
(2002) 09 AHC CK 0136
In the Allahabad High Court
Case No : First Appeal No.46 of 2001

A.P.Diagnostics

APPELLANT

Vs

Birla Medical Technologies

RESPONDENT

Date of Decision : 23-09-2002

Acts Referred:

Arbitration and Conciliation Act, 1996 — Section 19, 21, 37, 5, 8
Civil Procedure Code, 1908 (CPC) — Section 96

Citation : (2002) 09 AHC CK 0136

Hon'ble Judges : Pradeep Kant, J and M.A.Khan, J

Final Decision : Dismissed

Judgement

1. This is an appeal preferred under Section 96 of the Code of Civil Procedure against the order dated 12.9.2001 passed by Civil Judge (Sr. Div.), Lucknow in Reg. Suit No.524 of 1999 terming the said order as judgment and decree passed in the suit, which, according to the appellants, stands dismissed.

2. The necessary facts of the case are that the appellant, which is registered partnership firm (hereinafter referred to as "the firm") carries on business of diagnostic centre under the firm name and style of A.P. Diagnostics at Lucknow. The firm being interested in the purchase of Whole Body Spiral CT Scanner approached the defendant No.1 in the suit, namely, M/S Birla Medical Technologies (hereinafter referred to as Birla Technologies) for purchase of Whole Body Spiral CT Scanner. The firm appears to have approached Birla technologies for the said purpose, who has given its quotation vide quotation dated 13th August, 1997 and in turn the appellant on 31.3.1998 gave its terms and price on which it was prepared to purchase the Scanner. In response to the aforesaid offer M/s. Birla Technologies vide their letter dated 13.4.1998 accepted the terms of the offercumpurchase order dated 31.3.1998. According to the appellant, it was specifically provided in their offer/purchase order that the configuration of the machines includes amongst Others Laser Camera Model 3 M 969 HQ. Further the other terms were also said to have been mentioned in the said offer/purchase order. These terms did not contain any clause of arbitration in case any dispute

arises with respect to the terms of the contract or breach of the contract in the matter relating to the aforesaid contract. Further case of the appellant was that it paid a sum of Rs.10 lacs to M/s Birla Technologies against the purchase order and also provided irrevocable and clean inland deferred Letter of Credit from State Bank of India, Hussainganj Branch, Lucknow (defendant No.2 in the suit) and also gave six Bank Guarantees of State Bank of India, Hussainganj Branch, Lucknow for a total sum of Rs.16 Lacs, details of which have been given by the appellant in the plaint. Subsequently on opening of the Commercial Branch of State Bank of India, the said Letter of Credit of Rs.84 lacs and the Bank Guarantee, referred to above, have been transferred to the said Branch of the Bank, which has also been impleaded as defendant in the suit and as respondent No.2 in the present appeal. The case of the appellant is that the purchase order dated 31st March, 1998 for the Whole Body Spiral CT Scanner Model Sele CT SP was confirmed by M/S Birla Technologies vide its letter dated 13th April, 1998, who also assured the appellant to supply, install, make it operational and maintain for a total price of Rs.One Crore Ten Lacs on the terms of contract as enumerated in the plaintiffappellant's letter dated 31st March, 1998 which was reproduced in the letter dated 13.4.1998 of M/S Birla Technologies, viz. defendant No.1 in the suit. The appellant appears to have made payment of Rs.10 lacs as advance, Rs.84 lacs against irrevocable and clean inland deferred Letter of Credit from the Bankers, deferred for a period of six months and also provided Bank Guarantee of Rs.16 lacs for payment to be made in instalments. In pursuance of the said purchase order, the plaintiffappellant made payment of sale consideration and Whole Body Spiral CT Scanner at arrived at Lucknow on 15.8.1998 for which M/s Birla Technologies sent papers with covering letter dated 14.8.1998 and allegedly the Unit was found to be in bad packing and was short of vital components causing loss to the plaintiffappellant. The Engineers of M/S Birla Technologies came for physical installation of the machine only on 24th August, 1998 and the physical installation was completed on 24th August, 1998 but for want of Computer, which was not supplied by M/S Birla Technologies, the Whole Body Spiral CT Scanner could not commence its functioning. The Computer for the Whole Body Spiral CT Scanner was supplied by M/S Birla Technologies on 12th September, 1998 through Sri Amit Shevde, which again was faulty resulting in nonfunctioning of the CT Scanner. Since the appellant was suffering loss every day, its partner Dr. Ajit Kumar Pandey personally visited New Delhi on 20th September, 1998 where he met Mr. Prabhakar Srivastava, Chief Executive Officer of the Company, who agreed for replacement of computer, which computer was replaced on 24th September, 1998. The working of the Whole Body Spiral CT Scanner could not commence even thereafter and on 3.10.1998, the Service Engineer visited Lucknow and with the efforts of two Engineers, the trial case of the Unit was done on 4th October, 1998.

