A SPEECH & SOFTWARE TECHNOLOGIES (INDIA) PVT. LTD.

v.

NEOS INTERACTIVE LTD.

(Arbitration Application No.22 of 2007)

B DECEMBER 5, 2008

[J.M. PANCHAL, J.]

Arbitration and Conciliation Act, 1996:

C *ss.2(1)(b), 11(6) and (9) – International commercial arbitration – Application for appointment of arbitrator – Services Agreement containing arbitration clause – Plea that Services Agreement was made part of a later Tripartite Share* D *Purchase Agreement which stood terminated and with that Services Agreement ceased to exist and, the Tripartite Share Purchase Agreement was novated, rescinded and revoked on account of Letter of Intent, and, therefore the application was liable to be rejected – Held: Services Agreement was* E *not dependent upon Tripartite Share Purchase Agreement – An agreement to enter into an agreement is not enforceable nor does it confer any right upon parties – Letter of Intent relied upon is nothing but an agreement to enter into another agreement which was not executed – The Services Agreement has not ceased to exist – Applicant is entitled to* F *invoke arbitration clause – Disputes exist between parties relating to execution of Services Agreement – Application allowed – Arbitrator appointed – Contract – Agreement to enter into an agreement.*

G **The applicant filed the instant application u/s11(6) of the Arbitration and Conciliation Act, 1996 for appointment of an arbitrator stating that the applicant and the respondent entered into a Services Agreement dated 15.7.2006 whereunder the applicant was to provide**

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service to the respondent on a monthly payment; that the respondent had also agreed to compensate the Director of the applicant for coordination activities; that the respondent refused to make any payment to the applicant and insisted for execution of another agreement which the latter declined. The stand of the respondent was that after the parties signed the Services Agreement dated 15.7.2006, a Tripartite Share Purchase Agreement was executed on 1.8.2006 of which the Services Agreement formed part. The latter agreement was contingent upon certain events taking place by 31.7.2006 and since the said events did not take place by the stipulated date, it stood automatically terminated as a result of which the Services Agreement dated 15.7.2006, which was part of the tripartite agreement, ceased to exist and, therefore, the applicant was not entitled to invoke the arbitration clause thereof. It was further submitted by the respondent that the Tripartite Share Purchase Agreement was novated, rescinded and revoked on account of Letter of Intent dated 1.8.2006 and, therefore, the application should be rejected.

Allowing the application, the Court

HELD: 1. Exercise of power under Section 11(6) of the Act is judicial power. The preliminary matters to be considered by the court are (1) existence of arbitration agreement, (2) territorial jurisdiction, (3) whether there are live issues to be referred to the arbitrator, and (4) whether application is filed within the period of limitation prescribed by the law. If the court finds that the arbitration agreement does not exist or is rescinded then the prayer for referring the dispute to the arbitrator will have to be rejected. [Para 7] [68-C-D]

SBP and Company vs. Patel Engineering Ltd. **(2005) 8 SCC 618, relied on.**

A **2.1. From the record of the case it is evident that the Services Agreement dated July 15, 2006 was never a schedule to the Tripartite Share Purchase Agreement. The Services Agreement had been executed before the Tripartite Share Purchase Agreement was executed. The** B **existence of the Service Agreement was not dependent upon the completion of events as contemplated by the Tripartite Share Purchase Agreement and, therefore, it is incorrect to say that the Services Agreement ceased to exist on termination of the Tripartite Share Purchase** C **Agreement. [Para 10] [69-E-F; 70-F-G]**

2.2. The Letter of Intent dated August 1, 2006 under no circumstances can be treated as novating, rescinding or revoking the Tripartite Share Purchase Agreement. The said Letter of Intent on a bare reading is nothing but D **an agreement to enter into another agreement because it is provided in the said letter, "both parties agree to have set a deadline to sign this agreement by 15th September, 2006". It is well settled legal position that an agreement to enter into an agreement is not enforceable nor does it** E **confer any right upon the parties. The respondent has not stated in its counter reply that the agreement, which was to be executed by September 15, 2006, was in fact executed. During the course of hearing of the instant application it was fairly conceded on behalf of the** F **respondent that no such agreement was executed between the parties at all. Thus, it cannot be said that the agreement contemplated by the said Letter of Intent had novated, rescinded or superseded the Tripartite Share Purchase Agreement. Further, the terms of the Tripartite** G **Share Purchase Agreement, the Services Agreement and the terms contemplated by Letter of Intent dated August 1, 2006 are not consistent at all and, therefore, it cannot be said that novation of the Tripartite Share Purchase Agreement read with the Services Agreement had taken** H **place. [Para 11] [71-A-F]**

