

(2005) 12 CAL CK 0040
In the Calcutta High Court
Case No : C.O. No. 583 of 2005

Basundhara Towers Pvt. Limited and Another APPELLANT
Vs
Binapani Daw and Others RESPONDENT

Date of Decision : 21-12-2005

Acts Referred:

Arbitration Act, 1940 — Section 34
Arbitration and Conciliation Act, 1996 — Section 5, 8

Citation : (2006) 2 CALLT 555 : (2006) 3 CHN 240 : 110 CWN 172

Hon'ble Judges : Ashim Kumar Banerjee, J

Bench : Single Bench

Advocate : Joyanta Mitra, Sumit Talujdar, Manik Chandra Das and Aniruddha Chatterjee, for the Appellant; Ashok Banerjee and Shyamal Sarkar for the opposite party Nos. 1 to 4, Pratap Chatterjee, S.N. Mukherjee, Pramit Kumar Roy and S.K. Kanodia for the opposite party No. 5 and Dipayan Chowdhury and S. Chowdhury for the opposite party Nos. 10 to 13, for the Respondent

Final Decision : Dismissed

Judgement

Ashim Kumar Banerjee, J.—The suit property is commonly known as Manglahat in the town of Howrah. The property originally belonged to one Pulin Chandra Dawn since deceased. In 1939 the property was leased out for a period of 50 years. Some time after Mimanis came in possession claiming to be the lessee of the said premises in question. Mimanis also claimed that there had been an oral agreement for sale of the said property by Dawn family in their favour in 1987. A fire broke out in the suit property on 9th November, 1987 and the entire structure was burnt out in such devastating fire. The State Government immediately requisitioned the property which gave rise to litigation. Ultimately the order of requisition was set aside by Court. Another spate of litigation started as to who would be entitled to take possession back from the State Government in view of striking out the order of requisition. Dawn family claimed that during this period the original lease had expired and as such they were entitled to take possession of the premises in question whereas Mimanis claimed that since the

State Government took possession from them, they were obliged to hand it over back to Mimanis. Ultimately Dawn family got back possession from the State Government in terms of the order dated June 17, 1987 passed by the Division Bench of this Court. The possession was handed over to Dawn family immediately. Realising that they would not be favoured with possession Mimanis also filed a suit for specific performance alleging oral agreement against Dawn in 1997 which was, however, not proceeded with by them. In the meantime there had been a partition in Dawn family and one Pranab Chandra Dawn became the absolute owner of the premises by virtue of partition. At this juncture two agreements for sale were said to have been executed, one Vandana Real Estate Pvt. Ltd. (hereinafter referred to as "Vandana") claimed to be the holder of an agreement for development dated June 6, 1996 and the other by M/s. Basundhara Towers Pvt. Ltd. (hereinafter referred to as "Basundhara") dated February 4, 1998 apart from the oral agreement set up by Mimanis said to have entered into in 1987. In 1988 the lease had expired by efflux of time.

2. The agreement of Basundhara is the subject-matter of the instant proceeding which contained an arbitration clause.

3. In 2001 Mimanis again filed a suit being Title Suit No. 40 of 2001 almost on the identical relief.

4. Vandana also filed a suit in this Court being C.S. No. 406 of 1998 on 23rd September, 1998 praying for similar relief. In 2004 Vandana suit was settled between the parties by conveying the property in favour of two other companies Mangalahat Construction & Buildings Pvt. Ltd. and Gajanand Agency Services Pvt. Ltd. Such settlement was entered into between Dawn and Vandana. Dawn through Ms. Manika Dawn and Shri Priyo Brata Dawn immediately executed a deed of conveyance in favour of Mangalahat Construction & Buildings Pvt. Ltd. and Gajanand Agency Services Pvt. Ltd. on July 28, 2004. Similarly in respect of interest of other shares in Dawn family Joint Receivers executed similar Deed of Conveyance in terms of settlement. After coming to know of such development the present suit was filed by Basundhara on November 17, 2004 which was stayed by the order impugned in view of existence of arbitration clause in an application u/s 8 of the Arbitration & Conciliation Act, 1996.

ANALYSIS:

5. There are three agreements set up by the parties which are as follows:

- (i) Oral agreement with Mimanis in 1987.
- (ii) Written agreement with Vandana in 1998.
- (iii) Written agreement with Basundhara in 2001.

Four suits were filed which are as follows:

- (i) Title Suit No. 1991 of 1997 in Howrah Court by Mimanis.

(ii) Title Suit No. 40 of 2001 renumbered as Title Suit No. 105 of 2001 in Howrah Court by Mimanis.

(iii) C.S. No. 406 of 1998 filed in this Court by Vandana.

