of an arbitration clause, i.e., Clause No. 11.7 incorporated in the SHA dated December 1, 2005. The law does not provide that arbitration clause incorporated in a contract should be stamped. Therefore, the plea that Arbitration Agreement is not stamped and therefore the applicant is not entitled to relief, cannot be accepted.

9. The other contentions raised by the learned Counsel for the respondent relate to the merits of the claim raised by the applicant and, therefore, not dealt with in detail because those questions and/or disputes will have to be resolved by the Arbitrator after the parties lead evidence in support of their respective claims. In the present application, the Court is essentially concerned with the question whether a valid arbitration agreement with reference to live claim exists between the parties and whether conditions for the exercise of power under Section 11(6) are fulfilled. There is no manner of doubt that the respondent company is successor-in-interest of Exatt. After amalgamation of Exatt, with the respondent, all the liabilities and obligations of Exatt, including those mentioned in SHA dated December 1, 2005 stood transferred, in law, to the respondent company. This position of law was fairly admitted by the learned Counsel for the respondent at the time of hearing of the application. Even Clause 3.3 of the Scheme of Amalgamation inter-alia specifically provides that the respondent company will be bound by all the obligations and liabilities of any nature of Exatt. Therefore, Clause No. 11.7 of SHA dated December 1, 2005 is applicable to the respondent company in the same manner as it was applicable to Exatt. On the facts of the case, it is held that there exists a valid arbitration agreement between the parties. It is an admitted position that shares have not been issued by the respondent to the applicant and reason stated by the respondent for not issuing/allotting shares to the applicant is that the applicant was not a member of Exatt. The grievance of the applicant relates to non-payment of consideration for supply of equipment to Exatt under SHA dated December 1, 2005. The further dispute raised by the applicant relates to non-issuance of shares by the respondent in terms of Amalgamation Scheme entered into between Exatt and the respondent company. Thus the disputes are very much live and surviving. As far as fulfillment of conditions stipulated in Section 11(6) of the Act are concerned, this Court finds that procedure for appointment of arbitrator was agreed upon between the parties in Clause 11.7 of SHA dated December 1, 2005. The record clinchingly establishes that the respondent failed to act as required under that procedure in spite of service of notice dated July 31, 2008. The agreement on the appointment procedure does not provide other means for securing the appointment of a Sole Arbitrator. Therefore, the conditions precedent set out in Section 11(6) of the Act are completely satisfied and the applicant is entitled to approach the Court for securing appointment of Sole Arbitrator for resolution of the disputes, which have arisen between the parties. It is nobody's case that retired Mr. Justice Dhanuka is in any manner disqualified to act as Sole Arbitrator. Thus, the broad tests for appointment of an arbitrator as

laid down by the Court in *S.B.P. and Co. v. Patel Engineering*[1] (para 47), are fully satisfied in the instant case. Under the circumstances this Court is of the opinion that the application will have to be allowed.

10. For the foregoing reasons, the application succeeds. Mr. Justice D.R. Dhanuka (a retired Judge of Bombay High Court) is appointed as Sole Arbitrator to adjudicate the disputes between the parties that have arisen under the SHA dated December 1, 2005. The learned Arbitrator is requested to enter upon the reference as early as possible and do the needful in accordance with law. The learned Arbitrator would be entitled to determine his own fees receivable from the parties. It is made clear that no part of the dispute is decided by this Court on merits and all the questions including arbitrability of the dispute are left open to be decided by the learned Arbitrator. Subject to above mentioned clarifications, the application is allowed. There shall be no order as to costs.

[1]*(2005) 8 SCC 618*