M/S.Indospace Industrial Park ... vs M/S.Leapridge Advisors Llp on 22 August, 2010

Original Peti

THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on 12~08~2021 Delivered on 24~08~2021

CORAM:

THE HONOURABLE MR.JUSTICE N. SATHISH KUMAR

ORIGINAL PETITION No.956 of 2019 &
A.No.8959 of 2019

M/s.Indospace Industrial Park Oragadam Walajabad Pvt Ltd.,
Rep. by its Authorised Signatory,
11th floor, Tower 2 A, One India Bulls Centre,
Senapati Bapat Marg, Mumbai – 400 013. ...

.Vs.

1. M/s.Leapridge Advisors LLP,
   No.26, 2nd Street, East Abhiramapuram,
   Mylapore, Chennai – 600 004.

2. M/s.Avista Corporate Finance Advisory Private Limited,
   52, maker Chamber Vi, Nariman Point,
   Mumbai – 400 021. ...

Prayer: Petitions filed under section 34 of the Arbitration and Concili
Act,. 1996 to set aside the Award dated 22.08.2010.

For Petitioner : Mr.M.S.Krishnan,Senior Counsel
for Mr.C.Jagadish

For respondents : Mr.A.K.Mylsamy, Senior Counsel

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for A.K.Mylsamy Associates

ORDER

This original petition has been filed challenging the award passed by the sole arbitrator dated 22.08.2019.

2. The parties are arrayed as per their own ranking before the arbitration proceedings.

3. Brief facts leading to filing of this petition is as follows :

> 2.1 Originally, the name of the petitioner's company Shri Kailash Logistics Limited [SKL] engaged the respondents to provide financial advice.

In this regard, the Letter of Engagement dated 20.11.2013 was entered between the parties. The respondents also entered into an agreement with the petitioner on 07.01.2014 setting out their respective responsibilities as per the engagement letter and division of fee thereof . As per the engagement agreement, the respondent agreed to pay a fee of Rs.2,50,000/- for preparation of information memorandum and teasor besides 3% on the gross proceeds upon the consummation of the transaction. The claimant accordingly prepared the http://www.judis.nic.in Original Petition No.956 of 2019 information memorandum and raised the second payment and also raised invoices and they engaged in identifying the investors for investment in the respondent company from 24.11.2015 to 15.12.2015. They had also arranged a meeting of the representatives of claimants and SKL. They had also facilitated the execution of non disclosure between Xander Advisors PVT Ltd and the respondent. It is claimed that the claimant have been continuously interacting with respondents to facilitate a fruitful transaction between the Indospace Capital Advisors [ICA] and the respondent. However, from January 2016, the Chairman of SKL started to avoid and stopped its communication with the claimants and the claimants did not hear anything about the deal with the ICA from SKL.

2.2 The claimants through the news reports dated 05.01.2017 came to know that ICA had made investment of over Rs.200 crores in SKL and acquired majority stakes. They also came to know that the respondent has been converted from public limited to private limited company and changed its name to IIOWPL with effect from 21.02.2017 as per the letter dated 01.09.2017 passed by the NCLT Chennai branch in CP.61 of 2017. Therefore, the claimant has claimed transaction fee as per the engagement letter. He had issued a legal notice as the amount has not been paid and thereafter, the matter has been http://www.judis.nic.in Original Petition No.956 of 2019 referred to arbitration. The memorandum of understanding entered between the ICA and the respondent refers to investing funds for acquiring 100% of its share holding along with the management and control of the SKL for a consideration of Rs.190 Crores, which was the exact figure proposed by the investor on the negotiation initiated by the claimants on behalf of the respondent. The memorandum of understanding has been executed by the investor identified by the claimants for the exact consideration negotiated with the aid of the claimants in August 2016 was well within the period of 12 months post expiration of the Addendum dated 30.04.2016. Therefore, the claimants are entitled to 3% of the investment as transaction fee. It is also stated by the claimant that the respondent has also raised additional funds aggregating to Rs.12 crores by allotting 1,20,000/- compulsory debentures of 1000 each at par on preferential basis to ILP II Pte. Ltd. The said investment also being made before 30.04.2017, i.e., within one year from the date of expiry of the agreement period,

hence, the claimant is entitled to claim 3% transaction fee for the said amount also.

