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Court : Chennai Madurai

Decided On : Apr-04-2016

Judge : V. Ramasubramanian &Amp; N. Kirubakaran

Appeal No. : Appeal Suit No. 122 of 2013

Appellant : Alaska Export USA Inc.

Respondent : Alaska Exports, rep. by its Managing Partner, Having office and Others

Judgement :

(Prayer: Appeal Suit filed under Section 96 of CPC against the Judgment and decree dated 01.04.2013 made in I.A.No.65 of 2011 in O.S.No.37 of 2010 on the file of the District Judge, Karur.)

1. This regular appeal under Section 96 of the Code of Civil Procedure arises out of a Judgment and decree passed by the District Court, Karur allowing an application under Section 8 of the Arbitration and Conciliation Act, 1996 and consequently rejecting the plaint.

2. We have heard Mr.S.R.Rajagopal, learned counsel appearing for the appellant and Mr.T.V.Ramanujun, learned senior counsel appearing for the respondents 1 to 3.

3. On 1.10.2001, an agreement was entered into between (1) Alaska Export, a Partnership Firm, having its office at Karur, who is the first respondent herein, represented by its partners who are the respondents 2 and 3 herein and (2) M/s. Alaska Export, USA Inc., which is the appellant herein.

4. On the ground that the respondents herein failed to fulfill their obligation under the said agreement, the appellant filed a suit on the file of the United States District Court, Northern District of Illinois, Eastern Division, praying for injunction, recovery of money and rendition of accounts. On 22.5.2007, the District Court of Illinois granted an exparte decree in the said suit, in favour of the appellant herein, directing the respondents to jointly and severally pay a sum of $776,457.10 towards damages, reimbursement of expenses, punitive damages etc.. The Court also granted a declaration that the respondents herein are obliged to pay a commission of 5% of the FOB value of textile goods sold by the respondents for a period of 10 years from 30.3.2007.

5. On the ground that the District Court of Illinois which passed the said exparte decree is not in a reciprocating territory in terms of Section 44-A of the CPC., the appellant filed a suit in O.S.No.37/2010 on the file of the District Court Karur, praying for (i) a declaration that the judgment and decree dated 22.5.2007 passed by the United States District Court was final and conclusive (2) a direction to the respondents to jointly and severally pay interest at 18% per annum on the said sum of Rs.3,45,95,046 from the date of the plaint (3) directing the respondents to pay commission at 5% on the FOB value of the textile goods sold for a period of ten years and (4) a direction to the respondents to render accounts.

6. Immediately after service of summons, the respondents filed an application in I.A.No.65 of 2011 under Section 8 of the Arbitration and Conciliation Act, 1996, on the ground that under the agreement dated 1.10.2001, the parties were obliged to have their disputes settled through arbitration. This application was allowed by the District Court, Karur by a judgment and decree dated 1.4.2013 and the plaint itself was rejected. Therefore, the plaintiffs in the suit have come up with the above regular appeal.

7. The main grounds on which the judgment of the trial court is assailed are as follows:

(i) that an application under Section 8 of the Arbitration and Conciliation Act, is not maintainable in respect of International Commercial Arbitrations;

(ii) that in any case, the trial Court could not have referred the dispute to arbitration, when the appellant has alleged fraud; and

(iii) that at any rate, the judgment of the District Court in Illinois cannot be the subject matter of arbitration in India.

8. In support of the above contentions, Mr.S.R.Rajagopal, learned counsel for the appellant relies upon the following decisions:

(i) Shakthi Bhog Foods Ltd. v. Kola Shipping Ltd., [2009 (2) SCC 134] (ii) Swiss Timing Ltd., v. Commonwealth Games 2010 Organising Committee [2014 (6) SCC 677]

(iii) N.Radhakrishnan v. Maestro Engineers [2010 (1) SCC 72]

9. In response to the submissions of the learned counsel for the appellant, it is contended by Mr.T.V.Ramanujun, learned senior counsel for the respondents that the decree obtained by the appellant from the District Court of Illinois is a nullity, in as much as no notice was ever served on the respondents and a decree has been obtained behind the back. According to the learned senior counsel, the very agreement dated 1.10.2001, on the basis of which the appellant claims to have obtained an exparte decree from the American Court, is a fabricated document and hence no benefits could flow out of the same. According to the learned senior counsel for the respondents, the parties in fact entered into a commission agreement on 1.10.2001, which contained an arbitration clause and also which conferred jurisdiction only upon the courts at Karur in Tamil Nadu.

