DHV BV

v.

TAHAL CONSULTING ENGG. LTD. & ORS.

SEPTEMBER 12, 2007

[D.K. JAIN, J.]

Arbitration and Conciliation Act, 1996:

s. 11—Appointment of arbitrator—Powers of appointing authority—Nature and scope of—Held: For the purpose of deciding whether arbitral procedure is to be set into motion or not, the CJ or his designate has to examine and record his satisfaction that an arbitration agreement exists between parties and that in respect of the agreement a live issue, to be decided between parties, still exists—On being so satisfied, he may allow the application and appoint an arbitral tribunal or a sole arbitrator, as the case may be—However, if he finds and is convinced that the claim is a dead one or is patently barred by time, he may hold so and decline the request for appointment of an Arbitrator.

s.11(6)—Application for appointment of arbitrator after completion of contract—Consultancy contract—Agreement between parties stipulating income tax liability to be borne by employer on payments to be made by it to consultant—After completion of contract and payments received for services rendered, consultant received notice from Income Tax Department u/s 148 of Income Tax Act—Claim regarding payment of Income Tax on remittance made by employer to consultant in respect of the contract—On the questions: (i) Whether after completion of contract there is still an enforceable arbitration agreement between the parties and (ii) whether claim of consultant was stale and barred by limitation—Held: It was performance of contract that had come to an end, but contract is still in existence insofar as the dispute arising under clause 1.10 thereof, i.e., liability to pay income tax on payments made to consultant, is concerned—An enforceable arbitration agreement exists between the parties—Claim made by consultant in respect of income tax dues would fall within the ambit of arbitration agreement between parties—Subsequent creation of an additional payment by Income Tax Department in respect of payment by employer to consultant has given rise to a live dispute

A *requiring settlement between parties in terms of arbitration agreement— Thus, prima facie, claim made by consultant is not barred by limitation— Therefore, application allowed—Arbitrator appointed.*

SBP & Co. **v.** *Patel Engineering Ltd. & Anr.,* **[2005] 4 SCR Supp. 688, [2005] 8 SCC 618, relied on.**

B

CIVIL ORIGINAL JURISDICTION : Arbitration Petition No. 17 of 2006

(Under Section 11(6) of the Arbitration and Conciliation Act, 1996)

Sanjay Bansal, H.S. Bhatti, G.K. Bansal and Reepak Kansal for the C Petitioner.

Pramod Dayal and R. Nedumaran for the Respondents.

The Order of the Court was delivered by

D **D.K. JAIN, J.** 1. This is a petition under Section 11(6) of the Arbitration and Conciliation Act, 1996 (for short 'the Act') for the appointment of an Arbitrator for adjudication of the disputes which are stated to have arisen between the parties.

2. The petitioner M/s DHV Consultants BV (for short 'DHV') is a foreign E company registered in Netherlands, providing consultancy and engineering group services in aviation; spatial planning in environment, transportation and water with expertise in water management and water planning. Respondent No.1 - M/s Tahal Consulting Engineers Limited (hereinafter referred to as 'Tahal') is also a consultant foreign company based in Israel and respondent No.2 is the Water Resources Organisation, PWD, Government of Tamil Nadu F (hereinafter referred to as 'TNPWD').

3. The facts, relevant for the disposal of this petition, are as follows:

On 1st December, 1997, an agreement (hereinafter referred to as the 'main contract') was signed between Tahal and TNPWD, with DHV and two G other concerns, namely, Lahmeyer International of Germany and Consulting Engineering Services (India) Ltd., as sub-consultants, for providing management consultancy and technical assistance services for the Tamil Nadu Water Resources Consolidation Project. Subsequently, in March, 1998, a further sub-consultancy agreement (hereinafter referred to as the 'sub-contract') was H signed between Tahal and DHV for providing services in respect of the main

contract, scope whereof was defined in the conditions of both the said agreements. A

4. As per clause 1.10 of the special conditions of the main contract, TNPWD had agreed to bear the Income tax liabilities on payments to be made by it to the consultant, sub-consultants and their personnel. DHV was to receive all the payments through Tahal, being the principal consultant. The B contract was duly performed and DHV received all payments in respect of the invoices raised by them for the services rendered. The last payment was received some time in January, 2003 and the matter rested there.