3.1. The respondent filed the statement to the effect that SKL which was purchased by the first respondent, originally executed engagement letter to the claimants in order to raise securities and the scope of work was mentioned in http://www.judis.nic.in Original Petition No.956 of 2019 the engagement letter. As per the Memorandum of Understanding dated 05.08.2016, the respondent acquired 100% share holding of SKL and the investor invested Rs.190 crores and later on acquired the entire business and thereafter, SKL has been renamed as Indospace Industrial Park Oragadam Walajabad Private Limited. Therefore, it is its contention that the transaction contemplated in the engagement letter and the transaction completed are distinct as transaction mentioned in the engagement letter specified placing, raising or issuance of any form of equity linked mezzanine debt or debt securities [including any convertible securities without limitation and or senior notes or bank debt or line of credit or any loan] any or all of which being “securities”. Whereas the transaction involved was 100% of acquisition of share capital of SKL. Further, without prejudice to it, it is their contention that the claimant had not performed the scope of work as per the engagement letter. Hence, they are not entitled to any payment as transaction fee.

3.2 The engagement letter was executed to seek the assistance of the claimants in raising funds for expansion of logistics park at Oragadam and for development of proposed industrial park at Kancheepuram. The claimants have not performed their obligation as per engagement letter and no proof is filed for works undertaken except producing certain invoices and the e-mail http://www.judis.nic.in Original Petition No.956 of 2019 communications and the entire work pertaining to structuring and commercials were actually negotiated and finalized by the internal team of SKL. It is their contention that the discussion of the claimant were in advance stages with Xaner and therefore non disclosure agreement was entered between SKL and Xander which fact is acknowledged in para 6 of the claim statement. Hence, it is their contention that the transaction contemplated in the engagement letter never fructified and the transaction finally entered with SKL and the investor is different. It is also stated that one of the claimant Mr.Rajesh Jaggi informed that they are unable to convince Mr.Rajkumar to transact the investors offer price and the parties have given up and the respondent could try through their own sources. For preparing the information memorandum, the claimants have been paid and the claimants have not undertaken any work as per the scope of work. Hence, payment of transaction fee does not arise. The basis of claiming 3% is not substantiated.

4. Based on the above pleadings, following issues have been framed :

> 1. Whether the transaction contemplated under the Engagement Letter dated 20.11.2013 [as amended by the addendum dated 18.12.2015] and the transaction entered into between the shareholders of Shri Kailash Logistics Limited http://www.judis.nic.in Original Petition No.956 of 2019 [SKL} and ILP II Pte. Limited [investor] are distinct and different?
>
> 2. Whether the transaction that finally materialized and the transaction that is contemplated in the engagement letter are materially different 20.11.2013?

3. Whether the claimants are entitled to 3% of theadditional fund raised by way of issuing compulsorily convertible debentures of Rs.12,00,00,000/-[Rupees twelve crores only]?

4. Whether the claimants have performed the scope of work contemplated under the engagement Letter?

5. Whether the claimants or the respondent are entitled for the cost incurred towards arbitration?

6. What are the reliefs to be finally awarded by the arbitral tribunal?

Additional Issue :

7. Which party had committed breach ofcontract to sustain the claim of the claimants?

5. The learned arbitrator after considering the entire evidence and the http://www.judis.nic.in Original Petition No.956 of 2019 documents filed on either side had finally found that as per the engagement letter, the investment has been made to the company, therefore, the company is liable to pay the the transaction fee and passed the following award :

Directing the respondent to pay a sum of Rs.2,57,52,000/- [Rupees two crores fifty seven lakhs fifty two thousand only] to the claimants within a period of one month from the date of the award and if the said amount is not paid, it will carry 7% interest from the date of expiry of one month from the date of pronouncement of the award till the amount is paid to the claimants.

