
(2012) 01 DEL CK 0164

In the Delhi High Court

Case No : IA No. 9268 of 2011 in CS (OS) 2294 of 2010

Celebi Delhi Cargo Terminal Management India Pvt. Ltd.

APPELLANT

Vs

Aryan Cargo Express Pvt. Ltd.

RESPONDENT

Date of Decision : 20-01-2012

Acts Referred:

Citation : (2012) 187 DLT 54

Hon'ble Judges : Reva Khetrapal, J

Bench : Single Bench

Advocate : B.L. Wali and Mr. Sarul Jain, for the Appellant; Vaibhav Dang, for the Respondent

Judgement

Reva Khetrapal, J.—The above mentioned application filed by the defendant u/s 8 of the Arbitration and Conciliation Act, 1996 for referring the parties to arbitration is predicated on Clauses 9.1 and 9.2 of the Cargo Handling Agreement executed between the parties valid from 1st March, 2010 till 31st March, 2010 (Ex.D1). For the sake of facility of reference, the relevant clauses are extracted herein below -

9. Governing law

9.1 This Agreement, and the rights of the Parties hereto, shall be governed by, and interpreted in accordance with, the Laws of India without reference to any conflict of law provisions. The Courts of Delhi shall have exclusive jurisdiction in all matters concerning this Agreement.

9.2 In the event of any disputes, controversies or claims arising out of or in connection with or in relation to this Agreement, the Parties shall make all reasonable efforts to resolve disputes amongst themselves. Failing such mutual resolution of the dispute, the Parties shall refer the dispute to the arbitration of a sole arbitrator to be appointed mutually by both the parties. The arbitration shall be conducted as per the provisions of the Arbitration and Conciliation Act, 1996, as amended from time to time. The language of the arbitration proceeding shall

be English and the venue of the arbitration shall be New Delhi. The award of the arbitrator shall be binding on the Parties to this Agreement.

2. It is submitted in the application by the defendant as follows.

3. The plaintiff vide allotment letter dated 8th December, 2009 had agreed to allot space measuring 145 sq. metres to the defendant on license basis at First Floor of Import III Building at the IGI Cargo Complex. A perusal of the contents of the aforesaid letter would reveal that the arrangement between the parties was controlled by the terms and conditions mentioned in Clauses 1 to 14 of the said allotment letter. However, despite the said position, the plaintiff failed to apprise this Court that in furtherance of Clause 6 of the aforesaid allotment letter, the parties had executed a written agreement whereunder it was mutually agreed that all disputes, controversies or claims arising between the parties would be referred to arbitration. Consequently, the defendant has not filed its first statement on the substance of the dispute, and prays for reference of the dispute between the parties to the arbitration of a sole arbitrator to be appointed mutually in accordance with Clause 9 of the agreement.

4. Reply to the aforesaid application was filed by the plaintiff wherein it is averred that the application is liable to be dismissed at the threshold, being an abuse of the process of law as well as frivolous and vexatious, as the defendant had earlier moved an application, being IA No.7599/2011 under Order VIII Rule 1 read with Section 151 of the Code of Civil Procedure, 1908 alleging that the suit of the plaintiff was frivolous and the claim made therein was baseless and misconceived.

5. In its reply, the plaintiff also submits that (i) the agreement relied upon by the defendant in the present application is the "Cargo Handling Agreement" and, (ii) the charges for the services in respect of which the said agreement has been executed are not the subject matter of the present suit.

6. Elaborating the aforesaid contentions, the plaintiff submits in reply that the present suit has been filed by the plaintiff for recovery of monthly "License Fee", "Cargo Services Fees" and "Utility Charges" as agreed to be paid by the defendant for the possession and utilization of office space at First Floor of Import III Building at Indira Gandhi International Airport Cargo Complex allotted by the plaintiff to the defendant vide allotment letter dated 08.12.2009. The plaintiff further submits that in respect of the aforesaid charges no written agreement was signed between the parties. The Cargo Handling Agreement referred to by the defendant in his application was only for the services pertaining to cargo handling, and that too for the period of one month, i.e., the period intervening 1st March, 2010 to 31st March, 2010. The said Agreement, therefore, could not be said to govern the subject matter of the present suit. As such, the claim of the plaintiff as raised in the suit could not be referred to arbitration, not being covered under any arbitration agreement.

