

## **Alva Aluminium Ltd.Bangkok vs Gabriel India Limited on 16 November, 2010**

**Equivalent citations: 2010 AIR SCW 7068, (2011) 98 ALLINDCAS 228 (SC), (2011) 2 MPLJ 158, 2011 (1) SCC 167, (2011) 84 ALL LR 742, (2011) 1 CURCC 75, (2011) 1 CIVILCOURTC 800, (2011) 1 MAD LJ 811, (2011) 2 MAH LJ 585, (2010) 4 ARBILR 343, (2011) 1 RECCIVR 849, (2011) 2 ICC 331, (2010) 12 SCALE 93, (2011) 1 WLC(SC)CVL 211, (2011) 1 ALL WC 65, (2011) 1 CAL HN 137, (2011) 2 CIVLJ 548, 2011 (1) KCCR SN 10 (SC)**

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**Bench: T.S. Thakur**

REPORTABLE

IN THE SUPREME COURT OF INDIA

CIVIL APPELLATE JURISDICTION

ARBITRATION PETITION NO.2 OF 2010

Alva Aluminium Ltd. Bangkok

...Applicant

Versus

Gabriel India Limited

...Respondent

JUDGMENT

T.S. THAKUR, J.

This petition has been filed under sub-sections (5) and (9) of Section 11 of the Arbitration and Conciliation Act, 1996 for the appointment of an independent and impartial person as a sole arbitrator for the adjudication of the disputes that have arisen between the parties. The respondent has appeared to contest the petition primarily on the ground that no valid arbitration agreement exists between the parties so as to call for the appointment of an arbitrator in terms thereof. The respondent's case precisely is that the contract document which the petitioner relies upon has not

been signed on its behalf by an authorized person and is not, therefore, binding or enforceable against it. Two questions essentially arise for determination in the light of the pleadings of the parties and the submissions made by them at the bar. These are :

(1) Whether this Court is in a petition under Sections 11(5) and 11(9) of the Arbitration and Conciliation Act, 1996 required to determine the existence of an arbitration agreement between the parties? and (2) Whether any such agreement has indeed been executed between the parties in the present case to call for the appointment of an arbitrator for adjudication of the disputes and differences that have arisen between them?

I shall presently deal with both these questions but before I do so I may set out the facts necessary for the determination of the said questions.

The petitioner is a joint venture company between the G.P. Group in Thailand and Kliss Group in India, incorporated under the provisions of the laws of Thailand. The respondent, on the other hand, is an Indian company incorporated under the provisions of Companies Act, 1956. The disputes sought to be referred for adjudication thus involves international commercial arbitration within the meaning of Section 11(9) read with Section 2(f) of the Act aforementioned.

The petitioner-company appears to have had commercial transactions with the respondent for sometime past. One of the transactions which they appear to have entered into in the course of their business relationship was contract No.057/2008 for the sale by the petitioner and purchase by the respondent of 75 MTs of "Aluminium alloy ingots ADC 12". The present proceedings, however, do not concern the said contract. These proceedings relate to contract No.073/2008 executed on 30th July, 2008 for the sale by the petitioner and the purchase by the respondent of 150 MTs of "Aluminium Alloy Ingots AC2B" on the terms and conditions stipulated in the said contract. The contract among other terms and conditions stipulated the price of the goods to be US \$ 3490 per MT (CIF) payable by a 100% Letter of Credit (LC).

The petitioner's case is that the contract was duly signed on its behalf and forwarded to the respondent for its signature. A photocopy of the duly signed version of the contract was then returned to the petitioner by the respondent. It is not in dispute that the contract document, a copy whereof has been placed on record, contained the following arbitration clause:

"Disputes & Arbitration: Should a claim for quantity and/or quality arise, the buyer has to duly notify the seller within 10 days upon receipt of material at buyer's factory along with proof of deviation from quantity or quality as agreed between both parties.

The seller shall then amicably settle the claim with the buyer.

As per the International Trade 0.5% of Weight Calibration is acceptable on Net Weight.

In case both parties are unable to resolve any disputes amicably in connection to the contract or breach thereof, results from the arbitration carried out in accordance with laws of India shall be final and binding upon both parties. Arbitration charges and any other charges in this connection shall be borne or reimbursed by the losing party."