3. Further case of the appellant is that despite clear cut order for Laser Cameral Model 3 M 969 HQ mentioned in the appellant's purchase order dated 31st March, 1998 NISHIMOTO Camera was provided against which the appellant

protested by letter dated 3rd September, 1998 and required the company to provide Laser Camera Model 3 M 969 HQ. The appellants were given to understand that the Camera would be installed and Sri Amit Shevde, Software Engineer of M/S Birla Technologies who has been instructed to install the Camera. However, he did not succeed in installing the same. Since the Camera was to be installed by M/s Amoss Services Private Ltd., the appellants contacted the said company but were surprised to know that the said company will not send any Engineer because M/s Birla Technologies have not paid the amount of Laser Camera to M/S Amoss Services Private Ltd. Later on M/s. Amoss Services Private Ltd. confirmed that Mr. Stanley D'souza would be coming to install the Camera on 16th October, 1998, which Camera was installed on 22nd October, 1998. Despite several correspondence and efforts the Camera which was installed never satisfied the image quality and performance. The appellants, therefore, asserted that they were entitled for replacement. The appellants, therefore, asserted that they were entitled for replacement of NISHIMOTO Camera with Laser Camera of which the orders were placed. This was not done and, therefore, the appellants allegedly suffered losses, the details of which have been given by the appellant in the suit. Being aggrieved by the action of M/S Birla Technologies, the appellants served a notice dated 7.9.1999 upon M/S Birla Technologies requiring for replacement of NISHIMOTO Camera with Laser Camera as per contract within one month failing which the Camera would be purchased by the appellants at the costs of M/S Birla Technologies, which would be recovered from the company with interest at the rate of 20% per annum. The said notice also requested for transfer of the CT Unit of appellant to M/S Picker India Ltd. for remaining period of warranty and further maintenance on the same terms and conditions as agreed in terms of contract of CT Scanner and to compensate the appellant for the loss by way of damages for incomplete supply of equipment, delay in camera installation, partial running of the unit, breakdowns, application training, loss due to mental agony and loss of prestige and loss of interest. M/S Birla Technologies did not abide by the requirements of notice but got the Bank Guarantee of 2 lacs encashed, which according to the appellants, was misappropriation of the Bank Guarantee. Though M/S Birla Technologies assured the appellant for replacement of the Camera, for transfer of warranty and also for compensating the appellant of the loss suffered by it. On the facts stated in the plaint, the appellants felt that a fraud has been played upon them by M/S Birla Technologies and, therefore, filed a suit for permanent injunction before the trial Court alongwith an application for temporary injunction in which the appellants prayed that the defendants be restrained from encashing the Bank Guarantee.

4. Initially an ex parte injunction was granted on 24.12.1997 in favour of the appellant restraining the defendants from encashing the Bank Guarantee in question. Objections were filed against the said application and a reply to the same was also filed. However, on 31.5.2000 M/S Birla Technologies moved an application under Section 8 of the Arbitration and Conciliation Act, 1996

(hereinafter referred to as the "Arbitration Act, 1996") supported by an affidavit to which the appellants filed a reply duly supported by an affidavit.

5. The trial Court by means of the order dated 12.9.2000 allowed the application filed by M/S Birla Technologies under Section 8 of the Arbitration and Conciliation Act and directed the parties to get the Arbitrator appointed in terms of the agreement. The trial Court further terminated the entire proceedings of the suit and ordered for consigning the record. It is against the aforesaid order the present appeal has been filed.