10. In support of his contentions, the learned senior counsel for the respondents relied upon the following decisions:

(i) Ashapura Mine-Chem Ltd. v. Gujarat Development Corporation [2016 (1) LW 104]

(ii) SBQ Steels Limited v. Goyal Gases Private Limited [2014 (3) CTC 586]

(iii) Andritz Oy. v. Enmas Engineering Pvt. Ltd. [2007 4 CTC 186]

(iv) Union of India v. Reliance Industries Ltd. [(2015) 10 SCC 213]

(v) Learonal v. R.B.Business Promotions (P) Ltd. [(2010) 15 SCC 733]

(vi) Karnataka Bank Limited v. The Chairman/The Principal District Judge [2008 (6) CTC 526].

11. From the pleadings, the decision rendered by the trial court and the rival contentions, it is clear that three issues arise for consideration in the above appeal. These issues are:

(i) Whether the application filed by the respondents under Section 8 of the Arbitration and Conciliation Act, 1996 was maintainable?

(ii) Whether the trial Court was right in allowing the application under Section 8 of the Act (even if it is maintainable), when there were allegations of fraud. and

(iii) Whether in the facts and circumstances of the case, it was possible to refer the dispute revolving around the validity of the judgment of the District Court of Illinois to arbitration.

Issue-1:

12. The maintainability of the application under Section 8 is challenged by the appellant on the short ground that what the parties had was actually an International Commercial agreement and that therefore, Part-I of the Arbitration and Conciliation Act, 1996 would not apply.

13. It is not seriously disputed by Mr.T.V.Ramanujan, learned senior counsel appearing for the respondents, that the agreement that the parties had was an International Commercial agreement. But according to the learned senior counsel

for the respondents, the agreement relied upon by the appellant was completely different from the agreement that the parties actually entered into. According to the respondents, the agreement was only a commission agreement and hence the application under Section 8 of the Act was maintainable. In any case, it is contended by the learned senior counsel for the respondents that the label given to the application is not of any consequence and that the court should go by the substance of the application.

It is his contention that irrespective of whether Section 8 was quoted or Section 45 was quoted, the prayer was one and the same and hence the appellant cannot make much ado about it.

14. We have carefully considered the rival submissions. Unfortunately, there is a dispute in this case about the very nature of the agreement entered into by the parties with one another. The appellant herein claimed that they entered into a joint venture agreement on 1.10.2001 with the respondents. But the respondents claimed that it was not a joint venture agreement, but a commission agreement.

15. The nature of the agreement that the appellant claimed to have entered into with the respondents, as spelt out by the appellant in para 7 of the plaint is as follows:-

"7. On or about 1.10.2001 the plaintiff and the defendants entered into a joint venture agreement to be in force for a period of ten (10) years, whereby it was agreed that the plaintiff would procure textile orders from the USA and Canada and that the defendants in turn would manufacture and supply quality contract materials as per the specifications designs, colours, textiles, patterns etc., approved by the plaintiff and export the same to the buyers identified by the plaintiff. Under the said agreement, it was further agreed that profits from this venture shall be split between them at 60% for defendants and 40% for the plaintiff. It was also agreed that the defendants would reimburse the plaintiff for 50% of its expenditure incurred towards designing, administration, selling and marketing costs."

16. However, in paragraph 4 of the affidavit in support of their application under Section 8 of the Act, the respondents indicated the following as the nature of the agreement.