6. The learned Senior Counsel appearing for the petitioner mainly contended that the award suffers from perversity and the learned arbitrator has passed the award beyond the terms of the contract. The contract governing the parties have been interpreted wrongly and the learned arbitrator did not take into consideration of the obligation set out in the engagement letter. What was required under the agreement is to bring the investment to the company. None of the obligations contemplated in the agreement ever completed by the so called advisors, the respondents herein. Whereas the petitioner has independently purchased the entire shares out rightly. Therefore, they cannot http://www.judis.nic.in Original Petition No.956 of 2019 be forced to pay the amount of the erstwhile company. The terms of the contract have been over looked by the learned arbitrator. Further, it is his contention that after the company has been changed and the entire investment made by the Indo Space Industrial Park by issuing compulsory convertible debentures for 12 crores, after purchase of the entire shares made by the petitioner. The conclusion of the learned arbitrator that the investment to the company has been made at the instance of the advisor, is nothing but perversity. At any event, many obligations set out in the contract has not been completed. Therefore, the perversity in the award goes to the root of the matter and the award is liable to be set aside. In support of his submissions, he relied on the following judgments :

Associate Builders Vs. Delhi Development Authority reported in [2015] 3 Supreme Court Cases 49 Oil and Natural GAS Corporation Limited Vs Western Geco International Limited reported in [2014] 9 Supreme Court Cases 263 Oil and Natural Gas Corporation Ltd. Vs. Saw Pipes Ltd. reported in [2003] 5 Supreme Court Cases 705 S.R.Tewari Vs. Union of India and another reported in [2013] 6 Supreme Court Cases 602 http://www.judis.nic.in Original Petition No.956 of 2019 K.P.Poulose Vs. State of Kerala and another reported in [1975] 2 Supreme Court Cases 236 Sumitomo Heavy Industries Limited Vs. Oil and Natural Gas Corporation reported in [2010] 11 Supreme Court Cases 296 Gayatri Balaswamy Vs. ISG Novasoft Technologics Ltd. reported in 2014 [6] CTC 602

7. The learned counsel appearing for the respondent submitted that the learned arbitrator has rightly took note of various conditions found in the contract and the correspondences between the parties and factually found that the investment came into the company only at the instance of the advisors. Therefore, when the investment has come as proposed by the respondent and the respondents are bound to pay the transaction fee as agreed in the engagement letter. Merely because the name of the company has been changed, the obligation cannot be wiped out. Hence, submitted that the learned arbitrator has rightly found that the respondents are entitled to the amount and such findings are based on the factual aspects, considering documentary evidence and oral evidence let in. Hence, submitted that the award passed by the learned arbitrator does not require any interference by this Court. In support of his http://www.judis.nic.in Original Petition No.956 of 2019 contentions relied on the following judgments :

Renusagar Power Co. Ltd., Vs. General Electric Co. reported in AIR 1994 SC 860] Oil & Natural Gas Corporation Ltd. Vs. Saw Pipes Ltd. reported in AIR 2003 SC 2629 Associate Builders Vs. Delhi Development Authority reported in AIR 2015 SC 620 Ssangyong Engineering and Construction Co. Ltd. Vs. National Highways Authority of India [NHAI] reported in AIR 2019 SC 5041 Patel Engineering Ltd. Vs. North Eastern Electric Power Corporation Ltd. reported in AIR 2020 SC 2488 State of Rajasthan Vs. Puri Construction Co. Ltd. and another reported in [1994] 6 SCC 485 Arosan Enterprises Ltd. Vs. Union of India [UOI] and Ors. reported in AIR 1999 SC 3804 Ispat Engineering & Foundry Works, B.S.City, Bokaro Vs. Steel Authority of India, B.S.City Bokaro reported in [2001] 6 SCC 347 Bhagawati OxygenLtd. Vs. Hindustan Copper Ltd. http://www.judis.nic.in Original Petition No.956 of 2019 reported in AIR 2005 SC 2071 M.P.Housing Board Vs. Progressive Writers and Publishers reported in AIR 2009 SC 1585 Rajasthan State Board Transport Corporation and another Vs. Bajrang Lal reported in [2014] 4 SCC 693

