

Milind and Others Vs. Pramod

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Court : Mumbai Nagpur

Decided On : Feb-29-2016

Judge : R.K. Deshpande

Appeal No. : Arbitration Appeal No. 18 of 2015

Appellant : Milind and Others

Respondent : Pramod

Judgement :

1. Admit. Heard finally by consent of the learned Advocates appearing for the parties.
2. The respondent/plaintiff-Pramod s/o Deshraj Budhraj has filed Summary Civil Suit No.108 of 2015 under Order XXXVII of the Code of Civil Procedure on 10-8-2015 for a decree in the sum of Rs.3,51,26,250/- along with future interest at 21% per annum compounded quarterly from the date of filing of the suit till its payment, against the appellant-defendants, alleging that the defendants had issued four cheques dated 25-2-2015, 25-3-2015, 25-4-2015 and 25-5-2015 for an amount of Rs.1,00,00,000/- each in favour of the plaintiff to discharge their liability, and all the four cheques were dishonoured due to insufficient funds. The first cheque dated 25-2-2015 was presented on 26-2-2015, and upon its dishonour, it was returned to the defendant No.1, who made the payment of Rs.70,00,000/- and assured to make the balance payment of Rs.30,00,000/-, which he has failed to make. The

other three cheques were dishonoured on 13-6-2015 upon presentation, and no payment has been made. Thus, the claim was for the principal amount of Rs.3,30,00,000/- with interest at the rate of 21%. The parties shall hereinafter be referred accordingly to their status as the plaintiff and the defendants.

3. In response to the suit summons, the defendants at the very first opportunity produced an arbitration agreement dated 9-4-2014 along with an application Exhibit 23 filed under Section 8 of the Arbitration and Conciliation Act, 1996 read with Section 9-A of the Code of Civil Procedure on 30-9-2015 for referring the matter to the Arbitrator named therein. The plaintiff filed his reply on 7-10-2015, opposing this application. The Trial Court has, by an order dated 27-10-2015, rejected the application at Exhibit 23 and hence the defendants have approached this Court by filing this appeal under Section 37(1) of the Arbitration and Conciliation Act.

4. The controversy involved in the present appeal is restricted to the claim of the defendants to seek reference of the matter to the Arbitrator in terms of clause 11, in the agreement dated 9-4-2014, styled as "Sale Agreement/Memorandum of Understanding" (hereinafter referred to as "the said agreement"), executed between the defendants and the plaintiffs, who are described therein as PARTY NO.ONE and PARTY NO.TWO respectively. In order to appreciate the factual controversy involved in the matter, the terms of the said agreement will have to be looked into.

5. The salient features of the said agreement, to which the learned Advocates appearing for the parties have invited my attention, are stated as under :

(1) The defendants are the owners of separate block Nos.301 A, 301 B, 301 C and 301 D, admeasuring totally about 5000 sq.ft. carpet area, and terrace of about 12000 sq.ft. carpet area, situated on the third floor, bearing N.M.C. House No.64/301 A to 301 D, Ward No.65, Khasra No.101/3, City Survey No.1866, Sheet No.34, Mouza Sitabuldi, at SV Patel Marg, Kingsway, Sadar, Nagpur (hereinafter called as "the said property"), which is the subject-matter of the said agreement.

(2) The plaintiff has agreed to purchase and the defendants have agreed to sell the said property on 9-4-2014 for a total consideration of Rs.6,50,00,000/-, out of which the plaintiff had paid an amount of Rs.4,50,00,000/- by two cheques dated 27-3-2014 for Rs.2,50,00,000/- and dated 29-3-2014 for Rs.2,00,00,000/- to the defendants, and an amount of Rs.1,50,00,000/- by a cheque dated 22-4-2014. The balance consideration of Rs.2,00,00,000/- was agreed to be paid at the time of registration of the sale-deed within a period of six months, on or before 30-9-2014.

6. Clauses 8 and 11 of the said agreement were heavily relied upon by both the parties, and hence the same are reproduced below :

"8. That the PARTY No.ONE shall Execute and Register the Sale Deed in the name of PARTY No.TWO or his nominee and the PARTY No.TWO or his nominee shall take the Sale Deed on or before 30th September, 2014, on the same conditions as agreed between PARTY No.TWO and PARTY No.ONE provided all the necessary clearances as mentioned above have been taken by PARTY No.TWO. Time is the essence of the contract. Both PARTY No.ONE and PARTY No.TWO shall have the right for specific performance of contract as per clause 11 below."

