

IN THE HIGH COURT AT CALCUTTA
Civil Appellate Jurisdiction
(COMMERCIAL DIVISION)
Original Side

Present:- Hon'ble Justice I. P. Mukerji
Hon'ble Justice Md. Nizamuddin.

APO 11 of 2021
AP 405 of 2020

Gannon Dunkerley and Co. Ltd.
Vs.
SREI Equipment Finance Ltd.

For the Appellant	:	Mr. Mainak Bose, Ms. Sweta Gandhi Murgai, Mr. Vinay Saraf, Adv.
For the Respondent	:	Mr. Swatarup Banerjee, Mr. Abhijit Sarkar, Mr. Ayan Chakraborty, Mr. Hareram Singh, Adv.
Judgment on	:	23.03.2021.

I. P. MUKERJI, J.-

Only one point was urged in this appeal: there is no arbitration agreement between the parties. Hence, the respondent could not have invoked Section 9 of the Arbitration and Conciliation Act, 1996 in this court or anywhere else seeking the protective measure of appointment of a Receiver over the equipments in question.

On 7th January, 2021 in a Section 9 application a learned single judge of this court appointed a Receiver over the assets under Sl. Nos. 3 to 6 of Annexure IV of the Memorandum of Understanding for settlement dated 30th June, 2020 between the parties with a direction to take their actual physical possession. It was held by the learned judge that as “lessee” of equipments the appellant had failed and neglected to pay the agreed amount of “lease rent” under the said memorandum and that these assets needed protection.

On 20th January, 2021 the appeal from this order was admitted and expedited with a modification in the impugned interim order to the effect that the Receiver could take possession of the assets but would not remove them from the site. The appellant would not use the equipments in any manner whatsoever.

Whether or not there was an operative arbitration clause requires an examination of the transaction between the parties and the execution of agreements between them.

On 26th June, 2017 an agreement described as the “Master Facility Agreement” was executed between them. Under this agreement the respondent was to provide financial assistance to the appellant to purchase equipments. The loan was to be repaid in instalments. These assets were charged in favour of the respondent. It appears that as and when the instalments were paid, the hypothecation in favour of the respondent would be partly released.

Clause 9.11 of the agreement provided for dispute resolution by arbitration. The clause is inserted below:

“9.11 Dispute Resolution

Any disputes or differences arising out of or in connection with the Contract during its subsistence or thereafter between the parties including any disputes and differences relating to the interpretation of the agreement or any clause thereof shall be settled by arbitration in accordance with the provisions of the Arbitration and Conciliation Act, 1996 and rules framed there under and any amendment, modification, statutory enactment thereto from time to time and shall be referred to the Arbitration of a sole Arbitrator appointed by the Company upon intimation to all parties to this Agreement. The proceedings shall be held at Kolkata. The cost of the proceedings shall be borne by the parties to this Agreement. The award of the arbitrator shall be final, conclusive and binding on all the parties.”

In or about the end of June, 2020 it so happened that the appellant's dues climbed up to about Rs.82.43 crores. The parties sat down to settle their disputes. This ended up with the execution of a document described as "a Memorandum of Understanding for Settlement" on 30th June, 2020. The parties settled their outstanding at Rs.72 crores to be paid according to the Repayment Schedule mentioned in Annexure IV of the Memorandum. The equipments would continue to remain hypothecated till the entire settled amount was repaid. However, a part of the assets would be released by the respondent on timely repayment by the appellant.

Now, this subsequent agreement between the parties did not contain an arbitration agreement as a clause of that agreement.

The contentions raised by Mr. Mainak Bose, learned Counsel appearing for the appellant are broadly as follows:-

The agreement of 30th June, 2020 was an entirely new agreement between the parties in supersession of the Master Facility Agreement of 2017. It did not, according to learned counsel, contain an arbitration clause. Neither was the arbitration clause in the original agreement incorporated or deemed to be incorporated in the memorandum of understanding. He said that mere reference to the arbitration clause in the memorandum would not suffice. It had to be made part of the agreement by specific incorporation which had not been done. Various clauses of the memorandum, to which I shall refer later were read by learned Counsel in an attempt to prove this point.

