
(2013) 12 MP CK 0200

Madhya Pradesh High Court

Case No: Writ Petition No. 6557 of 2013

M/s. Jabalpur Corridor
(India) Pvt. Ltd. and
Another

APPELLANT

Vs

M.P. Road
Development
Corporation Ltd. and
Others

RESPONDENT

Date of Decision: Dec. 4, 2013

Citation: (2014) 1 MPHT 215 : (2014) 2 MPLJ 276

Hon'ble Judges: Alok Aradhe, J

Bench: Single Bench

Advocate: Vivek Tankha and Mr. Rishabh Sancheti, for the Appellant; P.K. Kaurav, Aditya Khandekar and Mr. Vishal Vijayawargiya, for the Respondent

Final Decision: Allowed

Judgement

@JUDGMENTTAG-ORDER

Alok Aradhe, J.

In this petition under Article 227 of the Constitution of India, the petitioners, inter alia, seek quashment of the order dated 19-2-2013 passed by the Trial Court, by which the application u/s 14 of the Arbitration and Conciliation Act, 1996 (in short "the 1996 Act") filed by respondent No. 1 seeking termination of mandate of Arbitral Tribunal, has been allowed. The background facts, leading to filing of this petition, briefly stated, are that the petitioner No. 1 is a company incorporated under the provisions of the Companies Act, 1956. The respondent No. 1 invited the tender for construction of Sagar-Damoh-Jabalpur road. The tender submitted by the petitioner No. 1 was accepted and concession agreement dated 11-4-2003 was entered into between the petitioner No. 1 and the respondent No. 1 with regard to construction and maintenance of Sagar-Damoh-Jabalpur road on BOT basis. Thereafter, the petitioner, respondent No. 1 and the Government of

Madhya Pradesh entered into a State Support Agreement on 14-4-2003 under which State Government guaranteed the implementation of terms and conditions of the concession agreement by respondent No. 1. The respondent No. 1 vide letter dated 12-7-2007 rescinded the contract under Clause 32.2 of the concession agreement on the ground that the petitioner could not complete the work within the stipulated time. Clause 39 of the concession agreement provides for settlement of the dispute through arbitration under the 1996 Act. After protracted correspondence, the petitioner appointed Mr. R.C. Chugh as an Arbitrator under Clause 39 of the concession agreement whereas the respondent No. 1 appointed one Mr. K. Shankar Narayanan as an Arbitrator vide letter dated 9-3-2011. The two nominated Arbitrators appointed Mr. K.K. Sethi as Presiding Arbitrator in the meeting of the Arbitrators which was held on 5-4-2011.

2. The petitioner filed the statement of claim before the Arbitrator on 16-7-2011. The respondent No. 1 raised a preliminary objection u/s 16 of the 1996 Act on the ground of limitation and for not exhausting the procedure for amicable settlement prescribed in the agreement. The respondent No. 1 also filed statement of defence and counter-claim before the Arbitral Tribunal. The matter was heard by Arbitral Tribunal on 23rd, 24th and 25th June, 2012. The respondent No. 1 filed an application u/s 16 of the 1996 Act in which challenge to the jurisdiction of the Arbitral Tribunal was made on the ground that the dispute between the parties has to be adjudicated under the M.P. Madhyastham Adhikaran Adhiniyam, 1983 (hereinafter referred to as "the 1983 Act") and not under the 1996 Act. The Arbitral Tribunal by order dated 25-6-2012 rejected the application submitted by the respondent No. 1 u/s 16 of the 1996 Act and determined the Rules of procedure of arbitration.

