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Scope of the Application of the Arbitration clause to the Non- Concluded Contract: PSA Mumbai Investment Pvt. Ltd. v Jawaharlal Nehru Port Trust

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Owing to the dramatic increase in the number of cases filed in Indian courts in recent years, which has contributed to pendency and delays, there is an obvious need for alternate conflict resolution mechanisms. As a new, less combative approach to settling legal problems, Conflict Management via Alternative Dispute Resolution (ADR), which was adopted by the Indian legal system to replace adversarial litigation, has emerged. As a result, terms in contracts that request arbitration in the case of a disagreement are more popular these days. The lawsuit in the case discussed in this article was also brought under Section 7 of the Arbitration and Conciliation Act, 1996, and the author here examines all of the case's many features in relation to Section 7 of the Indian Contract Act, 1872.

Keywords: *contract, arbitration, non-concluded contract.*

INTRODUCTION

The Hon'ble Supreme Court by its judgment dated September 11, 2018, in the case titled *PSA Mumbai Investments Pte. Limited v The Board of Trustees of the Jawaharlal Nehru Port Trust and Ors*¹. numbered as **Civil Appeal No. 9352 of 2018 (Arising out of SLP (C) No. 8166 of 2018)**, set aside the order passed by the Honorable Bombay High Court in an application under **Section 37(2) of the Arbitration and Conciliation Act, 1996**² in an appeal under Section 7 of the Indian Contract Act, 1872³. The Case was presided over by the **Honorable Mr. Justice Rohinton Fali Nariman** and the **Hon'ble Ms. Justice Indu Malhotra**.

The case mainly revolves around the application of **Section 7(1) of the Indian Contract Act, 1872**⁴ which says:

Acceptance must be absolute. – To convert a proposal into a promise the acceptance must – “

*(1) be absolute and unqualified*⁵;

The present case is about the conclusion of the agreement and the application of the Arbitration clause of the agreement to the same. The present appellant contends that the agreement's arbitration clause is not applicable as the acceptance of the agreement was neither absolute nor unqualified. However, the respondent contends that the Bombay High Court was correct in dismissing the order of the Arbitrator at the first stage where the arbitrator ruled that he does not have any jurisdiction in the proceedings. The Bombay High Court ruled that the Agreement was concluded and the arbitration clause applied to the proceedings. Therefore, the appellant has approached Supreme Court for the final verdict and relief.

¹ *PSA Mumbai Investments Pte. Limited v The Board of Trustees of the Jawaharlal Nehru Port Trust and Ors* (2018) 10 SCC 525

² Arbitration and Conciliation Act 1996, s 37(2)

³ Indian Contract Act 1872, s 7

⁴ Indian Contract Act 1872, s 7(1)

⁵ *Ibid*

FACTS OF THE CASE

A major port created under the Major Port Trusts Act is the Respondent (No.1) in the present suit. It launched a global request for qualifications in 2009, asking for applications for the design, build, finance, operate, and transfer of the fourth container terminal project. Various bidders submitted offers in response to the RFQ. Requests for Proposals ("RFP") were sent to the consortium, which included the appellant in the present suit, a Singapore-based subsidiary of PSA International Pte. Ltd., as the main member, and Respondent No. 2, M/s. ABG Ports Private Limited. In October 2010, the consortium filed its response to a request for proposals.

The appellant group was recognized as the successful bidder for the Project after the financial bid was launched in June 2011. The appellant Consortium received a Letter of Award from Respondent No.1 on September 26, 2011, which it accepted, and sent a signed copy to Respondent No.1 on September 29. The Concession Agreement had to be signed within 30 days of the letter of acceptance's date, according to clause 6 of the Letter of Award⁶. The appellant, however, prevented the Concession Agreement from being signed because they first objected to paying stamp duty on the Agreement, claiming that it was not required to be registered, and then because of disputes among themselves that led Respondent No. 2, who held a 26% share in the Consortium, to ask the Respondent No.1 to permit Respondent No.2 to resign as a member. Considering the Minister of Shipping and Ministry of Law's decision that a change in composition could not be permitted at this late date, Respondent No.1 once more requested that the Consortium sign the Concession Agreement in a letter dated August 30, 2012⁷.