6. A preliminary objection has been raised by the learned counsel for the respondents that the appeal under Section 96 of the Code of Civil Procedure is not maintainable, as the said order cannot be termed as "judgment and decree" within the meaning of Section 2(2) of the Code of Civil Procedure. His further objection is that against an order passed under Section 8 of the Arbitration Act, no appeal lies under the provisions of the said Act. Learned counsel further submitted that since the orders have been passed under Section 8 of the Arbitration Act, 1996, recourse of Section 96 cannot be taken for challenging the said order and that if the intention of the Legislature is not to provide an appeal against any order passed under Section 8, then an appeal cannot be entertained against the statutory provisions of the Arbitration Act, 1996. For this proposition, the learned counsel placed reliance upon Section 37 of the Arbitration Act, 1996 in which the orders have been described against which an appeal would lie under the said provision. Learned counsel further submitted that the appellant could raise the question of jurisdiction of the Arbitrator before the Arbitrator himself under Section 16 of the Act.

7. In response to the aforesaid preliminary objection, learned counsel for the appellant has asserted that the impugned order can very well be termed as judgment and decree, as it terminated the entire proceedings in the suit and ordered for consigning the record. He has also submitted that under the repealed Arbitration Act, 1940 there was a provision under Section 34 of the said Act for stay of the proceedings before the Civil Court when an objection was taken by the defendant regarding jurisdiction of the Civil Court to proceed with the suit in view of the Arbitration Agreement between the parties but under the Arbitration Act, 1996, there is no such provision for stay of the proceedings pending before the Civil Court. The submission of the learned counsel is that as per argument of the learned counsel for respondent No.1 no appeal would lie under the provisions of Arbitration Act, 1996 against an order passed under Section 8 and if the present appeal is also held to be not maintainable, treating the order not to be a judgment and decree within the meaning of Section 2(2) of the Code of Civil Procedure, the plaintiffappellant would be rendered remediless in so far as his claim is concerned.

8. Rebutting the plea of applicability of Section 16 of the Arbitration Act, 1996, learned counsel for the appellant put forth the argument that the question as to whether there is an arbitration agreement has been decided and will have to be

decided in every such case by the trial Court before referring the parties to arbitration under Section 8 of the Arbitration Act, 1996. This plea that there is an arbitration agreement, if accepted by the trial Court, would not be open to scrutiny under Section 16 of the Act. The Arbitrator would not be in a position to record a finding against the findings recorded by the Civil Court.

9. For determining the preliminary objection, it would be appropriate to have a glimpse of the scheme of Arbitration Act, 1940 (hereinafter referred to as the "1940 Act") as well as that of Arbitration Act, 1996 (hereinafter referred to as the "1996 Act"). Under the Act of 1940 a party could commence the proceedings in Court by moving an application under Section 20 for appointment of an Arbitrator and simultaneously it could move an application for interim relief under II Schedule read with Section 41(b) of the 1940 Act. Section 34 of the 1940 Act provided for stay of the proceedings in a suit where there existed an arbitration agreement and any party to such legal proceedings at any time before filing written statement or taking any other steps in the proceedings may apply the judicial authority before which proceedings are pending to stay the proceedings. Section 20 of the 1940 Act which fell in Chapter III of the Act under the heading "Arbitration With Intervention of A Court Where There Is No Suit Pending" gave right and liberty to the persons who have entered into an arbitration agreement before institution of any suit with respect to the subject matter of the agreement or any part of it, and where a difference has arisen to which the agreement applies, to apply the Court having jurisdiction in the matter to which the agreement relates, for getting the agreement filed in the Court, instead of proceeding under Chapter II of the 1940 Act. The Court was empowered to order for the agreement being filed and to make an order of reference to the Arbitrator appointed by the parties, whether in the agreement or otherwise, or, where the parties could not agree upon an Arbitrator, to an Arbitrator appointed by the Court. Section 33 of the 1940 Act specifically made a provision for challenging the very existence or validity of the arbitration agreement, where any party to arbitration agreement or any person claiming under him desires to challenge the same.

