



The Board of Trustees of the Jawaharlal Nehru Port Trust ("JNPT") v. PSA Mumbai Investments Pte. Limited and Ors. ("PSA") (March 3, 2018)

INTRODUCTION

1. The issue which before the Bombay High Court ("HC") was whether the arbitration agreement contained in an unsigned contract is valid under Section 7 of the Arbitration and Conciliation Act, 1996 ("Act"). The arbitration agreement was contained in one amongst other bidding documents which had in fact been signed and concluded.

BACKGROUND

2. JNPT issued a Request for Qualification ("RFQ") inviting applicants to bid for the development of a container terminal, on a build-operate-transfer basis. The consortium of PSA and ABG Ports Private Limited (collectively referred to as "the Respondents") submitted their application to bid for the Project. JNPT issued a Request for Proposal ("RFP") to the Respondents and invited their bid for the project. The RFP included a copy of the Draft Concession Agreement ("Concession Agreement"), to be executed between the parties.
3. Subsequently, JNPT issued a Letter of Award dated September 26, 2011 ("LOA"), in favor of the Respondent. The LOA stipulated that the Concession Agreement must be executed by the parties, within thirty days of the date of the LOA.
4. Disputes arose between the parties and JNPT invoked the arbitration clause contained in the Concession Agreement. PSA filed an application under Section 16(2) of the Arbitration and Conciliation Act, 1996 ("Act"), before the arbitral tribunal, to challenge the jurisdiction of the arbitrator. PSA contended that the Concession Agreement was never signed or duly executed by the parties, and in the absence of a valid arbitration agreement, the tribunal was devoid of jurisdiction. The tribunal held in favor of PSA and accepted the plea of absence of jurisdiction under an order dated April 18, 2016 ("Order"). Subsequently, JNPT filed the present appeal under Section 37(2) of the Act, before the High Court of Bombay ("HC").
5. While PSA contended that an unsigned arbitration agreement is unenforceable, JNPT claimed that the RFP included the draft Concession Agreement and thus the Concession Agreement is deemed to be part of the concluded bidding document.

OBSERVATIONS AND FINDINGS

6. Upon reading the terms of the RFQ, the RFP, and the LOA, the HC observed that (i) the RFQ included the Concession Agreement; (ii) PSA duly signed and executed the RFQ; (iii) the LOA was signed and constituted a concluded contract between the parties; and (iv) while PSA sought extension of time to execute the Concession Agreement, it proceeded to act on the LOA and submitted bid security in the form of bank guarantees.
7. Upon examining the provisions of the RFQ, the HC held that "*signing of a concession agreement after issuance of Letter of Award was one of the requirement to be complied with by the respondents and was not a condition precedent for formation of the contract as sought to be canvassed by the respondent No. 1 [PSA]. The contract was already concluded between the parties prior to the date of signing the concession agreement.*"
8. Relying upon *Kollipara Sriramulu*¹, the HC concurred that a mere reference to a future formal contract in an oral agreement will not prevent a binding bargain between the parties. The HC clarified that (i) while the concession agreement was intended to give formal shape to the terms agreed upon, it cannot prevent the existence of a binding contract; (ii) since the parties were not permitted to amend the concession agreement once executed, the terms of the contract stood finalized and concluded; and (iii) the conduct of the parties reflect their intention to construe the LOA as a concluded contract.
9. The HC drew a parallel between *Progressive Constructions Ltd.*² and the present case, both of which had an identical factual matrix. The HC relying on the principles laid down in *Progressive Construction*³, reiterated that the finalization of certain

¹ *Kollipara Sriramulu (dead) by his legal representative v. T Awastha Narayana*, (1968) 3 SCR 387

² *Progressive Constructions Ltd. v. Bharat Hydro Power Corporation Ltd*, ILR (1996) 1 Del 232

³ *Progressive Constructions Ltd. v. Bharat Hydro Power Corporation Ltd*, ILR (1996) 1 Del 232

terms and conditions would not adversely affect the conclusion of the contract. The HC observed that the contract stood concluded with the acceptance of the tender; and that the arbitration clause contained in the tender document would be binding on the parties.

10. Relying upon *Inox Wind*⁴, the HC reiterated that *“in a single contract case, general words of incorporation are sufficient, whereas by its nature a two contract case may require specific reference to the other contract, unless the secondary document is stated to be based on standard form terms containing an arbitration agreement”*.
11. The HC imported the principle laid down in *Inox Wind*⁵, and observed that the concession agreement was not a separate contract, but was one amongst other documents which formed part of the same contract. The HC held that *“The contract entered into between the parties in this case was a single contract. The contract was already concluded between the parties by virtue of issuance of the letter of award and acceptance thereof”*. The HC interpreted the terms of the contract and clarified that *“the execution of the concession agreement was one of the condition under the said contract which was required to be executed after the Letter of award was issued. Merely because concession agreement was not executed after taking extension of time to execute such concession agreement, it would not result in non-formation of the contract itself.”*
12. Relying upon *Reva Electric*, the High Court reiterated that the arbitration clause does not perish upon termination of the contract. The High Court held that the finding of the tribunal that the contract ceased to exist between the parties since JNPT terminated the LOA, was contrary to *Reva Electric Car Company Private Limited v. Green Mobile*, and Section 7 of the Act.

CONCLUSION AND ANALYSIS

13. Based the above findings, the HC declared that the arbitration agreement recorded in the Concession Agreement existed between the parties. The HC allowed the appeal, set aside the impugned Order, and directed the arbitrator to expeditiously decide the Section 34 proceedings.
14. The HC construed the Consortium Agreement to be an indivisible part of the bidding documents. Based on an interpretation of the RFQ and the intent of the parties, the HC further held that the acceptance of the LOA was deemed to be the acceptance of the Consortium Agreement.
15. Section 7(5) read with Section 7(4) of the Act provides that the reference in a contract to a document containing an arbitration clause constitutes an arbitration agreement if the contract is in writing (and signed by the parties) and the reference is such as to make that arbitration clause part of the contract. However, in the present case the HC endorsed the decision of the Supreme Court in *Inox Wind*⁶, and clarified that since the Consortium Agreement formed a part of a single contract, it stood concluded upon the execution of the LOA itself.

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⁴ *Inox Wind v. Thermocables Ltd*, (2018) 2 SCC 519

⁵ *Inox Wind v. Thermocables Ltd*, (2018) 2 SCC 519

⁶ *Inox Wind v. Thermocables Ltd*, (2018) 2 SCC 519