The appellant restated its request to allow the change in the composition of the Consortium in its letter dated September 15, 2012, in response to Respondent no. 1's Show Cause notice. The Appellant was competent to satisfy all the tender documents' requirements on its own as well. By letter dated October 16, 2012, Respondent No.1 cancelled the letter of acceptance given to the appellant Consortium and cashed the Rs. 67 crore bank guarantees given by the appellant.

⁶ *PSA Mumbai Investments Pte. Limited* (n 1)

⁷ *Ibid*

Respondent No. 1 then issued a claim in a letter dated November 26, 2014, requesting Rs. 4,46,28,46,454 in damages from the consortium. The appellant demanded that Respondent No.1 renounce its claim and disclaim all responsibility. Respondent No.1 then invoked the arbitration provision in Clause 19.3 of the Concession Agreement by issuing a notice of arbitration on February 18, 2015⁸.

The appellant applied *Section 16(2) of the Arbitration and Conciliation Act 1996*⁹, among other things, to challenge the Ld. The arbitrator's jurisdiction to continue the arbitration proceedings. The Appellant argued that because the parties had mutually agreed to extend the date of the Concession Agreement's execution due to certain important issues regarding the agreement's stamping, the consortium had mutually agreed to extend the date of their respective executions during that time.

Additionally, it was argued that because the parties did not sign the concession agreement, which contained the arbitration clause, there was no binding contract between them. It was argued that since the parties had not signed an arbitration agreement, Respondent No.1's use of the unsigned arbitration clause and the Ld. The arbitrator's subsequent request for a preliminary meeting to get clarification was ex-facie, improper under the law, and unsupportable. The Ld. Arbitrator approved the application made by the appellant and denied Respondent No.1's request to send the matter to the Arbitral Tribunal because there was no arbitration agreement between the parties and no basis for doing so.

Respondent No.1 filed a petition under *Section 37(2)(a) of the Arbitration and Conciliation Act, 1996*¹⁰ to overturn the ruling by t of the Ld. Arbitrator. The Ld. Arbitrator was instructed to move quickly with the arbitration proceedings after the Hon'ble High Court of Bombay ruled in favour of the petitioner, setting aside the Ld. Arbitrator's contested order, and restoring the arbitration process to file. Additionally, it was decided that the parties have the arbitration agreement listed in Clause 19.3 of the Concession Agreement. The appellant in the present suit

⁸ *Ibid*

⁹ Arbitration and Conciliation Act 1996, s 16(2)

¹⁰ Arbitration and Conciliation Act 1996, s 37(2)(a)

filed the petition in the Supreme Court contending the decision of the Bombay High Court and prayed to set aside the same on the grounds of *Section 7 of the Indian Contract Act*¹¹ as the acceptance to the agreement was never provided.

ISSUES OF THE CASE

- Whether the acceptance of the Letter of Award will be considered an agreement.
- Whether the concession agreement in the tender document (request for proposal- RFP) containing an arbitration clause would be binding between the parties.

ARGUMENTS ADVANCED

Appellant's Side

Through his learned counsel, Mr. Amit Sibal, the appellant made the detailed and extensive submission before the court. He contends that on the reading of both RFQ and RFP, the first thing that should be noted is the disclaimer which clearly states that neither document will be construed to be an agreement between the parties. Second, he heavily relies on the Schedule and the definition of "bid process" in the RFQ and RFP to demonstrate that the Letter of Award is not an unconditional acceptance of an offer made and must instead wait for a contract to be signed in the form of a Concession Agreement between Respondent No. 1 and Anr. The entity, namely the Special Purpose Vehicle established for the purpose, before proceeding. This is true at least insofar as the present tender is concerned. The Senior Advocate further emphasized the significance of keeping in mind that the bid process starts with the RFQ and ends with the signing of the Concession Agreement.