The above was followed by an addendum dated 24th September, 2009. The execution of the contract and an addendum to the same notwithstanding the respondent did not open the requisite Letter of Credit despite repeated requests and reminders sent by the petitioner company to the former. The petitioner company in that view instructed its Advocates & Solicitors to send a legal notice in which the respondent was given a final opportunity to open a letter of credit in favour of the petitioner within seven days of the receipt of the notice failing which the petitioner proposed to initiate appropriate legal proceedings in which the petitioner would hold the respondent responsible for all the damages and costs suffered by the petitioner on account of the breach of the terms of the contract. The notice did not evoke any response from the respondents nor did the subsequent two notices sent on behalf of the petitioner.

Fourth and final notice was eventually sent by the petitioner through their legal consultants in which the petitioner reiterated that the respondent had failed to fulfill its obligations under the contract resulting in heavy losses to the petitioner which the petitioner assessed at USD 338,286.34 equivalent to Rs.1,69,75,208.54. A demand for payment of that amount was accordingly made against the respondent. It was only, at this stage, that the respondent broke its silence and sent a reply through Padmanabhan Associates their Advocates & Solicitors in which the respondent for the first time came out with the defence that the contract referred to by the petitioner had not been signed by an authorized person. Mr. Sandeep K. Dabir who had signed the contract document was not, alleged the respondent, authorised to sign the contract. It was further alleged that the documents, information and correspondence provided by the respondent to the petitioner company was only "some sort of negotiation" in respect of the purchase of the material in question. According to the respondent while Shri Dabir was authorized to negotiate the terms of purchase he was at no point of time authorized to enter into a contract. It was asserted that his signatures were obtained by misguiding/ enticing and misdirecting him. The alleged contract was, therefore, repudiated as being void and unenforceable.

The petitioner sent a rejoinder to the reply in which he pointed out that the respondent had been represented not only by Shri Sandeep K. Dabir but even by Shri S. Sengupta with whom considerable correspondence had been exchanged. It was further asserted that at no stage during the correspondence was any indication given to the petitioner that Shri Dabir and Shri Sengupta were not competent to finalise and sign the contract in question.

The parties having thus taken totally contradictory positions, the petitioner informed the respondent that it had nominated Shri Rahul Narichania as a sole Arbitrator to adjudicate upon the disputes and that in case they had any objection to his acting as a sole Arbitrator, the respondent could nominate an Arbitrator on their behalf. Since the respondent stuck to its stand that there was no valid contract between the parties and consequently there existed no arbitration agreement for

referring the dispute for arbitration, the petitioner was left with no alternative except to file the present petition seeking appointment of an independent Arbitrator.

The petition has been, as noticed earlier, opposed by the respondent not only on the merits of the claim made by the petitioner but also on the ground that no arbitration agreement exists between the parties that could provide a basis for making a reference. According to the respondent, the petitioner had obtained the signature of Shri Dabir for blackmailing the respondent company. It is further alleged that the respondent company had not only taken disciplinary action against Shri Dabir but refused to ratify the unauthorized act of its employee. It is alleged that it was only Shri Sengupta who was competent to enter into a contract and that the earlier contract dated 7th July 2008 signed by the said officer on behalf of the respondent had been honoured.

In the rejoinder to the petition, the petitioner has denied the allegation that Shri Dabir was not competent or that he had been induced to sign the contract for mala fide reasons. It is further alleged that the issue whether Shri Dabir was authorized to execute the contract in question or not cannot be raised in the present petition.

It is in the above background that two questions which have been formulated in the beginning of this order arise for my consideration which may now be taken up ad seriatim. Regarding Question No. (1) There is a long line of decisions of this Court in which this Court has examined the nature and the scope of the enquiry and the jurisdiction of the Chief Justice or his designate while dealing with petitions under Section 11 of the Arbitration and Conciliation Act, 1996. References to all those decisions is unnecessary for the question that falls for determination here, stands concluded by two recent decisions of this Court which alone should suffice for the present.

In *National Insurance Co. Ltd. v. Boghara Polyfab (P) Ltd.* 2009 (1) SCC 267, this Court examined the provisions of Section 11 of the Act and categorized the issues that may arise for determination in a petition under Section 11 before the Chief Justice or his designate and the approach to be adopted qua the same. The Court said:

"22.1. The issues (first category) which the Chief Justice/his designate will have to decide are:

(a) Whether the party making the application has approached the appropriate High Court.

(b) Whether there is an arbitration agreement and whether the party who has applied under Section 11 of the Act, is a party to such an agreement.