"The said agreement is not a Joint Venture Agreement as termed by the Plaintiff and it deals about the Plaintiff procuring orders for the defendant and the reciprocal obligations between the parties. The said agreement also deals about payment of certain commission to the Plaintiff. In other words, we entered into only a Commission Agreement with the respondent/plaintiff with certain terms and conditions. Prior to entering into the Commission Agreement, the respondent/plaintiff represented to us that he will have the ability to procure orders in USA and Canada and he will forward the orders to us provided we agreed to pay a commission on FOB (Free on Board). Basing upon such negotiation and through the oral discussion through telephone, we entered into a Written Agreement on 01.10.2001. The said Agreement was executed in India signed by us and the Original Agreement was sent to the respondent/plaintiff at his USA address for signing. After signing the agreement, the respondent/plaintiff has retained the Original Agreement dated 01.10.2001 and on our request, he sent the Xerox copy of the Agreement for our reference. I am herewith producing the Xerox copy of the Agreement. Since the original agreement is in the custody of the respondent/plaintiff, we have produced the Xerox copy of the same."

17. Irrespective of what is the true nature of the agreement and irrespective of whether what the appellant says is right or what the respondents say is right, one thing is very clear. The agreement appears to be only an International Commercial Agreement, as the same had been entered into between the persons located in different countries and imposing International Commercial obligations upon the parties. Therefore, the agreement that the parties had should be taken to be an International Commercial Agreement.

18. Section 2(1)(f) of the Arbitration and Conciliation Act, 1996 defines the expression "International Commercial Arbitration" as follows:

"(f) "international commercial arbitration" means an arbitration relating to disputes arising out of legal relationships, whether contractual or not, considered as

commercial under the law in force in India and where at least one of the parties is

(i) an individual who is a national of, or habitually resident in, any country other than India; or

(ii) a body corporate which is incorporated in any country other than India; or

(iii) an association or a body of individuals whose central management and control is exercised in any country other than India; or

(iv) the Government of a foreign country."

19. Therefore, if an arbitration actually takes place between the parties to this litigation, it would be an "international commercial arbitration", as the conditions stipulated in Section 2(1)(f) stand satisfied in the case on hand, irrespective of whether the agreement produced by the appellant is true or the agreement produced by the respondents is true.

20. In the application I.A.No.65 of 2011 filed by the respondents before the trial Court under Section 8 of the Act, they extracted Clause 20 of the so called Commission Agreement dated 1.10.2001 and pleaded for referring the dispute to arbitration. Paragraph 5 of the affidavit of the respondents filed in support of their application under Section 8 of the Act reads as follows:-

"5. The agreement contains some other terms also. Regarding this application the following terms of the agreement dated 01.10.2001 are very relevant.

"20. In the event of any dispute or difference arising out of or relating to this agreement or the breach thereof, the parties hereto shall use their best endeavors to settle such dispute or difference amicably between themselves in good faith and understanding. If no consensus is reached on a dispute, then the parties hereto may appoint an Arbitrator to act on its behalf and the provisions of Indian Arbitration Act shall apply."

21. The appellant herein filed a counter to the said application under Section 8 of the Act. While dealing with the Arbitration Clause relied upon by the respondents in para 5 of their affidavit, the appellant very cleverly chose not to deny or admit

the existence of the same. Paragraph 6 of the counter filed by the appellant before the trial court to the application under Section 8 of the Act reads as follows:

"6. The contentions in paragraph 5 of the affidavit are irrelevant, and they cannot be advanced at this stage. In the present circumstances and in view of the claim of the respondent against the petitioners in the aforesaid suit, Clause No.25 cannot be relied upon. Moreover, when the decree has been passed by the competent court, the Clause referred to by the petitioners has become ineffective."

22. Again in the last part of para 10 of their counter to the application under Section 8 of the Act, the appellant merely claimed that the Arbitration Clause would not come into operation, as a litigation was already initiated in a court in the United States. Even in para 11 of their counter, the appellant referred to the Arbitration Clause in the agreement dated 1.10.2001 and merely dismissed the same as irrelevant. The only plea made by the appellant in the application under Section 8 of the Act was that Clause 25 of the so called joint venture agreement contained Arbitration Clause, but the same cannot be invoked by the respondents.

23. In other words, it is not the case of the appellant that the agreement on which they placed reliance did not contain an Arbitration Clause. According to the appellant, the agreement was a joint venture agreement and it contained an Arbitration clause in Clause 25. According to the respondents, it was a commission agreement and it contained an Arbitration Clause in Clause 20.