"11. Description of the complete property : 5000 sft covered carpet area, open terrace 12,000 sft. out of which 3450 covered carpet area and 4000 sft. open terrace has been offered on lease to Barbecue Nation as shown in the attached plan, Marked in blue. There is a capsule lift connecting the basement parking, the ground floor and the third floor, which is being offered to them as an exclusive use, as well as certain parking rights, the charges for the same shall only be the normal maintenance charges.

The property to be sold : 5000 sft covered carpet area, open terrace 4,000 approx. sft. as shown in the attached plan marked in red. The balance area of terrace about 8000 sft is not under sale and shall remain in the ownership of PARTY No.ONE. There is a capsule lift connecting the basement parking, the ground floor and the third floor, the same shall form a part of this sale. All facilities offered to Barbecue Nation shall be part of sale and before handing over the physical possession of the property it will be measured and appropriate pricing of covered

area and terrace area will be calculated.

All expenses borne in providing power of 150 KW to Barbecue Nation shall be borne by the Purchaser.

Conditional sale/compensation agreed : This is a conditional sale, in the event the property does not go on lease to Barbecue Nation or any other client within a period of six months from 1st April 2014, in that event the PARTY No.TWO shall have the right to charge an interest of 21% per annum as compensation, to be compounded every 3 months on the amount given and withdraw from this transaction. It is also agreed between the Parties that if the leasing of the property is concluded earlier, in that event the balance payment shall be made within 15 days from the date of agreement of the lease.

Arbitration : Any disputes in this matter shall be referred to the sole arbitration of Mr. Pankaj Roshan Chandna, and his decision shall be final as he has been instrumental in finalization of the transaction and is aware of all the communication between the two parties."

7. Clause 8 of the said agreement contains a stipulation that the time is the essence of contract and both the parties, viz. PARTY NO.ONE and PARTY NO.TWO shall have the right for specific performance of contract as per clause 11 thereof. Clause 11 contains a stipulation "Conditional sale/compensation agreed" and it states that this is a conditional sale in the event the property does not go on lease to "Barbeque Nation" or any other client within a period of six months from 1st April, 2014, in that event the PARTY NO.TWO shall have the right to charge an interest of 21% per annum as compensation, to be compounded every three months on the amount given, and withdraw from this transaction. The stipulation regarding arbitration contained in clause 11 states that any disputes in this matter shall be referred to the sole arbitration of Mr. Pankaj Roshan Chandna, and his decision shall be final as he has been instrumental in finalization of the transaction and is aware of all the communications between the two parties.

8. In para 4 of the plaint, it is stated that the cardinal term of the said agreement was that "Barbeque Nation", a multi city chain of restaurant, would take the

property on lease latest by 30th September, 2014, and if the said restaurant or any other client does not take the property on lease for any reason whatsoever, the payment made by the plaintiff shall be refunded forthwith in the October 2014 with interest at 21% per annum, compounded quarterly. The plaint alleges in para 5 that "Barbeque Nation", which is a restaurant, refused to take the property on lease, as the entire property was not sanctioned by the Nagpur Municipal Corporation - the planning authority, and only a part of it was sanctioned.

9. In para 6, it is alleged that the plaintiff has been incessantly asking for return of the amount with interest, as was agreed, and the defendants requested for providing installments. After due deliberation and discussion, the defendants issued eight cheques in favour of the plaintiff for repayment of the amount due under the said agreement in eight installments, which clearly shows that the liability to repay under the said agreement was an admitted liability and was never disputed by the defendants at any stage. Para 6 of the plaint gives the details of seven cheques of Rs.1,00,00,000/- each dated 25-2-2015, 25-3-2015, 25-4-2015, 25-5-2015, 25-6-2015, 25-7-2015 and 25-8-2015. It also gives the details of last cheque of Rs.64,11,123/- dated 25-9-2015.