3. The Services Agreement dated July 15, 2006 has not ceased to exist and the applicant is entitled to invoke the arbitration clause contained in that agreement. The application filed by the applicant is within the time prescribed by law. There is no manner of doubt that disputes are existing between the parties relating to the execution of the Services Agreement dated July 15, 2006, which are arbitrable. The application is allowed and arbitrator is appointed. [Para 12] [71-G-H; 72-A]

Case Law Reference:

(2005) 8 SCC 618 relied on para 7

CIVIL ORIGINAL JURISDICTION : Arbitration Application No. 22 of 2007.

Ramesh Singh, K.S. Rama Rao and Bela Maheshwari, for the Appellant.

Ravi Prakash Mehrotra, Deepti R. Mehrotra and Garvesh Kabra, for the Respondent.

The Judgment of the Court was delivered by

J.M. PANCHAL, J. 1. By filing the instant application under Section 11(6) of the Arbitration and Conciliation Act, 1996 ("the Act" for short), the applicant, i.e., Speech & Software Technologies (India) Pvt. Ltd. has prayed to appoint Mr. Justice Arvind Sawant (Retd.), former Chief Justice, High Court of Kerala, as sole arbitrator and to refer the disputes to him, which have arisen between the applicant and the respondent during the course of execution of Services Agreement dated July 15, 2006.

2. The relevant facts, which emerge from the record of the case, are as under: -

The applicant is a company registered under the Companies Act, 1956. Its registered office is situated at

A Chennai. The respondent is a company having its registered office at London. The applicant and the respondent entered into a Services Agreement dated July 15, 2006. Under the said agreement, the applicant was to provide services to the respondent as set out in schedule 2 to the said agreement. The B respondent had agreed to make payment of £15,500 per month to the applicant and also to compensate the Director of the applicant for coordination activities. A copy of the agreement dated July 15, 2006 is produced by the applicant at Annexure '1' to the application. It is the case of the applicant that since C December, 2006 the respondent refused to make any payment to the applicant and insisted for execution of another agreement as suggested by the principal shareholder of the respondent. The applicant has averred that the applicant was not inclined to enter into new agreement as suggested by the respondent D and as the respondent had failed to comply with the terms of the Services Agreement dated July 15, 2006, it terminated the said agreement by sending notice dated February 15, 2007 in terms of Clause 19 of the agreement. By the said letter the applicant also appointed Mr. Justice Arvind Sawant (Retd.), former Chief Justice of Kerala High Court, as the sole arbitrator E and called upon the respondent to appoint its arbitrator in the event the respondent did not agree to the appointment of Mr. Justice Arvind Sawant (Retd.) as the sole arbitrator. A copy of the notice dated February 15, 2007 is produced by the applicant at Annexure '3' to the application.

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3. On receipt of the notice the advocate of the respondent addressed a letter dated March 15, 2007 urging the applicant not to take any unilateral action for a period of two weeks so as to enable him to obtain comprehensive instructions in the G matter in order to effectively study and evaluate the issues involved in the matter. The case of the applicant is that the respondent did not give reply to the notice dated February 15, 2007, nor concurred in the appointment of Mr. Justice Arvind Sawant (Retd.) as sole arbitrator nor appointed its arbitrator. H The applicant has claimed that it is entitled to recover a sum

of £252,911-76 from the respondent for the services rendered. Under the circumstances the applicant has filed the instant application and claimed relief to which reference is made earlier.