5. Some time in February, 2004, DHV received notices from the Income Tax Department under Section 148 of the Income Tax Act in respect of the C assessment years 1997-98 to 2001-02, alleging non-payment of Income tax on the remittances made by TNPWD in respect of the said contract. They were required to submit their returns of income for the said assessment years. Seemingly, DHV objected to the said notices but later on submitted the requisite returns of income, including therein the receipts from TNPWD. D According to DHV, on receipt of the said notices they learnt that the respondents had defaulted in making payment of applicable taxes on the payments made by TNPWD to Tahal, which resulted in the creation of additional Income tax demand of Rs. 30,40,149/- which they were forced to pay to avoid penal consequences.

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6. Having paid the said additional demand on 15th March, 2005, DHV issued legal notices to Tahal and TNPWD, asking them to settle the dispute amicably in terms of clause 8.1 of the General Conditions of the main contract, dated 1st December, 1997. However, both the respondents denied their liability to reimburse the said amount to DHV. On refusal of the respondents to settle F the controversy, on 21st April, 2005, DHV issued yet another notice to the respondents demanding reference of the disputes to sole arbitration in terms of clause 8.2 of the main contract. Both the respondents refused to refer the disputes to arbitration, necessitating the filing of the present petition for the appointment of an Arbitrator.

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7. Both Tahal and TNPWD have filed counter affidavits resisting the petition. Tahal's objection is that : (i) the main contract under which DHV had demanded arbitration had expired almost four-five years prior to the filing of the application and, therefore, there was no existing arbitration agreement between the parties; (ii) not being a technical matter, the alleged dispute did

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A not fall within the ambit of clause 8 of the General Conditions of the Agreement (main contract) and (iii) at no point of time Tahal was under any contractual obligation relating to payment of taxes, such obligation being solely and strictly that of TNPWD. TNPWD opposes the petition mainly on the ground that: (i) DHV being a sub-consultant has no *locus standi* to invoke the arbitration agreement *qua* them as no payment was received by DHV directly B from TNPWD; (ii) the claim of DHV is barred by limitation inasmuch as the main contract was over on 31st March, 2002 and (iii) there was no cause of action to file the petition because whatever Income tax was to be deducted on payments to Tahal - the principal consultant, was duly deposited with the State Bank of India and requisite details were filed with the Income tax C department.

8. I have heard learned counsel for the parties. As noted above, the objection of the respondents to the appointment of Arbitrator is mainly two-fold viz. (i) after the completion of the main contract in March/April, 2002 and on final payment on 30th January, 2003, the contract came to an end and, D therefore, there was no valid arbitration agreement in existence and (ii) the claim of the DHV is stale and barred by limitation.

9. In support of the proposition that the entire tax obligation under the contract has been duly discharged, learned counsel for the TNPWD invited my attention to some correspondence with the Income tax authorities, wherein E the rate at which Income tax was to be deducted on payment under the contract has been indicated. Learned counsel for the respondents further submitted that in view of the decision of this Court in *SBP & Co.* v. *Patel Engineering Ltd. & Anr.*[1], the issues raised have to be adjudicated by me. Learned counsel for the DHV, on the other hand, contended that the F controversy regarding the tax liability in terms of clause 1.10 cannot be said to be stale because it arose only when DHV received notice from the Income tax department in February, 2004, requiring them to pay Income tax on the amounts received from TNPWD. It is also submitted that prior to the receipt of the said notices, DHV had no cause to complain, having received full payments against the invoices raised. It is, thus, pleaded that the cause of G action to ask for settlement of their claim arose only in the month of February, 2004. Further, the stand of learned counsel for the DHV is that issue of limitation is not to be finally decided by me as the same is to be conclusively decided by the Arbitrator under Section 16 of the Act.

H 1. [2005] 8 SCC 618.

10. Thus, the question for consideration before me is : (i) whether after the completion of the contract in March/April 2002, there is still an enforceable arbitration agreement between the parties and (ii) whether the claim made by DHV is stale and barred by limitation?