10. Section 33 read as under:

33. Arbitration agreement or award to be contested by application Any party to an arbitration agreement or any person claiming under him desiring to challenge the existence or validity of an arbitration agreement or an award or to have the effect of either determined shall apply to the Court and the Court shall decide the question on affidavits;

Provided that where the Court deems it just and expedient, it may set down the application for hearing on other evidence also, and it may pass such orders for discovery and particulars as it may do in a suit.?

11. Section 8 gave to the Court to appoint Arbitrator or umpire and Section 11 vested the Courts with power to remove arbitrator or umpire in certain

circumstances. The grounds for setting aside the award were detailed in Section 30 and appeal against the specified orders was provided under Section 39.

12. In the 1996 Act, there is no provision similar to Section 20 of the 1940 Act nor any provision analogous or similar to Section 30, Section 34, Section 41 and II Schedule to the 1940 Act. Section 8 of the 1996 Act is not in pari material of Section 20 of 1940 Act. Under Section 8 of the 1996 Act it is only if an action which is pending before the Court that a party applies that the matter is subject of an arbitration agreement, does the Court get jurisdiction to refer the parties to arbitration. The said provision does not contemplate, unlike Section 20 of the 1940 Act, a party applying to a Court for appointing an Arbitrator when no matter is pending before the Court. Under the 1996 Act appointment of arbitrator/arbitrators is made as per provisions of Section 1, which does not require the Court to pass a judicial order appointing arbitrator/arbitrators.

13. In the case of *M/s Sundaram Finance Ltd. v. M/s. NEPC India Ltd.*, AIR 1999 SC 565, the Apex Court found that Section 8 of the 1996 Act is not in pari material with Section 20 of the 1940 Act and Section 9 and 17 were also not similar to Section 41(c) and Second Schedule to the 1940 Act. Their Lordships of the Supreme Court further found that interim orders under Section 9 and 21 can be passed even before the commencement of the proceedings.

14. The existence or validity of an arbitration agreement or an award or to have the effect of either determined could have been very well adjudicated on an application being moved by any party to an arbitration agreement or any person claiming under him desiring to challenge the same under Section 33 of 1940 Act whereas no such equivalent provision finds place in the 1996 Act.

15. The Act of 1996 is in four parts and three schedules. Part 1 consists of Chapter I to X and rest of the Chapters fall under Part II to IV, regarding which there is no controversy in the present appeal. Chapter I deals with General Provisions. Section 2(1)(b) defines "arbitration agreement" which means an agreement referred to in Section 7. Section 7, which deals with arbitration agreement, defines "arbitration agreement" as under:

7. (1) In this Part, "arbitration agreement" means an agreement by the parties to submit to arbitration all or certain disputes which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not.

16. In this very Chapter Section 8 has also been placed which reads as under, and gives power to the judicial authority to refer the parties to arbitration where there is an arbitration agreement. An order passed under Section 8 referring the parties to arbitration is not open to appeal under the Act of 1996 as per the specific language of Section 37 which deals with appealable order. Section 37 is also 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 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 subsection (1) shall not be entertained unless it is accompanied by the original arbitration agreement or duly certified copy thereof.

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

37. Appealable orders (1) An appeal shall lie from the following orders (and from no Others) to the Court authorized by law to hear appeals from original decrees of the Court passing the order, namely:

(a) granting or refusing to grant any measure under Section 9;

(b) setting aside or refusing to set aside an arbitral award under Section 34.

(2) An appeal shall also lie to a Court from an order of the arbitral tribunal

(a) accepting the plea referred to in subsection (2) or subsection (3) of Section 16;

or

(b) granting or refusing to grant an interim measure under Section 17.

(3) No second appeal shall lie from an order passed in appeal under this section, but nothing in this section shall affect or take away any right to appeal to the Supreme Court.