8. The petitioner engaged the claimants to provide financial advice and entered into the engagement letter dated 20.11.2012 appointing claimants as financial advisors to provide financial advice and investment banking services in connection with the possible placement, raising or issuance of any form of equity, equity – linked, mazzanine debt or debt securities [including, without limitation, any convertible securities, preferred stock, secured, unsecured, non senior or subordinated debt securities, and/or senior notes or bank debt or line of credit of any loan] any or all of which being

securities from investors or financial institution or lenders [collectively called investors] as identified by the advisers and agreed by the company. The role of first claimants is as follows :

a] Recommending an optimal structure fo

transaction.

b] Assisting the Company in identifying potential investors.

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c] Preparing an “information memorandum”

consultation with Avista. This information memorandum will be circulated to the identified and agreed investors after the company approves.

d] Advising the company in determining pricing, deal structuring, negotiating and finalizing key terms.

e] Working with legal counsel and other advisors, appointed by the parties, to formalize the transaction. The role of the second claimants is as follows :

> a] familiarising ourselves with the Company's financial condition and business b] assisting the company in development and distribution of selected information, documents and other materials [it being expressly understood that the Company will remain solely responsible for such documents and all of the information contained therein] c] assisting the Company in evaluating indications of interest and proposals from the identified and agreed Investors d] assisting the Company in negotiating financial aspects, and assisting in facilitating the consummation of the http://www.judis.nic.in Original Petition No.956 of 2019 transaction.

9. The above clauses further indicate that in the event the SKL or its controlling equity holders of other affiliates, or its management receives any draft terms/term sheet from any other investor not introduced by advisors, the company shall promptly inform advisors of such an event. It is also agreed between the parties in clause 3 of the agreement that upon consummation of the transaction, advisor shall earn and the company shall promptly pay to the advisor a fee and this fee shall be adjustable against the overall success fee. It is the contention of the claimants that as per their advice 190 cores were invested by the Indo space company. The entire reading of the contract makes it very clear that the parties have appointed the respondent to give advice in identifying the investors and obtaining investment to the company. Therefore, it is the contention of the learned counsel that the success fee will be paid on performance of certain conditions by the advisor. It is the contention of the learned Senior Counsel that only when the money come to the bank account, the

transaction fee shall be payable. Much emphasis was made to sub clause 3 of clause 4 of the contract which reads as follows :

> "They entire transaction fee shall be payable to such a uniform proportion to the proceeds of the transaction credited http://www.judis.nic.in Original Petition No.956 of 2019 to the company's bank account, so that the entire transaction fee shall be payable by the time 50% of proceedsof the transaction are credited to the company;s bank account...."

10. On a perusal of the above clause, it stipulates the manner in which the transaction fee will be payable. Therefore, merely because the clauses indicate that the proceeds of the transaction should come to company's bank account, it cannot be said that then only the transaction fee will be triggered. Whereas, the main object of the contract is to bring investment to the company. Therefore, once the investment is brought to the company in any form and merely because, the same has not been brought in the manner indicated in the agreement, that cannot be a ground to wipe out the obligation of the company, which agreed to pay the transaction fee. The very object of the agreement is to bring potential investors to invest in the company. The learned arbitrator has in fact considered the various documents filed by he claimant. Particularly, the email communications marked as Ex.C.10 for the period between 24.11.2015 to 15.12.2015, the nature of the discussions of the parties for investment purposes. Ex.C.12 and Ex.C.13 dated 18.12.2015 and 08.01.216 have been considered by the learned arbitrator, wherein he has found that infact Indo Space has also given their offer which has been properly communicated to SKL. http://www.judis.nic.in Original Petition No.956 of 2019

11. The learned arbitrator has found out factually that the claimants have introduced potential investros and the Indo Space company has also given their offer in January 2016 and the correspondences between the claimant and the respondent prove that the SKL had stopped communicating suddenly and stopped payment of transaction fee. All the above facts have been considered by the learned arbitrator on appreciation of facts and documents filed by the claimant. Ex.C.9 infact has been pressed into service to prove the fact that the claimants have arranged for a meeting with the representatives of the Indo space company and SKL and they had discussion at the company premises and discussed particularly to take up the transaction fee. The learned Arbitrator has in fact considered all these documents and various correspondences between the parties in this regard. Thereafter, the company has engaged the advisor. However, the amount proposed to be invested by the investor has been invested for purchase of 100% shares of SKL. When the facts indicate that the purchase of 100% shares is materialised only after the purchaser was identified by the claimant, now, the petitioner cannot contend that the transaction contemplated under the engagement letter and the purchase of shares was distinct with each other.