10. The claim in the plaint in question is restricted to the alleged liability of the defendants discharged by the first four cheques of Rs.1,00,00,000/- each, out of which, part payment of the alleged liability to the extent of Rs.70,00,000/- contained in the first cheque, was discharged. The plaintiff issued a legal notice dated 22-6-2015, calling upon the defendants to return the sum of Rs.3,30,00,000/- contained in the aforesaid four cheques, which were dishonoured on 13-6-2015. Similarly, after dishonour of the other cheques, separate such summary suits have been filed, as is informed to this Court.

11. The Trial Court has recorded the finding that the defendants have till this date not applied for leave to defend and the grounds raised in the application could not have been raised in the application for leave to defend. It further holds that the issue of referring the matter to the Arbitrator could have been arisen only when the plaintiff had claimed the amount on the basis of the said agreement. It further holds that the agreement is used or relied upon in the present matter only in order

to show the background of the transaction. The suit has been filed on the basis of dishonoured cheques and recovery of that much amount only. It further holds that the agreement dated 9-4-2014 is no doubt the source of contract between the parties, but the dishonour of the cheques being a new cause of action, independent and distinct from that is founded on the agreement, and merely because the defendants have raised a plea that the cheques were security cheques, that is not enough. According to the Trial Court, the new cause of action of dishonour of cheques cannot be said to be the subject-matter covered by the arbitration clause under the agreement and, therefore, the matter cannot be referred to the Arbitrator.

12. Heard Shri D.V. Siras, the learned Advocate appearing for the appellant-defendants; and Shri M.G. Bhangde, the learned Senior Advocate, assisted by Shri R.M. Bhangde, Advocate, for the respondent-plaintiff. Although the suit in question is a summary suit under Order XXXVII of the Code of Civil Procedure, there was no application for leave to defend filed, as contemplated by sub-rule (5) of Rule 3 under Order XXXVII of the Code. It is not the case of any of the parties that the arbitration agreement does not subsist/exist. On the basis of the contentions raised by the learned Advocates appearing for the parties, and in the light of the findings recorded by the Trial Court, the following points for determination are framed, to deal with the contentions.

Points for determination

(1) Whether in the absence of an application for leave to defend, as contemplated by sub-rule (5) of Rule 3 of Order XXXVII of the Code of Civil Procedure, the application under Section 8 of the Arbitration and Conciliation Act, 1996 could be entertained and decided by the Trial Court?

(2) Whether the Trial Court was right in holding that the suit in question is exclusively based upon the dishonour of the cheques and it is not seeking to enforce the said agreement dated 9-4-2014, so as to attract the clause No.11 of the arbitration, contained therein?

As to Point No.(1) :

13. Sub-sections (1) and (2) of Section 8 of the Arbitration and Conciliation Act, 1996 being relevant, are reproduced below:

"8. Power to refer parties to arbitration where there is an arbitration agreement.-

(1) A judicial authority, before which an action is brought in a matter which is the subject of an arbitration agreement, shall, if a party to the arbitration agreement or any person claiming through or under him, so applies not later than the date of submitting his first statement on the substance of the dispute, then, notwithstanding any judgment, decree or order of the Supreme Court or any Court, refer the parties to arbitration unless it finds that prima facie no valid arbitration agreement exists.

(2) The application referred to in sub-section (1) shall not be entertained unless it is accompanied by the original arbitration agreement or a duly certified copy thereof:

Provided that where the original arbitration agreement or a certified copy thereof is not available with the party applying for reference to arbitration under sub-section (1), and the said agreement or certified copy is retained by the other party to that agreement, then, the party so applying shall file such application alongwith a copy of the arbitration agreement and a petition praying the Court to call upon the other party to produce the original arbitration agreement or its duly certified copy before that Court."

Sub-section (1) of Section 8 requires that a judicial authority, before which an action is brought in a matter which is the subject of an arbitration agreement, shall, if a party to the arbitration agreement or any person claiming through or under him so applies not later than the date of submitting his first statement on the substance of the dispute, then, notwithstanding any judgment, decree or order of the Supreme Court or any Court, refer the parties to arbitration unless it finds that prima facie no valid arbitration agreement exists. In the present case, there is no dispute in respect of the compliance of sub-section (2) of Section 8 of the said Act.