17. The aforesaid provision of appeal permits appeals against the orders specified in subsection (1) clauses (a) and (b) and subsection (2) clauses (a) and (b) and prohibits filing of appeal against any other order. The words in bracket (and from no Others)? put a complete embargo against filing of appeals with respect to the orders, which are not specified, in the aforesaid section. Since the order for referring the parties to arbitration is passed under Section 8 of the 1996 Act, an appeal against such order by any aggrieved person can be filed only under the provisions of the 1996 Act, if any such appeal is provided. The right of appeal cannot be inherent but it is to be invested by some statute or by some statutory rule. There cannot be any presumption of appeal being maintainable against an order passed under the Act unless such power or right is specifically provided under the statute. The phraseology used in Section 37 of the Act is more stringent and completely shuts out appeals against any other order except the orders, which have been made appealable under the aforesaid provision.

18. A very important feature introduced in the 1996 Act is Section 5 falling in Chapter I of Part 1 which defines extent of judicial intervention, and reads as

under:

?5. Extent of Judicial Intervention Notwithstanding anything contained in any other law for the time being in force, in matters governed by this Part, no judicial authority shall intervene except where so provided in this Part.?

19. Arbitration agreement is defined in Section 7, power of the Court to refer parties to arbitration where there is an arbitration agreement is provided in Section 8, power to grant interim measure by the Court is provided in Section 9, appointment of arbitrator under Section 11, grounds for challenge of appointment of arbitrator is provided under Section 12. The jurisdiction of arbitral tribunal is provided under Chapter IV, conduct of arbitral proceedings under Chapter V, making of arbitral award and termination of proceedings under Chapter VI, recourse against arbitral award in Chapter VII wherein Section 34 gives grounds for setting aside the arbitral award and finality and enforcement of arbitral award under Chapter VIII and Chapter IX where the appeals have been provided have been put under this Part. The intention of the legislature in specifically putting Section 5 defining extent of judicial intervention with a nonobstante clause is obviously in consonance with the objects of the Act, namely, to minimize the supervisory role of the Courts in arbitral process and to permit an arbitral tribunal to use mediation, conciliation or other procedures during the arbitral proceedings to encourage settlement of disputes.

20. The main objectives for which the enactment has been made are as under:

(i) to comprehensively cover international and commercial arbitration and conciliation as also domestic arbitration and conciliation;

(ii) to make provision for an arbitral procedure which is fair, efficient and capable of meeting the needs of the specific arbitration;

(iii) to provide that the arbitral tribunal gives reasons for its arbitral award;

(iv) to ensure that the arbitral tribunal remains within the limits of its jurisdiction;

(v) to minimize the supervisory role of Courts in the arbitral process.

(vi) to permit an arbitral tribunal to use mediation, conciliation or other procedures during the arbitral proceedings to encourage settlement of disputes;

(vii) to provide that every final arbitral award is enforced in the same manner as if it were a decree of the Court;

(viii) to provide that a settlement agreement reached by the parties as a result of conciliation proceedings will have the same status and effect as an arbitral award on agreed terms on the substance of the dispute rendered by an arbitral tribunal; and

(ix) to provide that, for purposes of enforcement of foreign awards, every arbitral award made in a country to which one of the two international Conventions relating to foreign arbitral awards to which India is a party applies, will be

treated as a foreign award.?

21. Objects mentioned at item No.5 and 6 cannot be lost sight of while considering the scheme of the Act. The Act envisages minimum supervisory role of the Courts in arbitral process and, therefore, Section 5 binds the limits of intervention by the judicial authority. To put it differently, the judicial authority can intervene only where such intervention has been allowed in this Part.

22. It is the statute, which governs the arbitration proceedings and the rights of the parties to proceed under the Act. The argument of the learned counsel for the appellant that in case this Court does not give an interpretation upholding the maintainability of the appeal under Section 96 of the Code of Civil Procedure against the order passed under Section 8 of the Arbitration Act, 1996, the appellant would become remediless, as no appeal lies under the 1996 Act against such an order passed under Section 8 is to be decided in the light that the Courts are not empowered to create forums for challenging an order passed under the particular Act, namely, under Section 8 of the 1996 Act, in the instant case, as it is the power and domain of the legislature to provide and create such forum. The High Court cannot question the wisdom of the legislature in not providing an appeal against any order or particular orders passed under the Act nor can it provide a forum of appeal that too in a case where the Act specifically prohibits appeals against any other orders except the orders specified under Section 37 of the 1996 Act. The wisdom, rationality and propriety in making such a provision of appeal can neither be looked into by the Court nor can be a ground for treating an appeal maintainable, if the same is not maintainable under the Act.