11. The controversy in regard to the nature of function to be performed by the Chief Justice or his designate under Section 11 of the Act has been set at rest by a seven-Judge Bench decision of this Court in *SBP's* case (supra). It has been held, per majority, that the function performed by the CJ or his nominee under the said Section is a judicial function. Defining as to what the CJ or his designate is required to determine while dealing with an application under Section 11 of the Act, P.K. Balasubramanyan, J, speaking for the majority said:

> "39. It is necessary to define what exactly the Chief Justice, approached with an application under Section 11 of the Act, is to decide at that stage. Obviously, he has to decide his own jurisdiction in the sense, whether the party making the motion has approached the right High Court. He has to decide whether there is an arbitration agreement, as defined in the Act and whether the person who has made the request before him, is a party to such an agreement. It is necessary to indicate that he can also decide the question whether the claim was a dead one; or a long barred claim that was sought to be resurrected and whether the parties have concluded the transaction by recording satisfaction of their mutual rights and obligations or by receiving the final payment without objection. It may not be possible at that stage, to decide whether a live claim made, is one which comes within the purview of the arbitration clause. It will be appropriate to leave that question to be decided by the arbitral tribunal on taking evidence, along with the merits of the claims involved in the arbitration. The Chief Justice has to decide whether the applicant has satisfied the conditions for appointing an arbitrator under Section 11(6) of the Act. For the purpose of taking a decision on these aspects, the Chief Justice can either proceed on the basis of affidavits and the documents produced or take such evidence or get such evidence recorded, as may be necessary. We think that adoption of this procedure in the context of the Act would best serve the purpose sought to be achieved by the Act of expediting the process of arbitration, without too many approaches to the court at various stages of the proceedings before the Arbitral Tribunal."

A 12. It is clear from the above extracted paragraph that in order to set into motion the arbitral procedure, the CJ or his designate has to decide the issues, if raised, regarding territorial jurisdiction and existence of an arbitration agreement between the parties. In addition thereto, he can also decide the question whether the claim was a dead one in the sense that the parties have already concluded the transaction by recording satisfaction of their mutual B rights and obligations or have recorded satisfaction regarding their financial claims. Nevertheless, the Court made it clear that at that stage it may not be possible to decide whether a live claim made, is one which comes within the purview of the arbitration clause and this question should be left to be decided by the arbitral tribunal on taking evidence. It is, therefore, plain that C purely for the purpose of deciding whether the arbitral procedure is to be set into motion or not, the CJ or his designate has to examine and record his satisfaction that an arbitration agreement exists between the parties and that in respect of the agreement a live issue, to be decided between the parties, still exists. On being so satisfied, he may allow the application and appoint an Arbitral Tribunal or a Sole Arbitrator, as the case may be. However, if he D finds and is convinced that the claim is a dead one or is patently barred by time, he may hold so and decline the request for appointment of an Arbitrator.

13. Applying these principles on facts in hand, I am of the opinion that the petition deserves to be allowed. In this context, it would be appropriate E to refer to clause 1.10 of the special conditions of the contract forming part of the main contract, to which all the parties herein are signatories. Insofar as it is relevant for our purpose, it reads as under:

"1.10 ... xxx.....xxx.....xxx

F *For Foreign Consultants/Personnel*

The Client warrants that the client shall pay on behalf of the Consultants and the Personnel any taxes, duties, fees, levies and other impositions imposed, under the Applicable Law, on the consultants and the Personnel in respect of:

G (a) any payments whatsoever made to the Consultants, Sub-Consultants and the Personnel of either of them (other than Indian Nationals or Foreign Nationals now permanently residing in India), in connection with the carrying out of the Services;

(b) any equipment, materials and supplies brought into India by H the Consultants or Sub-consultants for the purpose of carrying

out the Services and which after having been bought into such territories will be subsequently withdrawn therefrom by them;

(c) any equipment imported for the purpose of carrying out the Services and paid for out of funds provided by the client and which is treated as property of the client.

(d) Any property brought into India by the Consultants, any sub-consultants, the Personnel of either of them (other than Indian nationals or permanent residents of India), or the eligible dependants of such Personnel for their personal use and which will subsequently be withdrawn therefrom by them upon their respective departure from India, provided that:

(1) the consultants, sub-consultants and personnel and their eligible dependants, shall follow the usual customs procedures of the Government in importing property into India; and

(2) If the consultants, sub-consultants or personnel, or their eligible dependants, do not withdraw but dispose of any property in India country upon which customs duties and taxes have been exempted, the consultants, sub-consultants or personnel, as the case may be,

(i) shall bear all such customs duties and taxes in conformity with the regulations of the Government.