14. In terms of sub-section (1) of Section 8 of the said Act, it is not permissible for the defendants to apply to the Court to refer the parties to arbitration after filing an

application under sub-rule (5) of Rule 3 of Order XXXVII of the Code of Civil Procedure for grant of leave to defend. The application under Section 8 of the said Act is necessarily required to be made before the disclosure of the defence in response to the summons of the suit filed under Order XXXVII of the Code. Otherwise, it shall frustrate the very object of introducing an arbitration clause in the agreement, as has been urged by Shri Siras. This objection pertains to the jurisdiction of the Trial Court to deal with the controversy on merits, and, therefore, the question of seeking leave of the Court to defend the matter on merits does not arise. The Trial Court, therefore, committed an error in holding that the claim for reference of disputes to the Arbitrator could have been raised in the application for leave to defend under sub-rule (5) of Rule 3 of Order XXXVII of the Code.

15. The application for leave to defend under sub-rule (5) of Rule 3 of Order XXXVII of the Code of Civil Procedure has to be filed within 10 days from the service of summons for judgment. It is permissible for the defendant in terms of sub-rule (7) of Rule 3 of Order XXXVII to file an application for excusing the delay caused in entering an appearance or in applying for leave to defend the suit upon showing sufficient cause. In view of this, even if the application for leave to defend is not filed within 10 days, that will not prevent the defendant from filing such application at any subsequent stage by putting forth the cause that the application under Section 8 of the Arbitration and Conciliation Act was filed immediately, and the defendant was awaiting the decision on such application, which may be considered by the Court to be the "sufficient cause", as contemplated by sub-rule (7) of Rule 3 of Order XXXVII of the Code of Civil Procedure. However, if the application under sub-section (1) of Section 8 of the said Act is not filed at the very first opportunity, the defendants shall run the risk of waiver of such objection.

16. The controversy has been put beyond the pale of any doubt by the decision of the learned Single Judge of this Court (Shri S.C. Dharmadhikari, J.) in the case of Ion Exchange (India) Ltd. v. MSK Projects (India) Ltd., reported in 2005(4) Mh.L.J. 921, in which the question was whether an application under Section 8 of the Arbitration and Conciliation Act would lie in a suit filed under Order XXXVII of the Code of Civil Procedure. The Court has construed the word/phraseology "Action", employed under Section 8 of the said Act to cover all sorts of suits, which are

instituted in the Civil Courts by presenting a plaint. The Court has rejected the argument that summary procedure provided under Order XXXVII to certain suits being an exception carved out to the general procedural provisions applying Section 8 thereto would be defeating and frustrating the Legislative mandate. The Court has held that the said Act is aimed at encouraging parties to settle their disputes by taking recourse to arbitration and conciliation, and it minimizes the role, which is supervisory, of the Court in arbitration process. If the purpose of this enactment is to be achieved, then the interpretation of Section 8 that it would not apply to the suits under Order XXXVII, cannot be accepted. The Court has held that if summary suits are left out of the purview of Section 8(1), the purpose of enacting a comprehensive Legislation of Arbitration and Conciliation Act, 1996, cannot be achieved. Ultimately, the Court has held that Section 8 of the said Act would cover the suits under Order XXXVII of the Code of Civil Procedure and it is not permissible to leave them out of its purview.

17. In view of the aforesaid position, the point No.(1) is answered holding that even in the absence of any application under sub-rule (5) of Rule 3 of Order XXXVII of the Code of Civil Procedure for leave to defend, the application under sub-section (1) of Section 8 of the Arbitration and Conciliation Act would be maintainable.

As to Point No.(2) :

18. Both the learned Advocates have taken me through the judgment of the Apex Court in the case of Branch Manager, Magma Leasing and Finance Limited and another v. Potluri Madhavalata and another, reported in (2009) 10 SCC 103. In para 17 of the said judgment, after reproducing Section 8 of the Arbitration and Conciliation Act, the Apex Court has held as under :

"17. ...

An analysis of Section 8 would show that for its applicability, the following conditions must be satisfied:

(a) that there exists an arbitration agreement;

(b) that action has been brought to the court by one party to the arbitration agreement against the other party;

(c) that the subject-matter of the suit is same as the subject-matter of the arbitration agreement;

(d) that the other party before he submits his first statement of the substance of the dispute, moves the court for referring the parties to arbitration; and

(e) that along with the application the other party tenders the original arbitration agreement or duly certified copy thereof."