The learned Senior Advocate asserts that the Mumbai courts alone will have exclusive jurisdiction to resolve any disputes that may develop between the parties under the RFQ and the RFP up until such a Concession Agreement is executed. The arbitration clause won't take effect until after Respondent No. 1 and the Special Purpose Vehicle enter into a concession agreement, at which point it will govern any disagreements that may arise regarding the

¹¹ Indian Contract Act 1872, s 7

performance of the agreement between those two parties after the concession agreement. He also heavily relied on a clause in the RFP form that made this clearer still, as it stated that Respondent No. 1 might cancel the bid process up until the point at which the Concession Agreement was signed, but not after that. He also placed a lot of weight on the letter from October 16, 2012, by which the earlier Letter of Award was "withdrawn," demonstrating that no agreement had been reached between the parties because, in the absence of it, the term would have been "terminated".

Additionally, he heavily relied on the RFP text to demonstrate that the bid may be submitted by either a single entity or a consortium. He then showed us a clause in the RFP form that allowed for changes to the consortium if the appellant maintained the lead member. He claims that if left to its own devices, Respondent No. 1 would have accepted the shift from the Consortium to a single company based on this paragraph. However, defying the bid document, Respondent No. 1 sought confirmation from the Ministry of Shipping, who declined to do so. He summed up by saying that the application of the arbitration clause would be wholly "inapt" as stated above, "There is no concluded contract."

Respondent

Through his respected counsel, Respondent No.1 relied on the various clauses of the RFQ and RFP and statutory laws. He claimed that the draught Concession Agreement would take precedence over the RFP in the event of a conflict between the two documents, which he believed to be a crucial component of the RFP. Therefore, he claimed that the contradictory Courts Clause is invalid because the parties' arbitration agreement rules them.

Therefore, the courts of Mumbai would be protected by having exclusive authority there. Additionally, he claimed that the bidder accepted the Letter of Award in his favour, which constituted a legally binding agreement between the parties, and signed each page of the draught Concession Agreement, indicating that they would be subject to the arbitration clause therein. He made a strong case that it could never have been imagined that the Respondent No. 1 would have to go through a legal process rather than an arbitration process if disputes arose

during the bid process, and he asked us to examine the agreement by its purpose as well as how a man of commerce would do the same.

He concluded by saying even if the High Court ruling were incorrect, we should not use our discretionary jurisdiction. Given that a revenue sharing ratio of 50.8:49.2 has now been decreased, in a new tender between the Appellant and Respondent No. 1, to 35:65 due to the Appellant's action, a large income loss has been discerned under Article 136 of the Indian Constitution.

JUDGEMENT AND RATIONALE

The Honorable Supreme Court held that the RFQ explicitly specifies in a disclaimer that nothing in the RFQ shall be interpreted as constituting an agreement between the parties. Everything that is written in the RFQ provisions is merely there to inform potential bidders about the work that must be done. The bid itself went through two stages: the first was the eligibility step, and the second was the request for proposal stage. Due to the consortium's qualification in the first round, they were qualified to be taken into consideration under an RFP document published by Respondent 1 on July 6, 2010. It was stated in this document that nothing in the RFP should be interpreted as constituting an agreement between the parties, like the RFQ. The RFP's sole purpose was to let the consortium know exactly what was expected of it when it submitted its financial proposal for a future deal.

It is interesting to note that, despite the absence of a concession agreement between Respondent 1 and a special purpose vehicle established by the consortium for that purpose, the complex bid process will be governed by Indian law and Mumbai's courts will have exclusive jurisdiction over any disputes that may arise from or relate to the process even though there is no agreement at this stage.