22.2. The issues (second category) which the Chief Justice/his designate may choose to decide (or leave them to the decision of the Arbitral Tribunal) are:

(a) Whether the claim is a dead (long-barred) claim or a live claim.

(b) Whether the parties have concluded the contract/transaction by recording satisfaction of their mutual rights and obligation or by receiving the final payment without objection.

22.3. The issues (third category) which the Chief Justice/his designate should leave exclusively to the Arbitral Tribunal are:

(i) Whether a claim made falls within the arbitration clause (as for example, a matter which is reserved for final decision of a departmental authority and excepted or excluded from arbitration).

(ii) Merits or any claim involved in the arbitration."

The question whether there is an arbitration agreement and whether the party who has applied under Section 11 of the Act is a party to such an agreement in terms of the above decision falls in category (1) and has, therefore, to be decided by the Chief Justice or his designate.

The above decision was followed in A.P. Tourism Development Corpn. Ltd. v. Pampa Hotels Ltd. 2010 (5) SCC 425 where also one of the questions that fell for determination was whether existence or validity of the arbitration agreement is a matter to be decided by the Chief Justice/designate while considering a petition under Section 11 of the Act or the same has to be decided by the Arbitrator. Relying upon the decision of this Court in SBP & Co. v. Patel Engg. Ltd. 2005 (8) SCC 618 and National Insurance Co. Ltd. v. Boghara Polyfab (P) Ltd. 2009 (1) SCC 267, this Court held that the question had to be decided by the Chief Justice or his designate. The Court observed:

"It is held in SBP & Co. v. Patel Engg. Ltd. and National Insurance Co. Ltd. v. Boghara Polyfab (P) Ltd. that the question whether there is an arbitration agreement and whether the party who has applied under Section 11 of the Act, is a party to such an agreement, is an issue which is to be decided by the Chief Justice or his designate under Section 11 of the Act before appointing an arbitrator. Therefore there can be no doubt that the issue ought to have been decided by the learned designate of the Chief Justice and could not have been left to the arbitrator.

.....

On account of the prospective overruling direction in SBP, any appointment of an arbitrator under Section 11 of the Act made prior to 26-10-2005 has to be treated as valid and all objections including the existence or validity of the arbitration agreement, have to be decided by the arbitrator under Section 16 of the Act. The legal position enunciated in the judgment in SBP will govern only the applications to be

filed under Section 11 of the Act from 26-10- 2005 as also the applications under Section 11(6) of the Act pending as on 26-10-2005 (where the arbitrator was not yet appointed)."

It is in the light of above pronouncements, unnecessary to delve any further on this issue. It is clear that once the existence of the arbitration agreement itself is questioned by any party to the proceeding initiated under Section 11 of the Act, the same will have to be decided by the Chief Justice/designate as the case may be. That is because existence of an arbitration agreement is a jurisdictional fact which will have to be addressed while making an order on a petition under Section 11 of the Act. The position may be different where arbitration proceedings are initiated before a nominated arbitral Tribunal but the opposite party appears to dispute the existence of the arbitration agreement. In any such situation the Arbitral Tribunal can itself decide the issue in exercise of its powers under Section 16(1) of the Act which reads as under:

"Jurisdiction of arbitral tribunals

16.Competence of arbitral tribunal to rule on its jurisdiction.- (1) The arbitral tribunal may rule on its own jurisdiction, including ruling on any objections with respect to the existence or validity of the arbitration agreement, and for that purpose, -

(a) an arbitration clause which forms part of a contract shall be treated as an agreement independent of the other terms of the contract; and

(b) a decision by the arbitral tribunal that the contract is null and void shall not entail ipso jure the invalidity of the arbitration clause."

So also the parties may without approaching the Chief Justice refer the matters in dispute to the nominated Tribunal including the question whether there exists an arbitration agreement. In any such case also the Arbitral Tribunal can determine the existence of the arbitration agreement. Suffice it to say that the power available to the Arbitral Tribunal under Section 16 of the Act does not imply that the issue can be or ought to be left to be determined by the Arbitral Tribunal even in cases where one of the parties has filed a petition under Section 11 of the Act and the other party opposes the making of a reference on the ground that there exists no arbitration agreement between them. It is quite evident that the question whether or not an arbitration agreement exists between the parties will have to be answered for it is only if the answer to that question is in the affirmative that the Chief Justice or his designate can pass an order of reference of the disputes for adjudication. Question No. (1) is answered accordingly.