24. Therefore, it is very clear that there was an Arbitration Agreement and that one of the parties to the agreement (namely the appellant) is a body corporate which is incorporated in a country other than India, satisfying sub-clause (ii) of Clause (f) of sub-section (1) of Section 2. As a consequence, the provisions of Part-I of the Act will not be applicable, unless the place of arbitration is in India, as per Section 2(2).

25. But unfortunately, the appellant does not appear to have raised the same as an issue in the counter filed by them before the trial court. The counter filed by the appellant focused attention only on the question whether there could be an Arbitration of a dispute, after the dispute got resolved in a decree passed by a

competent court.

26. The non obstante clause in Section 45 becomes applicable only when a judicial authority is seized of an action in a matter in respect of which the parties have made an agreement referred to in Section 44. The appellant ought to have pleaded that apart from satisfying the definition of International Commercial Arbitration under Section 2(1)(f), the case also came within the purview of Section 44(a), so as to apply the non obstante clause relating to Part-I available in Section 45.

27. It is no doubt true that the scope of an enquiry under Section 45 is larger than the scope of the enquiry under Section 8. In an application under Section 8, the judicial authority has to satisfy itself only about three things namely: (i) that the subject matter is covered by an arbitration agreement; (ii) that the original arbitration agreement or a duly certified copy thereof is filed before the court; and (iii) that the application is made not later than when submitting his first statement on the subsistence of the dispute.

28. But in an application under Section 45, the judicial authority is competent to go into the question whether the agreement is null and void, inoperative or incapable of being performed.

29. But unfortunately, the appellant did not raise this issue before the trial court. As seen from sub-section (2) of Section 2, Part-I of the Act shall apply where the place of arbitration is in India. It is not as though an International Commercial Arbitration cannot take place in India. If it does, Part-I will apply and as a consequence, Section 8 may apply.

30. In paragraph 7 of their counter, filed before the trial court, the appellant agreed that the courts in both places namely (i) Karur Town in Tamil Nadu, India and (ii) United States of America, had jurisdiction. Therefore, it is not as though Part-I of the Act stood automatically excluded, even without a pleading as to the place where the arbitration should have taken place. As held by the Supreme Court in Union of India v. Reliance Industries Limited [2015 (10) SCC 213], the exclusion of Part-I, depends upon two questions namely, (1) whether the juridical seat of the

arbitration is outside India and (2) whether the law governing the arbitration agreement is a law other than Indian law. In this case both these conditions are not present.

31. Moreover, in so far as the judicial authority before which an action is pending is concerned, the difference between an application under Section 8 and application under Section 45 lies only in the nature of the enquiry to be conducted. Therefore, if the respondents were entitled to file an application under Section 45, the mere fact that they quoted Section 8 in the application, will not take away that right. The court can always treat the application as one under Section 45 and adopt the procedure prescribed therein while conducting the enquiry.

32. In Learonal v. R.B.Business Promotions Private Limited [(2010) 15 CC 733], the Supreme Court found that instead of filing an application under Section 45, the appellant before the Supreme Court filed an application under Section 8 and the same was dismissed by the Delhi High Court. The Supreme Court set aside the order of the Delhi High Court directing the app lication to be treated as one under Section 45. Therefore, the mere quoting of the wrong provision may not be of any consequence, unless an enquiry into the said application has also been held in accordance with the procedure prescribed by the wrong provision of law. Hence, the first issue is answered against the appellant.

Issue-2:

33. The second issue is as to whether the trial court could have referred the dispute to arbitration, when serious allegations of fraud and fabrication of document have been made.

34. Strong reliance is placed by Mr.S.R.Rajagopal, learned counsel for the appellant, upon the decision of the Supreme Court in N.Radhakrishnan v. Maestro Engineers [(2010) 1 SCC 72], wherein it was held that where serious allegations of fraud are made, the same could be tried only before a court.