Another crucial provision is that, until a concession agreement is signed, as previously indicated above between the special purpose vehicle and Respondent 1, the Jawaharlal Nehru Port Trust (Respondent 1) may terminate the bid process without providing any explanation. A draught concession agreement that is included in the RFP and is therefore regarded as a component of

the consortium bid is also very significant. An arbitration clause was present in this draught concession agreement.

Clauses 1.1.2, 1.1.5, 1.1.6, 1.2.3, 1.2.6, 1.2.7, 1.3, 2.1.4, 2.2.1, 2.2.2, 2.5.2, 2.6.1, 2.7.2, 2.11.2, 2.14, 2.14.1, 2.14.2, 2.14.3, 2.14.4, 2.20.7, 3.3.5, 3.3.6, and 6.1 of the RFP can be read together to reveal the following: (i) First and foremost, a disclaimer at the top of the RFP makes it clear that the parties are simply engaged in a bid process and that no contract has been signed between them; (ii) It is equally obvious that such a bid procedure would include a letter of award to be issued by Respondent 1, as well as two additional steps to be taken according to the schedule, before the draught concession agreement finally becomes an agreement between Respondent 1 and the special purpose vehicle that was formed by the consortium for this purpose; (iii) that the Mumbai courts will be the sole forum for dispute resolution throughout the bid process, and (iv) that up until the signing of the concession agreement, Respondent 1 has the right to void the bid process for any reason at all.

The letter of the award itself, dated September 26, 2011, as acknowledged by the appellant, would indicate that even after the letter of award, a special purpose vehicle exclusively to implement the project would have to be set up. This special-purpose vehicle would be known as the concessionaire. Furthermore, the concession agreement is anticipated to be signed within 30 days of the issuance of this letter of award, and the bid security provided by the appellant shall remain in effect until the special purpose vehicle furnishes the performance guarantee for an amount equal to Rs 3350 million.

The acceptance must be unconditional and absolute by *Section 7 of the Contract Act of 1872* to transform a proposal into a promise. Given the circumstances of this case, it is evident that the letter of award has not been received in its entirety and without reservation; Before an agreement could be deemed to exist that would be enforceable in law as a contract between the parties, two or three extremely crucial stages had to be taken. There would be no agreement between the parties unless a purchase order was issued. All the events that occurred before the placement of such a purchase order would merely have been the prologue to a contract, which should not be mistaken with the contract itself. It is well recognized that, if there is a binding

agreement between the parties, a simple mention of a future written contract will not prohibit it. However, there are instances where the parties did not intend to be bound until a formal contract was formed, as evidenced by the language used to refer to a future contract.

It is evident from paragraph 17 of the judgement that no contract had been finalized at the time of the letter of award. The fact that there is no agreement between the parties in the facts of this case makes it evident that the arbitration clause in the draught concession agreement would not be applicable. If the parties had an arbitration clause, it would be completely inappropriate because it would only apply to disputes between a special purpose vehicle and Respondent 1 arising from a concession agreement that had not yet been signed. It would not apply to disputes between Respondent 1 and the appellant and Respondent 2.

ANALYSIS

According to me, The Bombay High Court said in the case that while signing the concession agreement following the receipt of the letter of award was one of the requirements that the appellant consortium had to follow, it was not a condition precedent for the contract. It was decided that the parties had already reached an agreement before the Concession Arrangement was signed. However, **the Bombay High Court's decision was completely overturned by the Supreme Court.** A few crucial steps must be taken before there can be an agreement that would be enforceable in law as a contract between the parties, as is evident from the case's current facts. There is no unequivocal and complete acceptance of the Letter of Award. The Supreme Court, therefore, considered every factor before making its decision in favour of the truth.

If I look for some precedents of the same case, I would heavily rely on Supreme Court's Judgement in *Dresser-Rand S.A. v Bindal Agro Chem Ltd. and Anr.*, (2006) 1 SCC 751¹² as followed in *Bharat Sanchar Nigam Limited v Telephone Cables Limited*, (2010) 5 SCC 213¹³ where the court held in a near identical situation that the arbitration clause would not be applicable as there is no concluded contract.