3. The respondent No. 1 thereafter filed an application u/s 14 of the 1996 Act before the District Judge, Bhopal on the ground that Arbitral Tribunal has become de jure and is unable to perform its function. The Trial Court vide order dated 27-6-2012 granted interim stay of the proceeding before the Arbitral Tribunal. The petitioner filed reply to the application for stay. The Trial Court vide order dated 28-7-2012 after hearing the parties vacated the ad interim order of stay. The respondent No. 1 in a petition under Article 227 of the Constitution of India challenged the order dated 28-7-2012 passed by the Trial Court. The writ petition was disposed of by a Bench of this Court on 3-10-2012 with the direction to the Trial Court to expeditiously decide the arbitration case pending before it. Thereafter, the Trial Court vide order dated 19-2-2013 inter alia held that a works contract cannot be termed as a concession agreement merely because the mode of payment has been changed. It was further held that the proceeding under the 1996 Act is invalid and the dispute between the parties has to be adjudicated under the 1983 Act. In the aforesaid factual backdrop, the petitioner has approached this Court.

4. Learned Senior Counsel for the petitioner while referring to definition clauses of the agreement, namely, Clauses 1.1.18 and 1.1.37 as well as Clauses 3 and 9 of the concession agreement submitted that there is a difference between the concession agreement and works contract. It is further submitted that the respondent No. 1 itself in

Paragraph 11(c) in the statement of defence filed before the Arbitral Tribunal has admitted that the contract in question is a concession agreement therefore, the respondent No. 1 cannot be permitted to change its stand now. In support of his aforesaid submission, learned Senior Counsel has placed reliance on the Constitution Bench decision of the Supreme Court in [Electronics Corporation of India Ltd. and Others Vs. Secretary, Revenue Department, Govt. of Andhra Pradesh and Others,](#) . It is further submitted that the concession agreement specifically provides that the dispute between the parties has to be resolved in accordance with the provisions of the 1996 Act. Learned Senior Counsel while referring to the decision of the Supreme Court in [Va Tech Escher Wyass Flovel Ltd. Vs. M.P.S.E. Board and Another,](#) and [Ravikant Bansal Vs. M.P. Rural Road Development Authority and Another,](#) , submitted that the Supreme Court has held that 1983 Act applies where there is no arbitration clause in the contract, and where the agreement itself mentions that arbitration would be under 1996 Act, then in such a case the dispute has to be adjudicated by the Arbitral Tribunal under the 1996 Act. Reliance has also been placed on the decision of the Supreme Court in M/s. A.P.S. Kushwaha Vs. Municipal Corporation, Gwalior and others. Civil Appeal No. 1888-89/2011.

5. It was also submitted that even assuming the concession agreement to be a works contract, since the works contract is itself repudiated and is not in existence by virtue of its termination, the dispute between the parties has to be referred to an Arbitrator under the 1996 Act in view of decision of the Supreme Court in [M.P. Rural Road Development Authority and Another Vs. L.G. Chaudhary Engineers and Cont.,](#) . It was also argued that though the decision in the L.G. Choudhary (supra), has been referred for consideration to a Larger Bench, yet the High Court can decide the lis pending before it. In support of the aforesaid submission, learned Senior Counsel has placed reliance on the decision in the case of [Ashok Sadarangani and Another Vs. Union of India \(UOI\) and Others,](#) . Attention of this Court has been invited to several concession agreements executed by the respondent No. 1 upto 2013, in which the clauses clearly stipulate resolution of the dispute under the 1996 Act, whereas in case of works contract, the clauses in the works contract provide for resolution of the dispute under the 1983 Act. Lastly, it is urged that the stand taken by the respondent No. 1 before this Court that the concession agreement is a works contract is nothing but an afterthought.

6. On the other hand, learned Counsel for the respondents submitted that if the concession agreement is read in its entirety, it would be clear that the same is a works contract and the definition of works contract is vast and inclusive and even the consultancy services in respect of the works contract have been held to be works contract. In this connection, reference has been made to the decisions in M/s. Technogem Consultants Pvt. Ltd. Vs. General Manager, M.P. Rural Road Development Authority, AIR 2007 (NOC) 1105 MP and [D.D. Sharma through Shri R.B. Singh, Attorney Vs. Madhya Pradesh Rural Roads Development Authority,](#) . It was also submitted that in Paragraph 11(c) of the reply filed before the Arbitral Tribunal, in fact, there is no admission. It is a case of drafting error which has been caused inadvertently and in any