Shri Bhangde, the learned Senior Advocate, submits that the Court has to see whether the requirements of Section 8 of the said Act, as are reproduced above, have been complied with. The dispute in the present case is restricted to the compliance of clauses (a) and (c), reproduced above, and it is not disputed that clauses (b), (d) and (e) are satisfied in this case.

19. Shri Bhangde, the learned Senior Advocate, appearing for the respondent-plaintiff, was put a specific question that is it your case in reply to the application under Section 8 of the Arbitration and Conciliation Act that the agreement dated 9-4-2014 does not subsist, and he has answered it in the negative. It is nowhere the case of the plaintiff in response to the application under Section 8 of the said Act that there does not exist an arbitration agreement between the parties. Hence, the test in clause (a) above, is satisfied and it has to be held that there exists a valid and enforceable agreement of arbitration between the parties.

20. Shri Bhangde, the learned Senior Advocate, has urged that it is for the defendants to establish that the subject-matter of the suit is same as the subject matter of the arbitration agreement. In order to satisfy this Court on this question, Shri Siras for the appellant-defendants has invited my attention to the averments in para 4 of the plaint that if Barbeque Nation or any other client does not take the property on lease for any reason whatsoever, the payment made by the plaintiff shall be refunded forthwith in the October 2014 with the interest at 21% per annum, compounded quarterly. In para 6 of the plaint, it is alleged that the parties

met and extensively discussed, and after due deliberation and discussion, the defendants issued eight cheques in favour of the plaintiff for repayment of the amount due under the agreement dated 9-4-2014 in eight installments. He has further invited my attention to para 12 of the plaint, wherein it is stated that the cause of action accrued to the plaintiff in the month of October 2014 when the amount was to be returned by the defendants as per the agreement dated 9-4-2014.

21. Shri Siras has further invited my attention to clause 11 of the said agreement, which is reproduced earlier, regarding conditional sale/compensation agreed, in which it is stated that this is a conditional sale, in the event the property does not go on lease to Barbeque Nation or any other client within a period of six months from 1st April 2014, in that event the party No.2 shall have the right to charge an interest of 21% per annum as compensation, to be compounded every three months on the amount given and withdrawn from this transaction. He has further invited my attention to prayer clause (i) in the plaint, which claims a decree in the sum of Rs.3,51,26,250/- in favour of the plaintiff directing the defendants to pay the said amount along with future interest at 21% per annum compounded quarterly from the date of filing of the suit till realization, which is the claim in terms of clause 11 of the said agreement.

22. The total consideration to sell the said property, as agreed, was Rs.6,50,00,000/-, out of which an amount of Rs.2,00,00,000/- was the balance consideration, which was required to be paid at the time of registration of the sale-deed. The averment in para 5 of the plaint is that Barbeque Nation, a multi city chain of restaurant, has failed to take the said property on lease because part of the construction of the suit property was not sanctioned by the Nagpur Municipal Corporation and, therefore, the condition of sale incorporated in the said agreement became incapable of performance. The plaintiff was, therefore, entitled to return the amount of consideration along with the interest, as agreed.

23. Clause 8 in the said agreement gives the right to both the parties to the agreement to seek specific performance of contract as per clause 11 therein. The specific performance may relate either to get the refund of the entire consideration

along with interest at 21% per annum, compounded quarterly, by way of compensation, as is averred in para 4 of the plaint read with clause 11 styled as "Conditional sale/compensation agreed" in the said agreement. It is also open for the defendants in terms of clause 8 of the said agreement to seek specific performance of contract from the plaintiff to pay the balance amount of consideration of Rs.2,00,00,000/- by showing that there was a breach of contract on the part of the plaintiff in taking the stand that the condition under the contract could not be fulfilled, for the reason that part of the said property constructed was not sanctioned by the Nagpur Municipal Corporation. The entitlement of the plaintiff to get the refund of consideration with interest of 21% per annum as compensation, would depend upon resolution of the dispute, which is covered by the clause of arbitration under the said agreement.