7. Thus, it is categorically denied by the plaintiff in the reply filed by it that the

arrangement between the parties was controlled by the Cargo Handling Agreement. It is asserted that the present claim of the plaintiff is not the subject matter of the said agreement. Without prejudice to the aforesaid, it is stated that even if the charges for the cargo handling services during the validity of the said agreement are presumed to be part of the subject matter of the present claim of the plaintiff, the same cannot be separated and individually referred to arbitration and, as such, the application of the defendant is liable to be dismissed.

8. The defendant rejoined to the aforesaid reply by denying that the Cargo Handling Agreement (containing the arbitration clause) had not been executed in furtherance of the allotment letter dated 08.12.2009 or that the plaintiff's claim towards fees for cargo services (which is part of the dispute in the present suit) is not governed by the terms of the said agreement. It was submitted that pursuant to the terms contained in the allotment letter dated 08.12.2009, the defendant had not only deposited, in advance, a sum of Rs. 2,05,912/- (Rupees Two Lac Five Thousand Nine Hundred and Twelve Only), towards monthly license fee, but had also made security deposit of Rs. 12,35,470/- (Rupees Twelve Lac Thirty Five Thousand Four Hundred and Seventy Only) [equivalent to six months? license fee] and a sum of Rs. 1,00,000/- (Rupees One Lac Only) towards the electricity charges.

9. Significantly, in the context of the assertion of the plaintiff in reply that the plaintiff has claimed various reliefs in the suit, such as monthly license fee, cargo services fees and utility charges and, as such, the dispute with regard to cargo services fees for the valid period of the said agreement could not be separated from the rest of the claim and referred to arbitration, the defendant in rejoinder submitted as follows:-

The plaintiff has further wrongly assumed that by means of present application the defendant is seeking bifurcation of the subject matter of the suit/claim for recovery. The defendant craves leave of this Hon"ble Court to refer to the contents of submissions made hereinabove which are not repeated herein for the sake of prolixity. It is relevant to mention that although the defendant has sought intervention of this Hon"ble Court to refer the entire dispute to arbitration however, in the event this Hon"ble Court is of the view that the entire claim cannot be referred for arbitration then such part of the claim as is covered by the terms of arbitration agreement be referred to arbitration.

10. Oral submissions on the basis of the aforesaid pleadings were addressed by Mr. B.L. Wali, the counsel for the plaintiff and Mr. Vaibhav Dang, the counsel for the defendant. Mr. Wali, the learned counsel for the plaintiff, relied upon the judgment of the Supreme Court in the case of Sukanya Holdings Pvt. Ltd. Vs. Jayesh H. Pandya and Another, , to contend that there is no provision in the Act that when the subject matter of the suit includes the subject matter of the arbitration agreement as well as other disputes, the matter is required to be referred to arbitration. There is also no provision for splitting the cause or parties and referring a part of the subject matter of the suit to the arbitrator. He

submitted that the whole purpose of speedy disposal of the dispute would be frustrated by such bifurcation of the suits in two parts, one to be decided by the Arbitral Tribunal and the other to be decided by the Court in which the suit is filed.

11. Mr. Vaibhav Dang, on the other hand, relied upon a large number of judgments to buttress his case for reference of the dispute to arbitration, being the following:-

I. Impex Corporation and Ors. vs, Elenjikal Aquamarine Exports Ltd. 2008 (2) Arb. LR 560 (Ker) (DB), wherein, relying upon the decision of the Supreme Court in Smt. Rukmanibai Gupta Vs. Collector Jabalpur and Others, , it was held that an arbitration agreement is not required to be in any particular form. What is required to be ascertained is whether the parties have agreed to refer the dispute to arbitration.

II. National Aluminum Company Limited Vs. The Doaba Industrial and Trading Company (P) Limited, , in which it was held by the Orissa High Court that the security contract in the said case was an extension of the C&F contract and the arbitration clause in the earlier C&F contract could be imported into the subsequent security contract as it was not inconsistent with the terms of the subsequent contract between the parties.

III. Rashtriya Ispat Nigam Limited and Another Vs. Verma Transport Company, , in which the Supreme Court drew a distinction between Section 8 of the 1996 Act and Section 34 of the 1940 Act, holding that the exercise of discretion by the judicial authority, which was the hallmark of Section 34 of the 1940 Act, has been taken away under the 1996 Act. Whereas Section 34 of the 1940 Act contemplated stay of the suit; Section 8 of the 1996 Act mandates a reference. It further held that the expression "first statement on the substance of the dispute? contained in Section 8(1) of the 1996 Act must be contra-distinguished with the expression "written statement". What is, therefore, material is as to whether the petitioner has filed his first statement on the substance of the dispute or not, if not, his application u/s 8 of the 1996 Act may not be held wholly unmaintainable.