case there cannot be admission against law. In this regard, reference has been made to the decisions in the cases of [Jalandhar Improvement Trust Vs. Sampuran Singh](#), and [Madan Gopal Kanodia Vs. Mamraj Maniram and Others](#), . It was further submitted that under Clause 44.3 of the concession agreement, even after termination of the contract, the rights and obligations of the parties shall be governed by the 1983 Act, and the order passed by the Trial Court does not suffer from any error apparent on the face of record warranting interference by this Court in exercise of power under Article 227 of the Constitution of India. Reliance has also been placed on the decisions in [Surya Dev Rai Vs. Ram Chander Rai and Others](#), , [Shalini Shyam Shetty and Another Vs. Rajendra Shankar Patil](#), and [Radhey Shyam and Another Vs. Chhabi Nath and Others](#), .

7. I have considered the respective submissions made by learned Counsel for the parties. The 1983 Act is an Act enacted under Entry 13 of List III of Seventh Schedule of the Constitution of India and is a special enactment which provides for the establishment of a Tribunal to arbitrate in disputes to which the State Government or a Public Undertaking wholly or substantially owned or controlled by the State Government is a party and for the matters incidental thereto or connected therewith. Sections 2(d) and (i) of the 1983 Act, which define the expressions "dispute" and "works contract", respectively, read as under:--

2. Definitions.-- (d) "dispute" means claim of ascertained money valued at Rs. 50,000/- or more relating to any difference arising out of the execution or non-execution of a works contract or part thereof.

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2. (i) "works contract" means an agreement in writing for the execution of any work relating to construction, repair or maintenance of any building or superstructure, dam, weir, canal, reservoir, tank, lake, road, well, bridge, culvert, factory, workshop, powerhouse, transformers or such other works of the Government may, by notification, specify in this behalf at any of its stages entered into by the State Government or by an official of the State Government or Public Undertaking or its official for and on behalf of such Public Undertaking and includes an agreement for the supply of goods or material and all other matters relating to the execution of any of the said works.

Section 7(1) of the 1983 Act provides that either party to a works contract shall irrespective of the fact whether the agreement contains an arbitration clause or not, refer in writing the dispute to the Tribunal.

8. In the light of provisions of 1983 Act, which require parties to refer their dispute mandatorily to the Tribunal constituted under the 1983 Act, irrespective of arbitration clause, the singular issue which arises for consideration in the instant petition is whether the concession agreement in question is a works contract as defined u/s 2(i) of the 1983 Act, or not. It is well-settled in law that construction of contract must depend upon the

import of words used and the intention of the parties must be ascertained from the language employed in the contract and the object of the contract. The contract has to be read as a whole in order to ascertain its true meaning. [See: [Bank of India and Another Vs. K. Mohandas and Others](#),]. The Court seeks to give effect to the parties' intention to refer disputes to arbitration and to allow the Tribunal full jurisdiction except in cases of hopeless confusion. [See: Russel on Arbitration, Twenty Third Edition Page 68].

9. In view of aforesaid well-settled legal position, the provisions of the concession agreement executed between the petitioner No. 1 and the respondent No. 2 need to be examined. The parties have described the agreement as "concession agreement". Under the aforesaid agreement, the respondent No. 1 had granted the petitioner concession for a period of 5440 number of days, commencing from the commencement date including the right, licence and authority during the subsistence of the agreement to implement the project and the concession in respect of the project highway. The petitioner was awarded the work of construction and maintenance of 176 kilometres of road forming the part of National Highway No. 37. Clause 9 of the agreement defines the obligations of the petitioner No. 1 whereas Clause 10 thereof defines obligations of the respondent No. 1. Clause 39.3.1 provides that any dispute which is not resolved amicably as provided in Clauses 39.1 and 39.2 shall be finally decided by reference to arbitration by a Board of Arbitrators as per the provisions of the 1996 Act. Clause 44.3 of the agreement provides that termination of the agreement shall not relieve either party of their obligations or liabilities for the loss or the damage caused to the other party arising out of or caused by acts or omissions of such party prior to the effectiveness of such termination or arising out of such termination.