24. The Trial Court has committed an error in holding that the suit in question is exclusively based upon the dishonour of cheques and that the plaintiff is not seeking to enforce the terms of the said agreement. From the averments in the plaint, it is clear that the cheques were issued by the defendants in favour of the plaintiff to refund the amount of consideration in terms of clause 11 of the said agreement. Hence, it has to be held that the subject-matter of the suit is same as the subject-matter of the arbitration agreement. Once it is held that there exists a valid and enforceable agreement of arbitration between the parties, the parties are required to be referred to the arbitration in terms of sub-section (1) of Section 8 of the Arbitration and Conciliation Act. The point No.(2) is, therefore, answered accordingly.

25. Shri Bhangde, the learned Senior Advocate, has further urged that the said agreement does not provide for installments, and it is not the contractual term to pay the amount in installments. If the dishonoured cheques had not been issued, the suit could have been filed for recovery of the entire amount, but in the present case, the suit has been filed to recover the amount of liability covered by the dishonoured cheques, which do not cover the entire amount of consideration. According to him, the present suit is based upon the cause of action, which arose on account of subsequent agreement between the parties to provide installments, which is independent and distinct from the said agreement dated 9-4-2014.

26. Keeping in view the fact that the plaintiff had issued two cheques dated 27-3-2014 and 29-3-2014 for an amount of Rs.2,50,00,000/- and Rs.2,00,00,000/- respectively towards part of consideration to the defendants even before entering into an agreement on 9-4-2014, Shri Bhangde was put a specific question as to whether all the cheques dated 25-2-2015, 25-3-2015, 25-4-2015, 25-5-2015, 25-6-2015, 25-7-2015 and 25-8-2015 were issued on the dates mentioned in the cheques or were the post-dated cheques. He has answered that these cheques were all post-dated cheques. The theory of separate agreement is not found in the pleadings. Be that as it may, the plaint averments are completely silent about the date on which the alleged agreement to pay the amount in installments was entered into between the parties. The plaint is conspicuously silent about the dates on which such post-dated cheques were tendered to the plaintiff by the defendants.

27. In the absence of pleading the material date of fresh agreement and the dates of tendering of post-dated cheques, it is possible to assume that such cheques were tendered at the time of execution of the said agreement itself on 9-4-2014 or during the subsistence of the period of contract from 1-4-2014 till 30-9-2014, on which date the period has lapsed, or even after 30-9-2014, but before the first cheque was issued on 25-2-2015. It is possible to urge that the cheques were issued at the time of execution of the agreement dated 9-4-2014 by way of security, which is the stand taken by the defendants, and subject to resolution of dispute, if any, raised in respect of repayment of the amount of consideration, as contained and covered by clause 11 of arbitration in the said agreement. In the absence of any case regarding pre-existing liability or consideration, except to refund the consideration with 21% per annum as compensation to be compounded quarterly, it is not possible to link issuance of these cheques to an independent or distinct cause of action based upon the agreement alleged to have been entered into between the parties subsequent to 30-9-2014. If any such case is made out before the Arbitrator, it shall be open for him to deal or decide it in accordance with law.

28. The decision of the Apex Court in the case of Ram Deo v. Umrao Singh, cited supra, relied upon by Shri Bhangde, turns upon the facts of that case and it was

not a case of Section 8 of the said Act. It was a suit for damages and eviction and the question was whether the tenant was in arrears of rent. The Court held on facts of that case in view of subsequent agreement, pre-agreement arrears lost their original character on arrears of rent. The said decision, therefore, does not apply in the present case.

29. For the reasons stated above, the appeal is allowed. The order passed by the Trial Court on 27-10-2015 below Exhibit 23 in Summary Civil Suit No.108 of 2015, is hereby quashed and set aside. The application at Exhibit 23 is allowed and the parties are referred to arbitration in terms of clause 11 of the Sale Agreement/Memorandum of Understanding dated 9-4-2014 for adjudication of the dispute as per sub-section (1) of Section 8 of the Arbitration and Conciliation Act. The further proceedings of Summary Civil Suit No.108 of 2015 shall remain stayed, till the conclusion of the arbitration proceedings and it shall be open for the parties to move the Trial Court thereafter.

30. It is made clear that this Court has not touched the controversy on merits, including the entitlement of the plaintiff to claim refund consideration with the compensation at 21% per annum. If any observations are found touching the controversy on merits, the Arbitrator shall not get influenced by it and it shall be open for him to decide it independently in accordance with law.

31. The appeal is disposed of in above terms. No order as to costs.

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