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12. In Associate Builders Vs. Delhi Development Authority, the apex Court has explained the term patent illegality and held that patent illegality must go to the root of the matter, Public Policy violation should be so unfair and unreasonable as to shock the conscience of the Court. The

supervisory role of the Court under Section 34 is to be kept at a minimum level and interference is envisaged only in case of fraud or bias, violation of natural justice, etc., If the Arbitrator has gone contrary to or beyond the express of law of the contract or granted relief in the matter not in dispute that would come within the purview of Section 34 of the Arbitration and Conciliation Act 1996.

13. In Oil and Natural Gas Corporation Ltd., v. Saw Pipes Ltd., [2003 (5) SCC 705], wherein the Honoruable Apex Court has held that an Award can be set aside if it is contrary to:

a) fundamental policy of Indian law; or

b) the interest of India; or

c) justice or morality; or

d) if it is patently illegal Award could also be set aside if it is so unfair and unreasonable that it shocks the conscience of the court.

14. In Renusagar Power Co. Ltd. v. General Electric Co. [1994 Supp (1) http://www.judis.nic.in Original Petition No.956 of 2019 SCC 644] this Court laid down that the arbitral award can be set aside if it is contrary to (a) fundamental policy of Indian law; (b) the interests of India; or

(c) justice or morality. A narrower meaning to the expression "public policy"

was given therein by confining judicial review of the arbitral award only on the aforementioned three grounds.

15. In Sumitomo Heavy Industries Ltd. v. ONGC Ltd., it is held that the umpire has considered the fact situation and placed a construction on the clauses of the agreement which according to him was the correct one. One may at the highest say that one would have preferred another construction of Clause 17.3 but that cannot make the award in any way perverse. Nor can one substitute one's own view in such a situation, in place of the one taken by the umpire, which would amount to sitting in appeal.

16. Admittedly, in this case, the learned arbitrator has infact considered the factual matrix and found that purchase of share is also a form of investment to the company. Therefore, when the entire investment has come to the company at the instance of the advisors, it cannot be said that subsequent purchase of shares is a distinct other than contemplated under the agreement. http://www.judis.nic.in Original Petition No.956 of 2019 The contract has been considered by the learned arbitrator in this regard. Therefore, when all the factual aspects have taken note by the learned arbitrator, this Court cannot reappreciate the entire evidence while exercising its jurisdiction under section 34 of the Arbitration and Conciliation Act. Therefore, merely because the name of the company has been changed, the obligations cannot be wiped out. The obligations always has to go with the company and cannot avoid payment of money as per the engagement letter.

17. As far as the issue No.3 decided by the learned arbitrator with regard to 3% of the additional fund raised by way of issuing compulsorily convertible debentures of Rs.12,00,00,000/- is concerned, it is to be noted that the job of the advisors identifying the potential investors were over the moment the Indo Space invested 190 crores. With regard to the additional fund raised by way of debentures of 12 crores is concerned, It is to be noted that the entire investment namely purchase of 100% shares to the value of 190 crores were completed on 05.08.2016. The learned arbitrator has found that even while identifying the potential investors, they were prepared to deposit some amount. However, after that, some amount has been invested to purchase the shares. In fact, this amount has been arrived at in a meeting between the parties on 17.12.2015. Therefore, the entire amount of Rs.190 crores came into the company and the http://www.judis.nic.in Original Petition No.956 of 2019 company name was changed, the obligations of the parties gets terminated automatically. Thereafter, when the new company raising any amount by issuing compulsory convertible debentures for 12 crores in their Annual General Body Meeting on 13.09.2016, cannot be construed as an ivnestment made only at the advice of the petitioners herein. The learned arbitrator while holding so, the claimant is also entitled to payment of transaction fee for that amount, is in violation of the contract. In this regard, it is relevant to refer clause 2 of the contract which reads as follows :