4. On receipt of notice from this Court, the respondent has filed reply affidavit. In the reply affidavit it is mentioned by the respondent that the Services Agreement dated July 15, 2006 was signed on July 31, 2006 and August 1, 2006 by the applicant and the respondent respectively, after which Tripartite Share Purchase Agreement was executed on August 1, 2006, of which Services Agreement dated July 15, 2006 formed part as schedule 'A' to the agreement. It is averred in the reply that Share Purchase Agreement, *inter-alia* provided that on certain events not taking place by July 31, 2006, the Tripartite Share Purchase Agreement would stand terminated. According to the respondent the said Tripartite Share Purchase Agreement stood automatically terminated as the various events mentioned therein did not take place by July 31, 2006 and as Services Agreement relied upon by the applicant was part of the said agreement the same also stood automatically terminated and, therefore, the applicant is not entitled to invoke arbitration clause incorporated in the agreement dated July 15, 2006. It is claimed by the respondent that the Tripartite Share Purchase Agreement stood novated, rescinded and revoked on account of Letter of Intent dated August 1, 2006, executed by the parties, which totally replaced the Tripartite Share Purchase Agreement and, therefore, also the present application was not maintainable. By filing the reply, the respondent demanded dismissal of the application filed by the applicant.

5. The applicant has filed rejoinder affidavit to the affidavit in reply filed by the respondent. In the rejoinder affidavit, the applicant has, by and large, reiterated what is stated in the application and, therefore, this Court is of the opinion that it is not necessary to make a detailed reference to the rejoinder filed by the applicant.

A 6. This Court has heard the learned counsel for the parties at length and in great detail. This Court has also considered the documents forming part of the application.

7. By now it is well settled that exercise of power under Section 11(6) of the Act is judicial power. After the decision of B this Court in *SBP and Company vs. Patel Engineering Ltd.* (2005) 8 SCC 618, the Designated Judge has to consider the claim of both the parties to the matter and pass a reasoned order. It is also well settled that existence of arbitration agreement is a condition precedent before exercise of powers C under Section 11(6) of the Act. The preliminary matters to be considered by the court are (1) existence of arbitration agreement, (2) territorial jurisdiction, (3) whether there are live issues to be referred to the arbitrator, and (4) whether application is filed within the period of limitation prescribed by D the law. If the court finds that the arbitration agreement does not exist or is rescinded then the prayer for referring the dispute to the arbitrator will have to be rejected.

8. The contention raised by the learned counsel for the E respondent that the Tripartite Share Purchase Agreement stood automatically terminated because various events mentioned therein did not take place and, therefore, the Services Agreement dated July 15, 2006, which was part of the Tripartite Share Purchase Agreement, ceased to exist, cannot be F accepted.

9. In order to ascertain whether the Services Agreement dated July 15, 2006 exists or not, it will be relevant to notice salient features of two agreements, namely, (1) Services Agreement dated July 15, 2006 and (2) Tripartite Share G Purchase Agreement executed on August 1, 2006. Clause (2) of the Services Agreement dated July 15, 2006 requires the applicant to supply services to the respondent on payment of consideration by the respondent. The services to be supplied have been detailed in Schedule 2 to the agreement. The H consideration to be paid by the respondent is mentioned in

Schedule 1 to the agreement. Clause 4 of the said agreement provides that invoicing shall be done at the beginning of each calendar month and the amount due would be payable monthly. Clause 9 of the Services Agreement dated July 15, 2006 confers right upon the applicant to terminate the agreement if payment for services rendered is not received by the applicant within a period of fifteen days from the expiry of the previous month. Clause 10 of the said agreement provides for consequences which would ensue on termination of the agreement, whereas clause 19 enables the aggrieved party to approach arbitrator for resolution of the disputes. It is relevant to note that by letter dated February 15, 2007 the applicant had terminated the Services Agreement and appointed its sole arbitrator as well as called upon the respondent to concur with the said appointment or to appoint its arbitrator. It is an admitted fact that no reply was given by the respondent to the said notice. It is also relevant to notice that the execution of the Services Agreement dated July 15, 2006 is not denied by the respondent. What is claimed by the respondent is that the Services Agreement ceased to exist in view of termination of Tripartite Share Purchase Agreement.

