

i.T.E.C. Limited and anr. Vs. India Exhibition Management Pvt. Ltd. and anr.

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Court : Allahabad

Decided On : May-09-2008

Reported in : 2008(4)AWC3230

Judge : Amitava Lala and ;Shishir Kumar, JJ

Appellant : i.T.E.C. Limited and anr.

Respondent : India Exhibition Management Pvt. Ltd. and anr.

Disposition : Appeal dismissed

Judgement :

Amitava Lala, J.

1. This appeal has been preferred by the plaintiffs-appellants upon being aggrieved by the order passed by the learned Civil Judge (Senior Division), Gautam Budh Nagar dated 25th April, 2005 in Suit No. 257 of 2005, I.T.E.C. Limited v. India Exhibition, by which the matter was directed to be presented before the competent authority for resolution by arbitration in accordance with the rules.

2. The contention of Mr. Ravindra Kumar Das and Mr. K.D. Tiwari, learned Counsel appearing for the appellants, is that by disposing of such application and sending the dispute for resolution by arbitration, in effect, the court below sent the

entire matter lock, stock and barrel before the competent authority. Therefore, far to say about the application, the suit cannot be heard by the Court. It is further contended that at the time of hearing the application under Order XXXIX, Rule 1 of the Code of Civil Procedure (hereinafter in short called as the 'C.P.C.') for issuing injunction, the Impugned order was passed. The appellants contended before this Court that the appellant No. 1 intended to organise exhibitions and fares, etc. periodically on a land of the plaintiff-appellant No. 2 at N.O.I.D.A. with the joint venture of one Roger Shashoua, defendant-respondent No. 2 herein. Said Sri Roger Shashoua entered into the business with the plaintiffs-appellants by transfer of 50% share of the company, being plaintiff-appellant No. 1 herein, in his favour. But bypassing such agreement he started doing competitive business in the name of defendant-respondent No. 1 company. Said Sri Roger Shashoua controls a company known as M/s. Expomedia Group Plc., which controls the respondent No. 1 herein, i.e., company. Incidentally, it has been submitted that said Sri Roger Shashoua is debarred from carrying business in India by virtue of rejection letter of the Government of India dated 7th July, 2006, conveyed vide letter dated 11th July, 2006, being Annexure-2 to the rejoinder-affidavit.

3. Learned Counsel appearing for the appellants relied upon paragraph-36 of the judgment in *S.B.P. and Company v. Patel Engineering Ltd. and Anr.* : AIR 2006 SC450 , which is follows:

36. It is fundamental to our procedural jurisprudence, that the right of no person shall be affected without he being heard. This necessarily imposes an obligation on the Chief Justice to issue notice to the opposite party when he is moved under Section 11 of the Act. The notice to the opposite party cannot be considered to be merely an intimation to that party of the filing of the arbitration application and the passing of an administrative order appointing an arbitrator or an arbitral Tribunal. It is really the giving of an opportunity of being heard. There have been cases where claims for appointment of an arbitrator based on an arbitration agreement are made ten or twenty years after the period of the contract has come to an end. There have been cases where the appointment of an arbitrator has been sought, after the parties had settled the accounts and the concerned party had certified that he had no further claims against the other contracting party. In other words,

there have been occasions when dead claims are sought to be resurrected. There have been cases where assertions are made of the existence of arbitration agreements when, in fact, such existence is strongly disputed by the other side who appears on issuance of notice. Controversies are also raised as to whether the claim that is sought to be put forward comes within the purview of the concerned arbitration clause at all. The Chief Justice has necessarily to apply his mind to these aspects before coming to a conclusion one way or the other and before proceeding to appoint an arbitrator or declining to appoint an arbitrator. Obviously, this is an adjudicatory process. An opportunity of hearing to both parties is a must. Even in administrative functions if rights are affected, rules of natural justice step in. The principles settled by *Ridge v. Baldwin* (1963) 2 All ER 66. are well known. Therefore, to the extent, *Konkan Railway* (supra) states that no notice need be issued to the opposite party to give him an opportunity of being heard before appointing an arbitrator, with respect, the same has to be held to be not sustainable.