35. But one of us (VRSJ) had an occasion to consider in S.B.Q Steels Limited v. Goyal Gases Private Limited [2014 (3) CTC 586] the reach of the ratio laid down

by the Supreme Court in N.Radhakrishnan. After pointing out the distinction between the scope of the enquiry under Section 8 and that under Section 45 and after tracing the law on the point from the decision of the Supreme Court in Abdul Kadir Shamsuddin Bubere v. Madhav Prabhakar [AIR 1962 SC 406] it was held in paragraphs 72 to 74 of the decision in S.B.Q Steels as follows:

"72. In so far as the decision of the Supreme Court in N.Radhakrishnan is concerned, it is seen that the Supreme Court followed in that decision, its earlier decision in Abdul Kadir Shamsuddin Bubere. But as pointed out by me, Abdul Kadir Shamsuddin Bubere arose under the 1940 Act. Under the 1996 Act, two important deviations have been made. They are (i) the arbitration clause found in a contract is treated as a separate agreement by itself by applying the doctrine of severability; and (ii) while in an application under Section 45, it is permissible for the Court to see whether a contract is null and void, inoperative or incapable of being enforced, such a power is deliberately not conferred in a Court under Section 8 while dealing with a domestic arbitration. Therefore, by judicial interpretation, Sections 8 and 45 cannot be placed in pari materia ignoring the deliberate omission to include in Section 8, the 29 rider found in Section 45. Interestingly, before I delivered the decision on the scope of Section 8 in Sundaram Brake Linings Ltd., I had an occasion to consider in Andritz Oy v. Enmas Engineering Pvt. Ltd {2007 (4) MLJ 290}, the scope of Section 45. It was highlighted therein that the arbitration clause contained in a contract, can be equated to a lifeboat in sinking ship. Even if the ship explodes and sinks, the lifeboat can still sail. Similarly, even if the contract is vitiated by fraud, it will be open to the Arbitral Tribunal to decide that question by taking the lifeboat for its journey. In such circumstances, the contention that the dispute is not arbitrable at all, has to be rejected.

73. There is also one more reason as to why the above contention of the respondent cannot be countenanced. Under Section 19 of the Indian Contract Act, a contract to which the consent of a party was obtained by coercion, fraud or misrepresentation, is voidable at the option of the party whose consent was so caused. It is also open to the party whose consent was caused by fraud or misrepresentation to insist that the contract shall be performed and that he shall

be put in the position in which he would have been, if the representations had been made true. Section 19 of the Contract Act, reads as follows:-

"19. Voidability of agreements without free consent. When consent to an agreement is caused by coercion, fraud or misrepresentation, the agreement is a contract voidable at the option of the party whose consent was so caused. A party to a contract, whose consent was caused by fraud or misrepresentation, may, if he thinks fit, insist that the contract shall be performed, and that he shall be put in the position in which he would have been if the representations made had been true.

Exception.--If such consent was caused by 30 misrepresentation or by silence, fraudulent within the meaning of Section 17, the contract, nevertheless, is not voidable, if the party whose consent was so caused had the means of discovering the truth with ordinary diligence.

Explanation.--A fraud or misrepresentation which did not cause the consent to a contract of the party on whom such fraud was practised, or to whom such misrepresentation was made, does not render a contract voidable."

74. Interestingly, an agreement, the parties to which are under a mistake as to a matter of fact essential to the agreement, is made void under Section 20. But a contract vitiated by fraud or misrepresentation is made only voidable. Therefore, the normal premise that fraud vitiates all solemn acts, cannot at all times be made applicable to a contract, since the party whose consent was brought forth by fraud, is always entitled to have the contract enforced. Hence, the fourth contention of the respondent is rejected."

36. Therefore, it is not as though a question of fraud cannot be decided by Arbitral Tribunal. In as much as an Arbitral Tribunal is also competent to apply to the court for assistance in taking evidence, by virtue of Section 27 of the Act, we do not think that the moment an allegation of fraud is made, the jurisdiction of the court to refer the dispute to arbitration would stand excluded. The court itself can do so in terms of Section 45, if it comes to the conclusion that the fraud committed by one of the parties to the arbitration agreement has rendered the agreement null and void.