The self same clauses were referred to by Mr. Swatarup Banerjee, learned counsel for the respondent in his effort to show that the arbitration clause had been duly incorporated.

Before discussing the submission of learned Counsel for the parties, it is very necessary to set out certain clauses of the agreement which are very relevant for the purpose of this appeal:

Whereas:

A) Upon being approached by the Borrower, SEFL and the Borrower had entered into a Master Facility Agreement dated 26th June, 2017, (herein after to be referred as “MFA”) and pursuant thereto various Contacts/Tranche Schedule(s) (as more fully and specifically detailed in Annexure I herein below) were executed from time to time as per the requisition placed by Borrower to avail financial assistance to purchase various assets for its business on such terms and conditions as contained in the said MFA and respective Tranche Schedule(s) thereto. The said Assets which are detailed in the respective tranches and/or other relevant documents, are exclusively charged and hypothecated in favour of SEFL against repayment of the facility under the subject Tranche Schedule(s) read with MFA.....

DEFINITIONS:-

In addition to the terms defined in the Recitals of this MOU, unless repugnant to the meaning or context thereof the following words and terms shall have the meaning set out below:-

i) MOU shall mean this Memorandum of Understanding for Settlement along with all Recitals, schedules, annexures as appended hereto, as may be amended and modified in writing and is supplementary to the Master Facility Agreement (MFA) read with respective Tranches Schedule(s).....

4) This MOU shall be valid for period of 6 months from its date of execution, provided that if the Borrower fails to comply with any of its obligations under this MOU including payment of Instalments strictly as per Annexure IV for any reason whatsoever or in any manner whatsoever, and/or makes any further default as described under MFA, the following would be the consequences of default in addition to the consequences of events of default as mentioned in MFA:-

- a) SEFL may, notwithstanding anything else stated in this MOU, cancel, suspend, terminate, withdraw with retrospective effect, all or any of the relief and/or concessions provided to the Borrowers under this MOU,*
- b) The Total claim of Rs.82,43 Crores (Rupee Eighty Two crores Forty-three Lacs Only) excluding the amount paid if any under this MOU would be forthwith due and payable by the Borrower to SEFL alongwith interest @18% p.a till full and final realization to the satisfaction of SEFL.*
- c) Borrower would immediately and unconditionally surrender all the assets/securities hypothecated and/or charged to SEFL except those forming part of the contract, if any, in respect of which the instalment as mentioned in the Repayment Schedule IV has been paid by the Borrower.*
- d) SEFL shall have the right to take possession and/or sell the hypothecated assets and collateral properties offered against this settlement as mentioned in Annexure V without any further reference to Borrower.*
- 6) Parties hereby agree that on occurrence of any default by the Borrower under this MOU, they will fall back to MFA read with tranche Schedule(s) and SEFL would be at liberty to execute and enforce all the rights in terms of the MFA including but not limited to the right to initiate Arbitration under the respective Arbitration Clause of MFA besides taking any other action available law against the Borrower to realize the Total Claim amount to which Borrower would not raise any objection.*
- 10) The borrower hereby agrees and confirms that this MOU is supplementary to the MFA earlier executed between the parties and executed bona fide for the purpose quantifying the claim of SEFL as on date and for settlement of the disputes between the parties amicably.*

Apart from the terms specifically modified herein, all other terms and conditions of the MFA including Clause pertinent to Governing Law and Jurisdiction will remain unchanged and binding on the parties and SEFL has full rights and authorities to refer back to the MFA in case of my inconsistency of this MOU or default by the Borrower's obligation.

Mr. Bose submitted that the memorandum was a new, complete and valid agreement without an arbitration clause. It was in complete supersession of the Master Facility Agreement. The former had been completely novated and supplemented by the Memorandum creating new rights and liabilities. By referring to Clause 6, he submitted that it was only a reference to the Master Facility Agreement in the sense that in the event of any default in the performance of any condition in the Memorandum by the appellant, the respondent would be at liberty to “fall back” on the Master Facility Agreement and enforce rights thereunder. This did not mean or imply that the arbitration clause in the Master Facility Agreement was incorporated in the Memorandum. The description of the Memorandum as a supplementary agreement was proof of the fact that it was a subsequent agreement.