4. The contentions of the appellants were strongly opposed by Mr. Ravi Kant, learned senior counsel, and Mr. Zafar Naiyar, learned Additional Advocate General in individual capacity, Mr. Syed Ali Murtaza, learned Counsel appearing for the respondent No. 2, and Sri Yashwant Varma and Ms. Rohma Sayeed, learned Counsel appearing for the respondent No. 1.

5. According to Mr. Ravi Kant, no question of share holding has been raised in the plaint. Learned arbitrators have already passed an interim award. Remedy is available under the Arbitration and Conciliation Act, 1996 (hereinafter in short called as the 'Act') itself. He said that Section 2(1)(c) of the Act says, 'arbitral award' includes an interim award.

6. As referred by both Mr. Ravi Kant and Mr. Yashwant Varma, we have gone through Sections 8 and 16 of the Act, which are relevant for the purpose and quoted hereunder:

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 so applies not later than when

submitting his first statement on the substance of the dispute, refer the parties to arbitration.

(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.

(3) Notwithstanding that an application has been made under Sub-section (1) and that the issue is pending before the judicial authority, an arbitration may be commenced or continued and an arbitral award made.

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

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

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

(2) A plea that the arbitral Tribunal does not have jurisdiction shall be raised not later than the submission of the statement of defence ; however, a party shall not be precluded from raising such a plea merely because that he has appointed, or participated in the appointment of, an arbitrator.

(3) A plea that the arbitral Tribunal is exceeding the scope of its authority shall be raised as soon as the matter alleged to be beyond the scope of its authority is raised during the arbitral proceedings.

(4) The arbitral Tribunal may, in either of the cases referred to in Sub-section (2) or Sub-section (3), admit a later plea if it considers the delay justified.

(5) The arbitral Tribunal shall decide on a plea referred to in Sub-section (2) or Sub-section (3) and, where the arbitral Tribunal takes a decision rejecting the plea, continue with the arbitral proceedings and make an arbitral award,

(6) A party aggrieved by such an arbitral award may make an application for setting aside such an arbitral award in accordance with Section 34.

7. Mr. Ravi Kant has drawn our attention to various judgments. He relied upon *Hindustan Petroleum Corporation Ltd. v. Pinkcity Midway Petroleums* : AIR 2003 SC2881 and contended that the language of Section 8 of the Act is peremptory in nature. Therefore, in cases where there is an arbitration clause in the agreement, it is obligatory for the Court to refer the parties to arbitration in terms of their arbitration agreement and nothing remains to be decided in the original action after such an application is made except to refer the dispute to an arbitrator. Therefore, it is clear that if, as contended by a party in an agreement between the parties before the civil court, there is a clause for arbitration, it is mandatory for the civil court to refer the dispute to an arbitrator. It is also held therein in view of Section 16 of the Act as well as *Konkan Railway Corporation Ltd. v. Rani Construction (P.) Ltd.* : [2002]1SCR728 , that if there is any objection as to the applicability of the arbitration clause to the facts of the case, the same will have to be raised before the arbitral Tribunal concerned. He further cited *Shree Subhlaxmi Fabrics Pvt. Ltd. v. Chand Mal Baradia and Ors.* : AIR 2005 SC2161 . to establish in further that the consistent view taken by the Court, therefore, is that contentious issues should not be gone into or decided at the stage of appointment of an arbitrator and no time should be wasted in such an exercise. The remedy of the aggrieved party is to raise an objection before the arbitral Tribunal as under Section 16 of the Act it is empowered to rule about its own jurisdiction. He further cited *Ardy International (P.) Ltd. and Anr. v. Inspiration Clothes and U and Anr.* 2006 (1) SCC 417. to establish that in the first place, Section 8 of the Act is not intended to restrain the arbitration proceedings before an arbitral Tribunal. The situation contemplated by Section 8 can arise only at the first Instance of an opponent and defendant in a judicial proceeding, or, at the highest, suo motu at the instance of the judicial authority, when the judicial authority comes to know of the existence of the arbitration agreement. In either event, there is no question of the Court under Section 8 of the Act restraining the arbitral proceedings from commencing or continuing. In fact. Section 8 of the Act is intended to achieve, so to say, the converse result. In *Agri Gold Exims Ltd. v. Sri Lakshmi Knits and Wovens and Ors.* : (2007)3SCC686 . it was held that Section 8 of the Act is peremptory in nature.