(iv) Title Suit No. 90 of 2004 in Howrah Court by Basundhara.

6. First suit was abandoned by Mimanis. Third suit was settled by Vandana with Dawn. It is not clear whether second suit is still pending or not. The fourth suit was stayed by the order impugned.

PAYMENTS/DEPOSITS:

7.(i) Mimani deposited Rs. 163.00 lacs to show their bona fide in terms of the Division Bench order of this Court. They wanted to withdraw the said money. However, the Hon"ble Supreme Court of India did not allow them.

(ii) Vandana claimed to have paid Rs. 5.00 lacs at the time of initial agreement.

(iii) Basundhara claimed payment of Rs. 119.00 lacs to Pranab Chandra Dawn.

(iv) Rs. 5.00 crores paid by Mangalahat Construction & Buildings Pvt. Ltd. and Gajanand Agency Services Pvt. Ltd. at the time of execution of conveyance as recorded in the compromise decree.

JUDGMENT OF THE COURT BELOW :

8. It was contended before the learned Judge that since the suit was based on an agreement containing arbitration clause the same should be referred to arbitration. The plaintiff on the other hand contended that there were other parties who were not parties to the arbitration agreement and since it was not possible to bifurcate the cause of action the suit should not be stayed. It was also contended that since the interpretation of the agreement was required to be done for ends of justice the suit should be tried by the Civil Court.

9. The learned Judge came to conclusion that the subject-matter of the suit was squarely covered by the arbitration clause and as such the same was liable to be stayed and the disputes were liable to be referred to arbitration on the basis of the arbitration clause as contemplated in Section 8 of the said Act of 1996.

RIVAL CONTENTIONS OF THE PARTIES BEFORE ME :

10. Plaintiff/Petitioner/Basundhara: Mr. Joyanta Mitra, learned senior Counsel appearing in support of the application, contended that the suit involved complicated questions of facts and required interpretation of various orders of this Court as well as Apex Court. There were parties to the suit who were admittedly not parties to the concerned agreement. The controversy raised in the suit required adjudication not only in presence of plaintiff and Dawn but also in presence of Mimanis, Vandana, Mangalahat Construction & Buildings Pvt. Ltd. and Gajanand Agency Services Pvt. Ltd. etc. Mr. Mitra further contended that there was no scope to bifurcate the relief and even if the arbitrator ultimately

was inclined to hold in favour of the plaintiff he would not be in a position to grant complete relief to resolve the controversy once for all in absence of the parties outside the arbitration agreement referred to above.

11. In support of the contention Mr. Mitra cited the following decisions :

- (i) Sukanya Holdings Pvt. Ltd. Vs. Jayesh H. Pandya and Another,
- (ii) P. Anand Gajapathi Raju and Others Vs. P.V.G. Raju (Died) and Others,
- (iii) Idcol Cement Ltd. Vs. P. Roy Chowdhury and Company and Others,
- (iv) 2004 (2) W B L R 476, Joynath Shaw v. Bijoy Kumar Gupta and Ors.
- (v) AIR 1917 Cal 248, Bepin Behary Mozumdar and Ors. v. Jogendra Chandra Ghosh and Anr.

DAWN:

12. Mr. Shyamal Sarkar, led by Mr. Ashok Banerjee, learned Counsel appearing for Dawn contended that the agreement set up by Basundhara contained arbitration clause and the reliefs claimed are only against them and as such the suit was liable to be stayed u/s 8.

VANDANA:

13. Mr. Amitesh Banerjee, appearing for Vandana contended that since the subject-matter of the suit was squarely covered by the arbitration agreement it was immaterial who were the parties to the suit and the Court had no option but to stay the suit u/s 8 as the suit could not be proceeded with in view of Section 5 of the said Act of 1996.

MANGALAHAT CONSTRUCTION & BUILDINGS PVT. LTD. AND GAJANAND AGENCY SERVICES PVT. LTD.:

14. Mr. Satyabrata Mukherjee, learned senior Counsel appearing for these two parties contended that they stepped into the shoes of Vandana after a decree of compromise was had from this Court in the suit for specific performance filed by Vandana. According to him he already paid the entire consideration and he was holding appropriate deed of conveyance therefor. The subsequent suit filed by Basundhara was nothing but an attempt to prevent the lawful owner to enjoy the property and develop the same. Mr. Mukherjee contended that apart from Dawn the other parties in the said suit were described as proforma defendants and no relief was claimed against them. Hence, the suit was rightly stayed by the Court below. In this context he referred to paragraph 15 of the decision of Apex Court in Sukanya Holdings (supra).

MIMANIS:

15. Mr. Dipayan Chowdhury, learned Counsel appearing for Mimanis supported the contention of Mr. Mitra appearing for the petitioners. According to him, for

effective adjudication the suit should be allowed to be proceeded with so that the rival contentions of the parties could be resolved by the Court of Law.