That there is a written contract document between the parties, is not in dispute. That an arbitration clause is found in the said contract is also not in dispute. That Shri Sandeep K. Dabir had negotiated the contract on behalf of the respondent is also a fact that is not disputed. That correspondence between the parties was exchanged before the signing of the document and the said correspondence was not only with Shri Dabir but with Shri Sengupta, who according to the respondent, was the competent authority to sign the document is also not in dispute. All that the respondent in the above

backdrop argues is that Shri Sandeep K. Dabir was not competent to sign the contract and that Shri Dabir had been misdirected/ enticed/misdirected to initial the contract which is according to the respondent, void in terms of the Contract Act, 1872. Reply sent by the respondent to the notices served upon it summarises the twin objections to the contract set up by the petitioner in the following words:

"4. The documents, information and correspondence provided by our client clearly suggest that what was going on between M/s Kliss Trading Pvt. Ltd. the representatives of your client and certain officials of our client was only some sort of negotiation in respect of the purchase of 150 MTAC2B aluminium ingots. At no point of time our client had entered into any contract with you for the purchase of the above said material.

8. Our client further states that since your client had misguided/ enticed/ misdirected Mr. Dabir to initial the said contract the same is also void under the provision of the Indian Contract Act, 1872."

The question, therefore, is whether the contract set up by the petitioners can be held non est for the two reasons indicated in paragraph 4 and 8 extracted above. The defence set up by the respondent that the information and correspondence provided by the respondent was only suggestive of "some sort of negotiation" between the parties has not impressed me. The documents, information and correspondence when taken in their totality especially in the light of the signed contract document that stipulates the mutual rights and obligations of the parties do not show that the parties were simply negotiating a contract. The information provided, the correspondence exchanged and the documents executed are on the contrary clearly suggestive of the parties having finalized and signed a contract.

So also the assertion of the respondent that the petitioner had mis-directed, enticed or mis-guided Shri Dabri who was admittedly negotiating the contract on its behalf, had no authority to do so need be noticed only to be rejected. There are no particulars leave alone any material to establish that the signatures appended by Shri Dabir to the contract document in token of its acceptance, was vitiated by any misrepresentation or such other considerations that could have the effect of vitiating the contract. In the absence of details and particulars of what, according to the respondent, constituted inducement, mis- guidance or mis-direction referred to in paragraph 8, it is difficult to see how a fluent use of such expressions can help the respondent in avoiding a contract that had come into existence between the parties. A heavy duty lies upon the party who seeks to avoid a contract on the ground of mis- representation, fraud or coercion to prove any such allegation. Nothing of the sort has been done in the instant case by the respondent. So much so the respondent has not even placed on record any charter of duties and powers of Shri Dabir and Shri Sengupta nor has it chosen to place on record any material to suggest that any action was indeed taken against Shri Dabir for the alleged transgression of the limits of his authority and if so the nature of the disciplinary action taken against him. All this information and material was within the special knowledge of the respondent. Non- furnishing of such information must, therefore, give rise to an adverse inference against it. The petitioner company had in any event no reason to believe or even suspect

that Shri Dabir with whom it was dealing did not have the authority to sign the contract which was finalized between the two companies acting through their representatives. That is so especially when even according to the respondent, Shri Dabir had been authorized to negotiate the terms on behalf of the respondent. If Shri Dabir was competent to negotiate the terms of the contract, the petitioner cannot be said to have induced or defrauded him into signing of the contract, which was forwarded to the respondent and which was returned duly signed by Shri Dabir. The petitioner was in this backdrop justified in proceeding on the basis that the contract was duly negotiated and signed on behalf of the respondent company.

In the totality of the above circumstances, I have no doubt that a legally valid contract had indeed come into existence between the parties which contained an arbitration clause for adjudication of disputes that may arise between them. Question No.(2) is accordingly answered in the affirmative.

In the result, I allow this petition and appoint Mr. Justice Anil Dev Singh, former Chief Justice of Rajasthan High Court as sole Arbitrator for adjudication of the disputes between the parties arising out of the contract referred to in the petition. The Arbitrator shall be free to fix his fee and charges and the ratio in which the same shall be paid by the parties. The parties shall appear before the Arbitrator on 10th December, 2010 for further directions. Registry shall forthwith forward a copy of this order to the worthy Arbitrator for information and necessary action.

.....J. (T.S. THAKUR) New Delhi November 16, 2010