From Maharshi Dayanand University and Anr. v. Anand Corporation L/C Society Ltd. and Anr. : AIR 2007 SC2441 . we find that the Court held to the extent that in case of dispute with regard to acceptance of arbitration agreement, the arbitrator at the first instance will decide the same as preliminary issue.

8. Mr. Das, learned Counsel appearing for the appellants, contended that no arbitration agreement has been executed at all. However, on a query of the Court, he said that principally he agreed but no formal documentation was made. In such circumstance, we have gone through the arbitration clause as in the shareholders agreement dated 1st July, 1988, which is as follows:

14. Arbitration.

14.1. In the event a dispute arises in connection with the validity, interpretation, implementation, or breach of any provision of this agreement, the parties shall attempt, in the first instance, to resolve such dispute through negotiations within thirty (30) days from a party making a request therefor. In the event that the dispute is not resolved through negotiations, or such negotiations do not commence within thirty (30) days of a written request on this behalf, either party may refer the dispute to arbitration. Each party shall nominate one arbitrator and in the event of any difference between the two arbitrators, a third arbitrator/umpire shall be appointed. The arbitration proceedings shall be in accordance with the Rules of Conciliation and Arbitration of the International Chamber of Commerce, Paris.

9. We find from such clause that scope and ambit is very wide to cover not only breach of any part of the agreement but also validity, interpretation and implementation thereof. Therefore, under no stretch of imagination it can be said that when a person has principally agreed to the terms and a dispute arose about validity and/or interpretation and/or implementation thereof, the same will be considered by a civil court de hors the law of arbitration. It has to be decided by the arbitrator or arbitrators, who was/were directed to hear out the same, in respect of any dispute regarding validity, interpretation or implementation.

10. On a further query, the Court has come to know that the appellants have submitted to the jurisdiction of the arbitrators and participated in the proceedings to get a decision on the preliminary point of jurisdiction and become unsuccessful. The award goes against the appellants. In *Printers (Mysore) Private Ltd. v. Pothan Joseph* : [1960]3SCR713 . it has been held upon going through the arbitration agreement that when it provides that if the interpretation or application of the contract any difference of opinion arose between the parties, the same shall be referred to the arbitration. The words 'interpretation or application of contract' are frequently used in arbitration agreements and they generally cover disputes between the parties in regard to the construction of the relevant terms of the contract as well as their effect, and unless the context compels a contrary construction, a dispute in regard to the working of the contract would generally fall within the clause in question. According to us, although the judgment was delivered on the repealed Act, i.e., Arbitration Act, 1940 but the principle is directly applicable herein more prudently when the question of jurisdiction can also be decided by the arbitrator/s himself/themselves as per the new Act, i.e.. Arbitration and Conciliation Act, 1986.

11. On an incidental question about grant of injunction the Supreme Court in *Percept D'Mark (India) (P.) Ltd. v. Zaheer Khan and Anr.* : AIR 2006 SC3426 . held that an agreement, which . is Incapable of specific performance, will be inequitable if it is directed to be enforced. It can only be compensated in terms of money.

12. Mr. Yashwant Varma upon adopting the arguments of Mr. Ravi Kant contended before this Court that the injunction is refused on the ground of carrying on business. Therefore, such Injunction cannot be granted in the manner as prayed for.

13. However, we are not concerned whether order of injunction can be granted or not to be granted by the civil court on merit. We are only concerned as to whether the civil court rightly returned the proceeding for arbitration or not. According to us, when the appellants have principally agreed in terms of agreement subject to formal documentation and the clause of agreement is wide enough to cover the question of validity, interpretation and implementation and when the appellants

have already submitted to the jurisdiction of the arbitrators and when a preliminary award is passed against them, the appeal arising out of suit and/or proceeding is infructuous in nature. If the appellants are aggrieved at all by the award, it is open for them to challenge the same before the appropriate Court of law. It is also open for them to apply for Interim measure before an appropriate Court of law in the appropriate circumstance. Even if the setting aside proceeding goes against them, they have a right to appeal. But under no circumstances the appeal pending before us can be held to be sustainable. Hence, it is dismissed accordingly, however, without imposing any costs.

Shishir Kumar, J.

14. I agree.

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