10. From perusal of the agreement, it is evident that under the agreement, the petitioners are under an obligation to prepare a detailed design, engineering, financing, procurement, construction, operation and maintenance of the project road. Thus, the project is deemed to be leased out to the petitioners for maintenance as well as collection of toll and regular entry and exit taking care of the project road, till the expiry of the concession period. The agreement provides execution of EPC contract and other contracts for execution of the project. The petitioner was also at liberty to employ other contractors for items of works as considered necessary for execution of the project. The petitioner, respondent No. 1 as well as the State Government have entered into an agreement, namely. State Support Agreement on 14-4-2003 in pursuance of the concession agreement. From perusal of the State Support Agreement, it is evident that it forms an integral part of concession agreement. From perusal of Clause A-F of the agreement, it is evident that concession agreement has been made part of State Support Agreement. Clause 3 of the aforesaid agreement provides the duties of the Government of Madhya Pradesh whereas Clause 4 contains the petitioner's obligation under the agreement. Clause 7 provides for breach and compensation to the petitioner No. 1 respectively by the Government of Madhya Pradesh as well as by the respondent No. 1. Under Clause 8.3 of the agreement, the Government of Madhya Pradesh is made liable to indemnify the petitioner No. 1 for any

payment required to be made by it with respect to levy of any local taxes. It is pertinent to mention here that Clause 9 of the State Support Agreement also provides that a dispute between the parties shall be resolved as per the 1996 Act.

11. The expression "works contract" as defined in the 1983 Act has a restricted meaning and has special and limited connotation and the same does not include detailed design, financing and operation of the contract. The works contract is a lump sum contract wherein the contractor has to quote the amount for execution of the work based on details furnished by the employer. There is no necessity for creation of any Escrow Account in works contract. In works contract, the payment is made against the running account bills prepared by contractor and submitted to the employer periodically. Whereas in concession agreement, the concessionaire has to utilise and arrange the funds. The concessionaire under the agreement after completion of the construction recovers the amount invested by him for completion of the project by way of toll. No State Support Agreement is executed in case of a works contract whereas the same is executed in a case of concession agreement. It is pertinent to mention here that the petitioner is not liable to pay Value Added Tax, Sales Tax and other taxes under the concession agreement, which are payable under the works contract. The aforesaid salient features clearly show that there is distinction between the works contract and concession agreement. As stated supra, the State Support Agreement forms an integral part of concession agreement and both have to be read together. By no stretch of imagination, State Support Agreement can be termed as "works contract", and both the aforesaid agreements contain provisions with regard to resolution of dispute under 1996 Act. For this reason also, concession agreement cannot be termed as works contract.

12. It is well-settled in law that commercial documents must be construed in a manner as understood in commercial parlance. [See: [Administrator of the Specified Undertaking of the Unit Trust of India and Another Vs. Garware Polyester Ltd.](#),]. It is pertinent to mention here that admittedly respondent No. 1 has entered into as many as seventeen concession agreements between the period from 7-8-2009 till 8-8-2012 and in each of the concession agreements, the clause provides that the dispute shall be resolved under the 1996 Act. The respondent No. 1 between the period of February, 2009 till October, 2012 has entered into six agreements which are works contracts. The same clearly provide that the dispute between the parties shall be resolved as per the provisions of the 1983 Act. The aforesaid facts goes a long way to show that the respondents have clearly understood the distinction between the works contract and the concession agreement and have consciously chosen the Forum provided under the 1996 Act.