¹² *Dresser Rand S A v Bindal Agro Chem Ltd. & Anr* (2006) 1 SCC 751

¹³ *Bharat Sanchar Nigam Limited v Telephone Cables Limited* (2010) 5 SCC 213)

If the arbitration clause was applied in the case, it would be wholly inapt according to the *M.R. Engineers and Contractors Private Limited v Som Datt Builders Limited*, (2009) 7 SCC 696¹⁴ as it was decided that it was only intended to address issues arising from a Concession Agreement that had never been signed, and between Respondent No. 1 and the Special Purpose Vehicle and not between Respondent No. 1 and the Appellant and Respondent No. 2, it was only intended to address those issues.

From the side of Respondent No. 1, I would extensively pay attention to the Supreme Court's Judgements in *Kollipara Sriramulu (Dead) by his L.R. v T. Aswatha Narayana (Dead) by his L.R. and Ors.*, (1968) 3 SCR 387¹⁵ stating that just because a future formal contract might need to be signed between the parties does not preclude the possibility of an agreement being made on facts in the absence of a future formal contract.

COMPARISON WITH OTHER COUNTRIES

Section 7 of the 1996 English Arbitration Act¹⁶ provides that, unless otherwise agreed, the arbitration clause shall not be regarded as invalid because the underlying contract has become ineffective. "*Unless otherwise agreed by the parties, an arbitration agreement that forms or was intended to form part of another agreement (whether or not in writing) shall not be regarded as invalid, non-existent or ineffective because that other agreement is invalid, or did not come into existence or has become ineffective, and it shall for that purpose be treated as a distinct agreement.*"

Likewise, the separability doctrine in France is recognized in **Article 1447 of the French Arbitration Act 2011**¹⁷, which provides that "[a]n arbitration agreement is independent of the contract to which it relates. It shall not be affected if such contract is void." **Article 1053 of the Dutch Arbitration Act 2015**¹⁸ similarly provides that "an arbitration agreement shall be considered and decided upon as a separate agreement".

¹⁴ *M.R. Engineers and Contractors Private Limited v Som Datt Builders Limited* (2009) 9 SCALE 298

¹⁵ *Kollipara Sriramulu by his L.R. v T. Aswatha Narayana (Dead) by his L.R. and Ors* (1968) 3 SCR 387

¹⁶ English Arbitration Act 1996 s 7

¹⁷ French Arbitration Act 2011, art. 1447

¹⁸ Dutch Arbitration Act 2015, art. 1053

Lord Diplock discussed the nature of the arbitration clause in *Bremer Vulkan Schiffbau Und Maschinenfabrik v South India Shipping*, [1981] A.C. 980¹⁹, a significant English decision. He said that "the arbitration clause constitutes a self-contained contract collateral or ancillary to the [underlying] contract itself." The remarks of Lord Diplock were supported by two further members of the House of Lords.

Drawing reasoning from other countries like Britain, French, or the Dutch, the arbitration clause of the contract is judged independently and it does not get affected if the contract becomes ineffective or non-concluded as in our facts. I believe the reasoning adopted by the Supreme Court of India is correct and worthy of praise as the arbitration clause is a part of the contract and if the contract was never signed, it should not be applied to the case proceedings.

CONCLUSION

Section 7(1) of the Indian Contract Act that the acceptance of the contract should be absolute and unqualified. The Supreme Court gave the final verdict upholding the Indian Contract Act²⁰ as well as taking a different stance than other countries. The Verdict of the Supreme Court is welcome and does abide by the laws of sovereign India and its pledge to serve justice to the truth. The Supreme Court without hesitation overruled the previous verdict of the Bombay High Court which shows that the apex court will take any step to uphold justice to all and make place for an egalitarian society.

¹⁹ *Bremer Vulkan Schiffbau Und Maschinenfabrik v South India Shipping* [1981] A.C. 980

²⁰ Indian Contract Act 1872