PETITIONER IN REPLY:

16. Mr. Mitra in reply contended that it would not be proper for this Court to look to only the prayers of the plaint. Unless and until the entire plaint was read as a whole the underlying disputes and the real controversy could not be inferred and if the same was done it would only warrant continuance of the suit by a Civil Court.

MY VIEW:

17. To resolve the subject controversy view of the Apex Court in the case of Sukanya Holdings (supra) as followed by our Court in the case of Joynath Shaw v. Bijoy Kumar Gupta and Ors. (supra) and Idcol Cement Ltd. v. P. Roy Chowdhury and Company and Ors. (supra) would be the guiding factor. Hence, I do not wish to deal with other cases cited by the parties.

18. Sukanya Holdings : Before Sukanya Holdings (supra) it was the consistent approach of the Court of Law including the Apex Court to stay the suit as and when the Court was approached u/s 8. In the old law specially u/s 34 of the Act of 1940 there was some discretion left to the Court. However, such discretion is no more left to Court because of the stringent provision u/s 8 of the said Act of 1996. The Apex Court for the first time in Sukanya Holdings (supra) elaborately discussed various aspects of Section 8 and came to a finding that if the Court ultimately found that the arbitrator would not be in a position to resolve the subject-matter of the suit for which the arbitration agreement was entered into the suit need not be stayed. The Apex Court, however, observed that Section 8 was independent of Section 5 and to decide the application u/s 8 Section 5 would have no bearing. The Apex Court also considered the issue as to whether part controversy could be referred to arbitration. The Apex Court ultimately held that if bifurcation was allowed it would lead to frustrate the concept of speedy disposal of disputes decreasing the cost of litigation. Paragraphs 15 and 16 of the judgment being relevant herein are quoted below :

15. The relevant language used in Section 8 is : "in a matter which is the subject of an arbitration agreement". The Court is required to refer the parties to arbitration. Therefore, the suit should be in respect of "a matter" which the parties have agreed to refer and which comes within the ambit of arbitration agreement. Where, however, a suit is commenced - "as to a matter" which lies outside the arbitration agreement and is also between some of the parties who are not parties to the arbitration agreement, there is no question of application of Section 8. The words, "a matter" indicate that the entire subject-matter of the suit should be subject to arbitration agreement.

16. The next question which requires consideration is?even if there is no provision for partly referring the dispute to arbitration, whether such a course is

possible u/s 8 of the Act. In our view, it would be difficult to give an interpretation to Section 8 under which bifurcation of the cause of action, that is to say, the subject-matter of the suit or in some cases bifurcation of the suit between the parties who are parties to the arbitration agreement and others is possible. This would be laying down a totally new procedure not contemplated under the Act. If bifurcation of the subject-matter of a suit was contemplated, the legislature would have used appropriate language to permit such a course. Since there is no such indication in the language, it follows that bifurcation of the subject-matter of an action brought before a judicial authority is not allowed.

19. This judgment was followed by two Hon"ble Judges of this Court in the case of Joynath Shaw v. Bijoy Kumar Gupta and Ors. (supra) and Idcol Cement Ltd. v. P. Roy Chowdhury and Company and Ors. (supra).

APPLICABILITY OF SUKANYA (SUPRA) IN THE INSTANT CASE :

20. Mr. Mitra by his eloquent submission drew a picture of the disputes which might suggest that suit should continue not only to decide the rival claims of the parties but also to reach a finality in the controversy once for all. However, despite such eloquent submission the frame of the suit which was stayed by the order impugned does not suggest that. I feel, Mr. Mitra's submission should be considered within the framework of the plaint. To appreciate the plaintiffs case before the Court below few paragraphs of the plaint are necessary for discussion. The plaint is languish one giving entire history of the disputes starting from the execution of the lease in 1939 by Pulin Chandra Dawn. Paragraphs 1 to 27 dealt with the history of the case upto the stage of holding on possession by Basundhara. In paragraph 28 the plaintiff asserted that they were entitled to collect rent, issues and profits out of the suit property. Paragraphs 29 and 30 dealt with the issue of settlement of the High Court suit and the observation of the Division Bench as well as Apex Court with regard to the title of Mimanis. In paragraph 31 plaintiff asserted that the defendants acted in collusion and conspiracy to deny the title of the plaintiffs. In paragraph 32 the plaintiff expressed their readiness and willingness to perform their part of the obligation under the agreement for sale. In paragraph 33 the plaintiff claimed that the suit was not barred by limitation. In paragraph 34 the plaintiff contended that their right was denied by Dawn. In paragraph 35 the plaintiff contended that the defendants were bent upon depriving the plaintiffs right, title and interest under the agreement and they were entitled to specific performance of the contract.