Learned counsel cited paragraphs 12 and 15 of the Section 9 application. They are as follows:

12. *The petitioner had accordingly accommodated the Respondent but unfortunately after payment of first two installments due and outstanding on 30th June, 2020 and 15th July, 2020 in terms of repayment schedule mentioned in the said MOU dated 30th June, 2020 and after taking NOC with regard to 17 tranches the respondent have deliberately committed breach with regard to repayment of the settlement amount due and outstanding from 30th July, 2020 in connection with remaining tranches as mentioned in the said repayment schedule executed under the Master Facility Agreement dated 26th June, 2017 to the petitioner.*

15. *In the aforesaid circumstances and in view of the failure on the part of the respondent in making payment of the said outstanding amount of Rs.76,24,58,000/- the petitioner in accordance with the terms and conditions of the said MOU by a notice issued by its Advocate dated 10th October, 2020 immediately called for making payment of the then outstanding dues of Rs.74,41,30,630/- to your Petitioner together with further interest thereon until payment at the agreed rate provided under the said agreement. The respondent also requested to surrender all the assets/securities, hypothecated and/or charged including all the collateral properties offered against this settlement in terms of the default clause of the said MOU. A copy of the said notice is annexed hereto and marked with the Annexure 'D'.*

He also submitted that the cause of action of the respondent in that application was based on the alleged breach by the appellant of the terms and conditions of the memorandum which shows that the memorandum was treated as a separate agreement.

Mr. Swatarup Banerjee learned Counsel appearing for the respondent submitted that the existence of the arbitration clause was not questioned before the learned single Judge. It was raised for the first time on appeal. He cited Section 7(5) of the Arbitration and Conciliation Act, 1996 which is as follows:

“7(5) *The reference in a contract to a document containing an arbitration clause constitutes an arbitration agreement if the contract is in writing and the reference is such as to make that arbitration clause part of the contract.”*

He argued that the above clauses of the contract not only referred to the master facility agreement but had the effect of incorporating the arbitration clause into the memorandum.

DISCUSSION

First, the law on the subject has to be looked into.

The root case is **Union of India vs. Kishorilal Gupta & Bros.** reported in **AIR 1959 SC 1362** cited by Mr. Bose. The law was stated by Mr. Justice K. Subba Rao thus:

“The following principles relevant to the present case emerge from the aforesaid discussion: (1) An arbitration clause is a collateral term of a contract as distinguished from its substantive terms; but nonetheless it is an integral part of it; (2) however comprehensive the terms of an arbitration clause may be, the existence of the contract is a necessary condition for its operation; it perishes with the contract; (3) the contract may be non est in the sense that it never came legally into existence or it was void ab initio; (4) though the contract was validly executed, the parties may put an end to it as if it had never existed and substitute a new contract for it solely governing their rights and liabilities thereunder; (5) in the former case, if the original contract has no legal existence, the arbitration clause also cannot operate, for along with the original contract, it is also void ; in the latter case, as the original contract is extinguished by the substituted one, the arbitration clause of the original contract perishes with it; and (6) between the two falls many categories of disputes in connection with a contract, such as the question of repudiation, frustration, breach etc. In those cases it is the performance of the contract that has come to an end, but the contract is still in existence for certain purposes in respect of disputes arising under it or in connection with it. As the contract subsists for certain purposes, the arbitration clause operates in respect of these purposes.”

In **Young Achievers vs. IMS Learning Resources Private Limited** reported in **(2013) 10 SCC 535** also cited by Mr. Bose, Kishorilal Gupta was referred to. The facts of that case were somewhat similar to ours in the sense that the original agreements dated 1st April, 2007 and 1st April, 2010 between the parties were followed by a new agreement dated 1st February, 2011 described as the “Exit Paper”. The court held that the subsequent

agreement was in complete supersession of the original agreement and hence the arbitration clause also were superseded and did not survive.