37. Having said that, we have to point out that the case on hand stands on a slightly different footing. In this case there are two different agreements relied upon by the parties. According to the appellant there was a joint venture agreement dated 1.10.2001, which contained an arbitration clause in Clause 25. According to the respondents there was a commission agreement dated 1.10.2001, which contained an arbitration clause in Clause

20. Apart from these fundamental differences in the nomenclature and in the serial number, there were also other serious differences, which appear to be irreconcilable. These differences are as follows:

(i) While the first and last pages of the agreement relied upon by both parties are one and the same, the second and third pages of the agreements differ from each other. A finding to this effect has been recorded by the trial court in para 8 of its decision, after comparing Ex.P1 agreement filed by the respondents and page 15 of Ex.R7 filed by the appellant.

(ii) In page 2 of Ex.P1 agreement filed by the respondents, there are 12 clauses, but in page 2 of the agreement relied upon by the appellant there are 9 clauses.

(iii) In page 3 of Ex.P1 there are clauses 13 to 18. In page 3 of the agreement relied upon by the appellant, there are clauses 10 to 18. (iv) In page 4 of Ex.P1, the signatures of the parties are found. But in page 4 of the agreement relied upon by the appellant, there are clauses from 19 to 26.

(v) The arbitration clause and jurisdiction clause are found in Ex.P1 at serial numbers 20 and 21. But these clauses are found as serial numbers 25 and 26 in the agreement relied upon by the appellant.

(vi) Though the arbitration clauses namely clause 20 of Ex.P1 and clause 25 of the agreement relied upon by the appellant are one and the same, the clauses relating to jurisdiction (Clause 21 in Ex.P1 and Clause 26 in the agreement relied upon by the appellant) appear to be different.

38. Apart from the above serious differences, there is also one more drawback. Even according to the respondents, they did not have the original agreement with

them. What was filed by them in support of their application under Section 8 was only a xerox copy and we do not know how it was marked as Ex.P1.

39. Since the application filed by the respondents was under Section 8, they were required either to file the original agreement or a certified copy thereof, as per Section 8(2). Therefore, if the matter goes before the Arbitral Tribunal, it has to first adjudicate upon the genuineness of Ex.P1. It is needless to say that the Arbitral Tribunal is a creature of an arbitration agreement. There cannot be one Arbitral Tribunal, created under two different arbitration agreements namely Clause 20 of Ex.P1 and Clause 25 of the agreement relied upon by the appellant.

40. The complications that would arise out of a reference of the dispute on hand to an Arbitral tribunal are one too many. First of all, when parties rely upon 2 different documents, as the basis for their commercial relationship and both documents contain independent arbitration clauses (though identically worded), it is not possible to appoint one Arbitral Tribunal by choosing any one of those agreements. If we do so, the Tribunal so created under one such agreement, cannot go beyond the terms and conditions of that contract to resolve the dispute. It cannot even look into the document relied upon by the other party, since the Arbitration agreement contained in that document is an independent one by itself. It is needless to point out that an Arbitral tribunal constituted in terms of one Arbitration agreement (that forms part of one substantial contract) cannot decide the disputes arising out another contract, which contains a different arbitration agreement. Consequently, the other document relied upon by the other party will automatically become invalid without anyone, either the court or the Arbitral Tribunal pronouncing a verdict on its validity. Therefore, the trial court could not have allowed the application, either under Section 8 or even under Section 45. Hence, the second issue has to be answered in favour of the appellant, though not on the question of fraud, but due to the fact that both parties place reliance upon two different arbitration agreements, which form part of two different documents that constitute the substantial contract between the parties and both of which are alleged by each other to be fabricated and forged.

40. In view of our finding on the second issue, we do not think that it is necessary to go into the third issue. Therefore, the third issue is left unanswered.

CONCLUSION

41. In the light of our finding on issue No.2, the order of the trial court allowing the application under Section 8 cannot be sustained. Hence, this appeal is allowed, the judgment and decree of the trial court dated 1.4.2013 are set aside and the suit O.S.No.37 of 2010 is restored to the file of the trial court for disposal in accordance with law. In the facts and circumstances of the case, the parties shall bear their respective costs in this appeal.