> "This engagement is exclusive for the investors identified by the Advisors and valid for a period of 4 months from the acceptance of this letter by your, or such further date as may be mutually agreed between the parties in writing. If this Agreement expires or is terminated for any reason and the Company [and/or any of its subsidiaries or affiliates or any entity formed by or at the direction of any such person] consummates, or enters into an agreement to engage in any Transaction with any investor introduced by Advisors or with whom Advisors has had discussions relating to the transaction [which subsequently completes at any time] prior to the date that is twelve [12] months after such expiration or termination date, the advisers shall be entitled to receive its Transaction Fee upon Completion thereof as if no such expiration or termination had occurred.
>
> http://www.judis.nic.in Original Petition No.956 of 2019

18. The above clause makes it very clear that even after the agreement is terminated for any reason of the company and or any of its subsidiaries or its affiliates or any entity formed by or with any investor introduced by advisors or with whom advisors had discussions relating to the transactions, prior to the date of expiry and 12 months after such expiration or termination, the advisors shall be entitled to receive transaction fee as if there is no expiration or termination.

19. It is to be noted that as per the claim statement itself the claimant company had introduced potential investors namely Indo Space as agreed in the engagement letter for investing to the tune of 190 crores. The endeavour of the advisor were to bring the amount agreed by the Indo space. Thereafter, in the name of share purchase, the same amount has been pumped by the Indo Space.

Therefore, the advisor's right to claim the transaction fee will be only on the finalised amount during their discussion. Hence, merely on the basis of the above terms, it cannot be said that any further amount raised by way of debentures, they are entitled to fee as per the contract, is in fact against the very terms of the contract itself. The above contract apply only when the transaction discussion has been materialised and the amount came into company on the basis of such materialised terms even after termination of the contract, then it http://www.judis.nic.in Original Petition No.956 of 2019 can be said that they are entitled to 3% amount on the materialised deal, i.e., nature of investment. Whereas, the finalised deal in the negotiations has already come into the company. Therefore, only on the finalised deal, i.e., Rs.190 crores, which was invested in the company, the claimants are entitled to claim 3% transaction fee and not beyond that. Therefore, the learned arbitrator awarding transaction fee at the rate of 3% on 12 crores raised by the company in its own capacity by issuing debentures, at any stretch of imagination can be classified as investment made at the instance of the Advisor.

20. In this regard it is relevant to refer the judgment in In Ssangyong Engineering & Construction Company Limited Vs. National Highways Authority wherein the Honourable Apex Court has held that when the finding of the Arbitrator based on no evidence at all or an Award which ignores vital evidence in arriving at its decision would be perverse and such an award is liable to be set aside. Similarly, the Apex Court has also held that a finding based on documents taken behind the back of the parties by the Arbitrator would also qualify as a decision based on no evidence, in as much as such decision is not based on evidence led by the parties and such an Award also have to be characterised as perverse.

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21. In this case also, the learned arbitrator completely ignored the vital terms of the contract and gone beyond the terms of the contract in this regard. The findings of the learned arbitrator in this regard, in fact goes to the root of the matter and is perverse in nature. Therefore, this Court is of the view that such a finding given in issue No.3 alone goes beyond the terms of the contract which is severable from the other main aspects and this Court is inclined to set aside the award of the learned arbitrator passed in Issue No.3 for a sum of Rs.36 lakhs as transaction fee and the rest of the award is confirmed.

23. Accordingly, the petition is partly allowed and the award is set aside with respect of a tune of Rs.36 lakhs. Consequently, the connected application is closed.

24.08.2021 vrc http://www.judis.nic.in Original Petition No.956 of 2019 N. SATHISH KUMAR, J.

vrc Order in:

ORIGINAL PETITION No.956 of 2019 24.08.2021 http://www.judis.nic.in