13. In Paragraph 11(c) of the statement of claim filed before the Arbitral Tribunal, the petitioner stated that the contract value of the concession agreement is Rs. 89.78 Cr. whereas the contract value of EPC contract is Rs. 120 Cr. In this context, the respondent No. 1 in Paragraph 11(c) of the statement of defence has stated as follows:--

That as far as the contents of Para 11(c) is concerned it is improper to state that the value of contract was 89.78 Cr. It is submitted that the present is not a works contract but a concessionaire agreement. It is submitted that concession agreement was on BOT basis for reconstruction, strengthening, widening and rehabilitation of 176 km. road and its operation and maintenance to be executed through concession on build, operate and transfer basis concession agreement is the agreement for concession period. The tenders were invited for concession period. The EPC contract means contract or contracts entered into by the concessionaire with one or more contractors for the detailed working, design, engineering, procurement of material and equipment construction. The contract value of such contract is the mutual settlement between EPC contractors and concessionaire and respondent has no role in that. As per agreement prior approval for entering EPC contract has to be taken. The higher cost of EPC contract entered by claimant is his own will and respondent are not concerned with that.

14. Thus, both the parties have clearly understood the agreement to be a concession agreement and had consciously taken a decision that the dispute between the parties shall be resolved under the 1996 Act. The respondent No. 1 in view of its admission made in Paragraph 11(c) of the statement of defence filed before the Arbitral Tribunal cannot be permitted now to contend that the agreement in question is a works contract, as admission in the pleading stands on a higher footing than evidentiary admission and is fully binding on the party making such an admission. [See: [Nagindas Ramdas Vs. Dalpatram Ichharam alias Brijram and Others](#),].

15. Even assuming that the agreement in question is not a works contract, yet for another reason the dispute between the parties has to be resolved under the provisions of 1996 Act. In V.A. Tech Escher Wyass Flovel Ltd. (supra), a two-Judge Bench of Supreme Court held that 1996 Act would apply when there is an arbitration clause, whereas 1983 Act would apply where there is no arbitration clause. In Ravikant Bansal (supra), a two-Judge Bench of the Supreme Court held that where an arbitration clause mentions that arbitration would be governed by M.P. Arbitration Tribunal, in such cases, 1983 Act would apply.

16. Again a two-Judge Bench of Supreme Court by judgment dated 17-2-2011 in A.P.S. Kushwaha (SSI Unit) (supra), while dealing with a dispute arising out of an agreement with regard to maintenance of water supply and electric works in different parts of Gwalior Municipal Corporation area, which is also a works contract, while taking note of the judgment of Supreme Court in V.A. Tech Escher Wyass Flovel Ltd. (supra), held that if the contract between the parties contains an arbitration clause, the provision of 1996 Act would apply. However, it is pertinent to mention here that another two-Judge Bench of the Supreme Court in case of L.G. Choudhary (supra), inter alia, held that all disputes pertaining to works contract have to be statutorily referred to the Tribunal set up under the 1983 Act. However, there was divergence of opinion with regard to issue whether the dispute regarding cancellation/determination of such works contract can be referred to arbitration under the 1983 Act. In view of the aforesaid divergence of opinion, the matter

has been referred for consideration by a Larger Bench and the view taken by in V.A. Tech Escher Wyass Flovel Ltd. (supra), has been held to be per incuriam.

17. It is pertinent to mention here that in the case of L.G. Choudhary (supra), the Supreme Court has not taken note of earlier decision rendered by a two-Judge Bench in the case of A.P.S. Kushwaha (SSI Unit) (supra). A Special Bench of this Court in the case of [Jabalpur Bus Operators Association and Others Vs. State of M.P. and Another](#), has held that in case of a conflict between decisions of Supreme Court comprising equal number of Judges, decision of earlier Bench is binding. Therefore, the ratio laid down by a two-Judge Bench of Supreme Court in A.P.S. Kushwaha (SSI Unit) (supra), which is prior in point of time, is binding on this Court. For this reason also, the dispute between the parties has to be referred to the Arbitral Tribunal under the 1996 Act. In view of the preceding analysis, it is evident that the order passed by the Trial Court suffers from an error apparent on the face of record and, therefore, the same cannot be sustained in the eye of law. The dispute between the parties has to be resolved under the provisions of the 1996 Act. In the result, the impugned order dated 19-2-2013 passed by the Trial Court is hereby quashed and the writ petition is allowed. However, there shall be no order as to costs.