10. From the record of the case it becomes at once evident that the Services Agreement dated July 15, 2006 was never a schedule to the Tripartite Share Purchase Agreement. This becomes clear from the contents of clauses 5.2 and 5.2.5 of the Tripartite Share Purchase Agreement dated August 1, 2006. Clause 5 of the Tripartite Share Purchase Agreement, which is to be found on running page 99 of the short counter affidavit filed on behalf of the respondent, provides the venue where completion of the said agreement would take place and also mentions post completion obligations. According to clause 5.1 of the said agreement, completion was to take place at a venue to be agreed between the applicant and Abela on the second business day after the day on which the conditions stipulated were satisfied. The consequences which were to follow on the completion of the Tripartite Share Purchase

A Agreement are mentioned in clause 5.2. Clause 5.2.5 of the agreement reads as under: -

> "SST and the Company shall enter into the Services Agreement and Shareholders Agreement (SHA) as per drafts given in Schedule A and B."

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It is the specific case of the respondent that the Tripartite Share Purchase Agreement dated July 15, 2006, of which Schedules A and B were intrinsic and inseparable parts, stood automatically terminated on July 31, 2006 owing to non-
C completion of the material conditions as postulated in clause 3.4 of the agreement, without any further obligations, liability or claim between the parties under the agreement. As the Tripartite Share Purchase Agreement automatically stood terminated due to non-completion of the conditions mentioned
D in clause 3.4 of the agreement, there was no obligation on the applicant to enter into the Services Agreement, draft of which was annexed to the Tripartite Share Purchase Agreement as Schedule A or Shareholders Agreement, draft of which was produced as Schedule B to the agreement. It is not the case
E of the respondent at all that the draft of the Services Agreement was signed by the applicant at any point of time. Hence, automatic termination of Tripartite Share Purchase Agreement has nothing to do with the existence of the Services Agreement dated July 15, 2006, which was already separately executed
F between the parties. The record would indicate that the Services Agreement was executed before the Tripartite Share Purchase Agreement was executed. The existence of the said agreement was not dependent upon the completion of events as contemplated by the Tripartite Share Purchase Agreement
G and, therefore, it is wrong to contend that the Services Agreement ceased to exist on termination of the Tripartite Share Purchase Agreement.

11. Similarly, the plea that the Tripartite Share Purchase Agreement was novated, rescinded and revoked on account
H of Letter of Intent dated August 1, 2006 and, therefore, the

instant application should be rejected, has no force. The Letter of Intent dated August 1, 2006 under no circumstances can be treated as novating, rescinding or revoking the Tripartite Share Purchase Agreement. The said Letter of Intent on a bare reading is nothing but an agreement to enter into another agreement because it is provided in the said letter that "both parties agree to have set a deadline to sign this agreement by 15th September, 2006". It is well settled legal position that an agreement to enter into an agreement is not enforceable nor does it confer any right upon the parties. The agreement in terms of the said Letter of Intent was to be signed on or before September 15, 2006. It is not the case of the respondent that any agreement was executed between the parties on or before September 15, 2006. The respondent has not stated in its counter reply that the agreement, which was to be executed by September 15, 2006, was in fact executed. During the course of hearing of the instant application it was fairly conceded by the learned counsel for the respondent that no such agreement was executed between the parties at all. Hence, as the agreement contemplated by the Letter of Intent was never executed, it cannot be said that the agreement contemplated by the said Letter of Intent had novated, rescinded or superseded the Tripartite Share Purchase Agreement. Further, the scope/terms of the Tripartite Share Purchase Agreement as well as those of the Services Agreement and the terms contemplated by Letter of Intent dated August 1, 2006 are not consistent at all and, therefore, it is difficult to hold that novation of the Tripartite Share Purchase Agreement read with the Services Agreement had taken place, as contended by the respondent.

12. The net result of the above discussion is that the Services Agreement dated July 15, 2006 has not ceased to exist and the applicant is entitled to invoke the arbitration clause contained in that agreement. The application filed by the applicant is within the time prescribed by law. There is no manner of doubt that disputes are existing between the parties

A relating to the execution of the Services Agreement dated July 15, 2006, which are arbitrable. Under the circumstances, the instant application will have to be accepted.

13. For the foregoing reasons the application succeeds. Mr. Justice Arvind Sawant (Retd.), former Chief Justice, High B Court of Kerala, is appointed as the sole arbitrator. The learned arbitrator is requested to enter on the reference and do the needful in the matter as early as possible in accordance with law.

C 14. There shall be no order as to costs.

R.P. Arbitration application allowed.