(ii) Shall reimburse them to the client if they were paid by the client at the time the property in question was brought into the Government's country."

14. Under the said clause, TNPWD, as a client had taken upon itself the obligation to pay on behalf of the consultants, sub-consultants and the personnel any taxes, dues, fees, etc. imposed under the applicable law. At the same time, it is significant to note that as per clause (d) thereof, not only there is an obligation to pay taxes etc. in certain situations, reimbursement of some of the amounts by the consultants to the client, which the client was compelled to pay, is also postulated. Obviously, such a situation may arise and this clause would be enforceable even after the expiry of the contract on completion of the services and on the payments having been made. Therefore, it cannot be laid as an abstract proposition that whenever the contracted work is completed, all the rights and obligations of the parties under the contract, *ipso facto,* come to an end and the arbitration agreement also perishes with

A the contract. Each case is required to be considered on its own facts. In the instant case, though it is true that all the payments were to be made by TNPWD to the consultants, namely, Tahal, but the obligation to pay taxes was also in respect of the payments which were to be received by the sub-consultants, namely, DHV in terms of sub-clause (a). Similarly, DHV as well as Tahal was under an obligation to reimburse to TNPWD the amount, if any, B paid by them in terms of the aforenoted clause. Thus, it was the performance of the contract that had come to an end, but the contract is still in existence insofar as the dispute arising under clause 1.10 thereof is concerned. I have, therefore, no hesitation in rejecting the plea of learned counsel for the TNPWD that DHV had no direct contract with them insofar as the payments of taxes C were concerned, and, therefore, the dispute raised by them could not fall within the ambit of arbitration agreement between TNPWD - the client and Tahal - the consultant or that on completion of the contract, the arbitration clause in the main contract got extinct. In my opinion, therefore, an enforceable arbitration agreement exists between the parties.

D 15. Clause 8.2 of the main contract provides for the right to arbitration and reads as follows:

> "8.2 Right to Arbitration
>
> Any dispute between the parties as to matters arising pursuant to this E contract which cannot be settled amicably within thirty (30) days after receipt by one Party of the other Party's request for such amicable settlement, may be submitted by either Party for arbitration in accordance with the following provisions:
>
> xxx..xxx..xxx"

F 16. The arbitration agreement is in clear terms and brings within its ambit any dispute between the parties as to matters arising pursuant to the main contract which cannot be settled amicably. Admittedly, the liability to pay the taxes flows from the contract and not otherwise. Having found that it was obligatory upon TNPWD to discharge the tax liability in respect of the G payments made to the sub-consultants and DHV being a signatory to the main contract, I am of the opinion that claim made by DHV in respect of the Income tax dues would fall within the ambit of the arbitration agreement between the parties.

H 17. As regards the question as to whether the said claim can be said

to be stale in the sense that after the last payment in January, 2003, none of the three parties herein had any pending claims against each other insofar as the payments under the main contract were concerned, I am of the view that notwithstanding the fact that payments against all the invoices raised by DHV stood paid, in the light of the agreement between the parties in terms of clause 1.10, subsequent creation of an additional payment by the Income tax department in respect of the payments made by TNPWD to DHV through Tahal, has given rise to a live dispute requiring settlement between the parties in terms of the arbitration agreement. For the view I have taken, it is axiomatic that *prima facie*, the claim made by DHV is not barred by limitation.

18. For the aforesaid reasons the petition is allowed and as prayed by learned counsel for the parties, instead of constituting an Arbitral Tribunal, Justice P.K. Balasubramanyan, a former Judge of this Court, is appointed as the Sole Arbitrator to adjudicate upon the claims/disputes raised by DHV, subject to his consent and such terms as he may deem fit and proper. Needless to add that the learned Arbitrator shall deal with the matter uninfluenced by any observation in this order on the rival stands of the parties.

19. The Registry is directed to communicate this order to the learned Arbitrator to enable him to enter upon the Reference and decide the matter as expeditiously as practicable. The petition stands disposed of with no order as to costs.

R.P. Arbitration petition disposed of.