23. The appeal, in the instant case, has, however, not been filed under Section 37 of the 1996 Act but has been filed under Section 96 of the Code of Civil Procedure.

24. The provisions of Code of Civil Procedure would be applicable only to the extent to which they have been made applicable under the Act. By inference or for necessity, the provisions of the Code of Civil Procedure including Section 96 of the Code cannot be applied to the proceedings under the Arbitration Act of 1996. This also appears to be the intention of the Act while enacting Section 5, referred to above. The order having been passed under Section 8 of the 1996 Act, if any appeal could lie, it could have been under the provisions of the 1996 Act itself and not under Section 96 of the Code of Civil Procedure. The applicability of Code of Civil Procedure has been excluded in the proceedings under the Arbitration Act by means of Section 19, which reads as under:

19. Determination of rules of procedure (1) The arbitral tribunal shall not be bound by the Code of Civil Procedure, 1908 (5 of 1908) or the Indian Evidence Act, 1872 (1 of 1872).

(2) Subject to this Part, the parties are free to agree on the procedure to be followed by the arbitral tribunal in conducting its proceedings.

(3) Failing any agreement referred to in subsection (2), the arbitral tribunal may, subject to this Part, conduct the proceedings in the manner it considers appropriate.

(4) The power of the arbitral tribunal under subsection (3) includes the power to determine the admissibility, relevance, materiality and weight of any evidence.?

25. The question whether an order passed under Section 8, as in the instant case, amounts to a decree within the definition of Section 2(2) of the Code of Civil Procedure or not and thus can be appealable under Section 96 of the Code of Civil Procedure has to be answered in the manner keeping in mind that the order has specifically been passed under Section 8 of the Arbitration Act, 1996 and not under the provisions of the Code of Civil Procedure and, therefore, irrespective of the nature of the order, an appeal would not lie under Section 96 of the Code of Civil Procedure. It has not been provided under the 1996 Act that an order passed under Section 8 of the Act would amount to decree passed by the Civil Court so as to make it amenable in the appellate forum under Section 96 of the Code of Civil Procedure. Even otherwise, if the argument of the learned counsel for the appellant is accepted in this regard, it would amount to negating the very object of the Arbitration Act, 1996 and to give a finding which may nullify against the substance of Section 5 of the Act. If an appeal has not been provided against a particular order, the same cannot be filed by circumventing the provisions of the Act under any other provision of law. Section 5 opens with the words "Notwithstanding anything contained in any other law for the time being in force", meaning thereby that irrespective of provision of appeal in any other law including the Code of Civil Procedure, the matters governed by Part 1 cannot be questioned before any judicial authority except where such intervention has been provided in this Part.

26. Learned counsel for the respondents has vehemently urged that the appellant is still having a right to raise the question regarding existence and validity of arbitration agreement under Section 16 of the Act. However, since we are of the view that the present appeal is not maintainable, we do not intend to enter into the question, which touches the merits of the case. It may be open to the parties and they will be at liberty to take such pleas, as may be available to them and put their respective claims, as per law, before the Arbitrator, who shall decide the same in accordance with law. The parties shall also be at liberty to raise their claim at any appropriate forum, which may be available to them.

27. Before parting, we will prefer to mention that the learned counsel for the appellant has strenuously urged that there was no concluding contract between the parties and that an arbitration clause which was mentioned in the invoice dated 13.8.1997 was never accepted by the appellants and that their counter offer was accepted by the respondents and, as such, the matter could not have been referred to the arbitration and in this connection he has cited several authorities, but since we have found that the appeal itself is not maintainable, we refrain ourselves from entering into these questions.

28. The appeal under Section 96 of the Code of Civil Procedure thus not being maintainable against the order passed under Section 8 of the Arbitration and Conciliation Act, 1996 is hereby dismissed.

(Appeal dismissed)