21. Paragraphs 36, 37, 38 and 39 are most relevant to decide the legality of the order impugned. These four paragraphs are set out below :

36. That the Dawn Defendants from 1 to 4 are to be directed by decree to execute and register sufficient appropriate instrument for enforcement of the agreement dated 4th February, 1998, 27th July, 2000.

37. The Mimanis are made defendants to the suit although no relief has been prayed against them but as they were parties in other suits and there were

conflicting interest between the parties and for effective determination of the suit their presence is necessary.

38. The plaintiff has been advised to file a separate suit if necessary only to get rid of the decree that the compromise decree passed in C.S. Suit No. 406 of 1998 is void, inoperative and not binding upon the plaintiff.

39. That the other defendants are made parties though they have no right, title, interest and possession in suit property in any manner whatsoever still they have been made parties for effective adjudication of suit as they may have falsely claimed in somewhere other to have interest in the suit property.

22. Although in paragraphs 1 to 35 the plaintiffs contended that they were entitled to have specific performance of the agreement for sale they contended that Mimanis were made defendants for the purpose of effective adjudication. They were advised to file a separate suit for setting aside of the compromise decree in the High Court suit filed by Vandana. In paragraph 39 it was contended that although the other defendants did not have any right, title and interest over the properties for the purpose of effective adjudication they were made parties.

23. Prayer (a) and (b) of the plaint are quoted below :

(a) A decree for specific performance of contract dated 4th February, 1998 and modified agreement dated 27th July, 2001 respectively directing the defendant Nos. 1 to 4 to convey the property described in the schedule to the plaint on receipt of the balance amount of the consideration money within the time fixed by the learned Court after payment of deposit of the balance consideration a decree be passed directing the said defendant Nos. 1 to 4 to execute and register the Deeds in terms of the agreement dated 4th February, 1998 modified with the agreement dated 27th July, 2001 respectively.

(b) A decree for permanent injunction restraining the defendants from interfering with the lawful right and possession of the plaintiffs in the suit property on the basis of agreement dated 4th February, 1998 modified with supplementary agreement dated 27th July, 2001 respectively.

On a complete reading of the plaint it appears that the plaintiff started roping the other defendants and thereafter at last based their case on the agreement for sale and a supplementary agreement thereof only. No relief was claimed as against other defendants. Prayer (a) dealt with a relief for specific performance simpliciter on the basis of agreement for sale and supplementary agreement whereas prayer (b) dealt with the issue of permanent injunction as against the defendants denying the plaintiffs' title based upon the agreement for sale.

CONCLUSION:

24. From the framework of the suit as analysed by me hereinbefore it is clear that the plaintiff not only wanted to assert their rights under the agreement for sale but also based their claim only on the basis of the said agreement and the

agreement only. It is true that the plaintiff could assert their right only on the basis of such agreement, at the same time they should have specifically claimed relief as against other defendants which they did not do. To get rid of the decree of compromise application for setting aside of the decree was already made by the plaintiffs which is still pending and awaiting its disposal. Hence in my opinion, although the plaintiff made allegation as against other defendants at the end did not pray for any relief as against them. Hence, the Court below did not have any other option but, to stay the suit as it came within the mischief of Section 8. The applicability of ratio in *Sukanya* (supra) in my view, cannot come in the way of staying of the suit. Had it been an application u/s 34 under the old law considering the peculiar facts and circumstances the Court could refuse stay of suit, because of the stringent provision of Section 8 under the new law the Court is left with no other discretion but to refer the matter to arbitration.

25. The matter can be viewed from another angle. The controversy with Dawn and Mimanis were already existing when plaintiff entered into an agreement for sale with Dawns. Existence of the agreement of Vandana was also there. Although Mr. Mitra on instruction contended that they were neither aware of such agreement nor were aware of pendency of the suit in this Court. Keeping their eyes wide open the plaintiff entered into an agreement for sale coupled with an arbitration clause. Despite those controversies the plaintiff agreed to refer the disputes to arbitration. Hence, it is not open for the plaintiffs to resist such order of stay.

26. Mr. Mitra further contended that on the day of execution of the agreement for sale there had been no litigation pending between Dawn and other parties. Even if Mr. Mitra's contention is correct technically there was no litigation pending the original controversy starting from the day one when the Mimanis started raising disputes with regard to the possession was existent and the plaintiffs should have been more careful before executing agreement for sale containing arbitration clause.

RESULT:

27. The application thus fails and is hereby dismissed.

28. There would be however no order as costs.

29. Urgent xerox certified copy will be given to the parties, if applied for.