
(2010) 09 SHI CK 0017
In the High Court Of Himachal Pradesh
Case No : C.M.P.M.O. No. 188 of 2007

Branch Manager Mahindra and Mahindra Finance Ltd. and
another

APPELLANT

Vs

Pushpalata and another

RESPONDENT

Date of Decision : 10-09-2010

Acts Referred:

Arbitration and Conciliation Act, 1996 — Section 16, 34(2), 34(3), 8

Citation : (2010) 3 ShimLC 454

Hon'ble Judges : Kurian Joseph, C.J

Bench : Single Bench

Judgement

Kurian Joseph, C.J.—The order passed by the Civil Judge (Senior Division), Shimla in Civil Suit No. 17-1 of 2004 is under challenge in this petition. It is an order passed on an application filed by the Defendants in the suit. The suit was filed praying for a mandatory injunction directing the Defendants to pay an amount of Rs. 1,35,000/- with interest at the rate of 18% per annum. The very case of the Plaintiffs was that they had entered into agreement, dated 19.4.2001, whereby an amount of Rs. 2.20 lacs for purchase of a vehicle was financed by the Defendants. Thereafter, it is alleged in the plaint, that the financier forcibly took possession of the vehicle and hence the suit.

2. The Defendants filed an application u/s 8 of the Arbitration and Conciliation Act, 1996, in terms of Clause 22 of the Agreement, which reads as follows:-

If any difference, dispute or question shall arise between the parties as to the interpretation, meaning or effect of this Agreement or as to the rights or liabilities of the parties arising hereunder or as to any other matter or things relating to this Agreement or arising out of or in connection herewith either during the continuance of this Agreement or after any termination or purported termination hereof, the same shall be referred to sole arbitration under the provisions of the Arbitration & Conciliation Act, 1996 or any statutory modification, re-enactment thereof for the time being in force. The Arbitrator

shall be a retired Judge of the Bombay High Court and shall be appointed by the Owner. The decision of the Arbitrator whether on questions of Law or of Fact, shall be final and binding on the parties. The venue or arbitration shall be at Mumbai.

3. The learned Civil Judge holding that there is arbitral dispute to be referred for decision by the arbitrator, dismissed the application and hence this petition.

4. Though the Defendants placed reliance on the decision of Supreme Court in Hindustan Petroleum Corporation Ltd. v. Pinkcity Midway Petroleum's (supra) for canvassing the position that the question of jurisdiction of the arbitrator is to be raised before the arbitrator itself, in view of Section 16 of the Arbitration and Conciliation Act. Without any discussion as to the issue, the Civil Judge rejected the contention observing only that the decision would not apply to the facts of the case.

5. Learned Counsel for the Plaintiff herein vehemently contends that the suit is filed based on a cause of action and that cause of action and relief molded thereon is not a matter of arbitration in terms of the agreement entered into between the parties. It is further contended that In view of the intra-contradictory terms in the agreement, the matter cannot be referred to arbitration since the arbitrator does not have jurisdiction to adjudicate on the claim, as raised by the Plaintiffs.

6. Section 16 of the Arbitration and Conciliation Act reads as follows:

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 defense; 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. It is fairly clear that it is a self contained code on the rights, privileges, jurisdiction and procedure are concerned. Admittedly, the Plaintiff has entered into an agreement for hire-purchase with the Defendants. That agreement contains an arbitration clause, as extracted above. Once an agreement contains a provision regarding arbitration the matter has to be referred to the arbitrator. All other questions as to whether the claim is covered by the agreement, whether the agreement as such is applicable in the light of the claims made by the parties, whether the arbitrator has jurisdiction to embark upon adjudication etc. are all matters to be raised before the arbitrator only and not before any other forum.

8. The issue is also wholly covered as above by the decision of the Supreme Court in Hindustan Petroleum Corpn. Ltd. Vs. Pinkcity Midway Petroleums,

To quote:-

14. This Court in the case of P. Anand Gajapathi Raju and Others Vs. P.V.G. Raju (Died) and Others, has held that the language of Section 8 is per-emptory 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. In the instant case the existence of an arbitral clause in the agreement is accepted by both the parties as also by the Courts below but the applicability there of is disputed by the Respondent and the said dispute is accepted by the Courts below. Be that as it may, at the cost of repetition. We may again state that the existence of the arbitration clause is admitted. If that be so, in view of the mandatory language of Section 8 of the Act the Courts below ought to have referred the dispute to arbitration.

15. The question then would arise: what would be the role of the Civil Court when an argument is raised that such an arbitration clause does not apply to the facts of the case in hand? Learned Counsel for the Appellant contends that it is a matter which should be raised before the arbitrator who is competent to adjudicate upon the same and the Civil Court should not embark upon an inquiry in regard to the applicability of the arbitration clause to the facts of the case. While Learned Counsel appearing for the Respondent contends that since the applicability of the arbitration clause to the facts of the case goes to the very root of the jurisdiction of the reference to arbitration, this question will have to be

decided by the Civil Court before referring the matter to arbitration even in cases where there is admittedly an arbitration clause. The answer to this argument, in our opinion, is found in Section 16 of the Act itself. It has empowered the Arbitral Tribunal to rule on its own jurisdiction including rule on any objection with respect to the existence or validity of the arbitration agreement. That apart, a Constitution bench of this Court in *Konkan Railway* (supra) with reference to the power of the arbitrator u/s 16 has laid down thus:

It might also be that in a given case the Chief Justice or his designate may have nominated an arbitrator although the period of thirty days had not expired. If so, the Arbitral Tribunal would have been improperly constituted and be without jurisdiction. It would then be open to the aggrieved party to require the Arbitral Tribunal to rule on its jurisdiction. Section 16 provides for this. It states that the Arbitral Tribunal may rule on its own jurisdiction. That the Arbitral Tribunal may rule "on any objections with respect to the existence or validity of the arbitration agreement" shows that the Arbitral Tribunal's authority u/s 16 is not confined to the width of its jurisdiction, as was submitted by Learned Counsel for the Appellants, but goes to the very root of its jurisdiction. There would, therefore, be no impediment in contending before the Arbitral Tribunal that it had been wrongly constituted by reason of the fact that the Chief Justice or his designate had nominated an arbitrator although the period of thirty days had not expired and that; therefore, it had no jurisdiction.

(Emphasis supplied)

16. It is clear from the language of the Section, as interpreted by the Constitution Bench judgment in *Konkan Railway* (supra) 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 concerned Arbitral Tribunal. Therefore, in our opinion, in this case the Courts below ought not to have proceeded to examine the applicability of the arbitration clause to the facts of the case in hand but ought to have left that issue to be determined by the Arbitral Tribunal as contemplated in Clause 40 of the Dealership Agreement and as required under Sections 8 and 16 of the Act.

9. In view of the decision of the Apex Court, as above, the view taken by the Civil Judge (Senior Division), Shimla that there is no arbitral dispute to be referred to the arbitrator is not tenable in the eyes of law. Therefore, the order is set aside. The matter is remitted to the Civil Judge (Senior Division), Shimla for passing afresh order in the light of this order. The order, as above, shall be passed within three months from the receipt of the copy of this order.

10. The petition stands disposed of, so also the pending application(s), if any.