The facts and decisions in **Zenith Drugs & Allied Agencies Pvt. Ltd. Represented by its Managing Director, Shri Uday Krishna Paul vs. Nicholas Piramal India Ltd.** reported in **2019 SCC OnLine SC 946** were similar.

The parties entered into the Master Facility Agreement on 26th June, 2017 and the Memorandum of Understanding on 30th June, 2020. They were two agreements at two different points of times. The Master Facility Agreement contained an arbitration clause. The Memorandum of Understanding did not contain such a clause.

The parties may well enter into two contracts covering the same transaction at different points of time. Let us assume that in the first agreement there is an arbitration clause. In the second agreement there is none.

If the second contract supersedes the first contract, the arbitration clause perishes upon execution of the second agreement.

The second contract may not supersede the first contract. Both may be separate running contracts between the same parties.

Whether the Memorandum was in supersession of the Master Facility Agreement by novation or was just in modification thereof? Whether there were two parallel agreements between the parties with regard to the same transaction or series of transactions? Whether the second agreement has incorporated some of the terms and conditions of the first agreement? Is it a separate agreement but upon happening of a certain contingency the terms and conditions of the second agreement necessarily became incorporated into it?

The term which is relevant for our consideration is the arbitration clause in the Master Facility Agreement.

In my view, the arbitration clause need not be stated to be specifically incorporated in a subsequent agreement, between the parties. One has to examine the meaning of the words used by them. If the word are unambiguous, no further exercise is required. If the language is a little ambiguous the intention of the parties has to be ascertained as to whether they intended the arbitration clause to be part of the subsequent agreement and to be governed by it to resolve their disputes arising from them or either. The intention of the parties may be express or implied but it has to be clear from the agreement.

Certain clauses of the Memorandum are very important. In its definition part it is stated that it would be supplementary to the Master Facility Agreement (see definition Clause i). In Clause 4 defaults were described as non-compliance with the requirement of the Memorandum as well as of the Master Facility Agreement. Clause 6 stated that in case of any default by the appellant in payment under the document the terms and conditions of payment under the Master Facility Agreement would revive. More importantly Clause 6 stated that all the rights under the Master Facility Agreement could be enforced, with special emphasis on the arbitration clause. Clause 10 made it plain that “apart from the terms specifically modified herein, all other terms and conditions of the MFA (Master Facility Agreement) including Clause pertinent to Governing Law and Jurisdiction will remain unchanged and binding on the parties”.

That the Memorandum of Understanding was described as supplementary to the Master Facility Agreement goes to show that the latter and the memorandum would operate concurrently, as one agreement. Only those parts of the Master Facility Agreement which had been modified by the Memorandum were made inoperative, temporarily. However, they would become instantly operative on the breach of specified terms and conditions in the Memorandum. There is no supersession of the Master Facility Agreement by the Memorandum. Hence, the court is not called upon to

adjudge whether on supersession of the Master Facility Agreement the arbitration clause in it was incorporated in the later agreement. Both agreements operated simultaneously. The later agreement was supplementary to the original agreement. It is evident from the intention of the parties that this supplementary agreement was subject to the arbitration clause as well. The draftsmen of the Memorandum were careful enough to say that the arbitration clause in the Master Facility Agreement continued to govern the supplementary agreement also. That is to say it was deemed to have been incorporated in the Memorandum. No further specific incorporation of the arbitration clause, in my opinion, was necessary.

Hence, the Section 9 application before the Hon'ble First Court invoking the arbitration clause in the Master Facility Agreement and the Memorandum was maintainable.

This appeal has no merit and is accordingly dismissed. The interim order in appeal is vacated.

Certified photocopy of this order, if applied for, be supplied to the parties upon compliance with all requisite formalities.

I agree,

(MD. NIZAMUDDIN, J.)

(I. P. MUKERJI, J.)