IV. Ram Naresh Kumar Singh Vs. Food Corporation of India Ltd., Patna and Others, , in which the Patna High Court elucidated the real test for determining whether an act is a step in the proceedings and held that this was to be determined by testing whether the act displays an unequivocal intention to proceed with the suit and to give up the right to have the matter disposed of by way of arbitration.

V. GNB Bros. Pvt. Ltd. vs. Sudhir Gensets Ltd. Civil Revision Petition No. 131/2005, wherein a learned Single Judge (Hon"ble Mr. Justice Pradeep Nandrajog) of this Court interpreted the phrase "not later than when submitting his first statement on the substance of the dispute? in sub-section (1) of Section 8 to hold that an application invoking remedy u/s 8 of the Arbitration and

Conciliation Act, 1996 cannot be postponed beyond a reasonable period; and dismissed the respondent's application u/s 8 of the Act which was presented three years after the respondent was served with summons of the suit.

VI. Shukaran Devi vs. Om Prakash Jain & Anr. 133 (2006) DLT 297. In this case, another learned Single Judge of this Court (Hon'ble Mr. Justice Anil Kumar) emphasized the preemptory nature of Section 8 of the Arbitration and Conciliation Act, 1996 and held, rejecting the objection of the plaintiff that the application u/s 8 had been filed to avoid the rigour of Order VIII Rule 10 of the CPC as the defendant No.1 did not file either the application or his written statement within 30 days, that on this ground alone the application of the defendant u/s 8 could not be declined.

VII. Associates India Financial Services Pvt. Ltd. Vs. Mr. Jairaj Shetty, , in which it was held that when there is a dispute between the parties, the same is required to be adjudicated upon and resolved through the process of arbitration in cases where there is an arbitration clause, as contemplated by Section 8 of the Arbitration and Conciliation Act, 1996 and not otherwise.

12. Though, in my view, there can be no quarrel with the law enunciated in the aforesaid decisions, I am satisfied that the application of the defendant in the present case is untenable for the reasons delineated hereinbelow, but first an overview of the facts is necessitated.

13. A bare glance at the plaint shows that the suit instituted by the plaintiff seeks recovery of a sum of Rs. 36,67,820.94 (Rupees Thirty Six Lacs Sixty Seven Thousand Eight Hundred Twenty and Ninety Four Paise Only) along with 18% interest thereon from the defendant. The plaintiff is a company having its registered office at RoomNo.23, International Cargo Terminal, Import Building III, Indira Gandhi International Airport, New Delhi. It has been granted the Letter of Award by the Delhi International Airport Pvt. Ltd. (in short "DIAL"), thereby authorizing it to exercise the right and authority for upgradation, modernization, financing, operation, maintenance and management of the Cargo Terminal for providing services at the Indira Gandhi International Airport, New Delhi vide a Concession Agreement dated 24th August, 2009. The defendant is a company having its registered office at A-87/88, Road No.4, Mahipalpur Extension, New Delhi - 110037, which is engaged in the business of air cargo transportation within India and across the globe. The defendant through its Director approached the plaintiff for space requirement at Indira Gandhi International Airport Cargo Terminal. The plaintiff by letter dated 8th December, 2009 (Ex.P5) allotted space to the defendant on payment of monthly license fee and deposit of security and electricity charges as set out in paragraph 7 of the plaint. After acceptance of the terms and conditions of the said allotment, the defendant took possession of the allotted space on 28th December, 2009 on payment of the security deposit and advance license fee.

14. It is the case of the plaintiff that the defendant miserably failed to fulfill its

contractual obligations and defaulted in payment of monthly license fee, cargo services fees and utility charges as agreed. Since the defendant kept on avoiding the payment of dues which remained outstanding under various heads for months together, the plaintiff, by its letter dated 22nd July, 2010 (Ex.P11), called upon the defendant to make the payment of the total outstanding dues amounting to Rs. 28,83,226/-. The said letter spells out the dues under various heads as follows:-

1.

Fees for Cargo Services

Rs. 1,652,399

2.

License Fees

Rs. 1,228,506

3.

Utility Charges

(i.e. electricity etc.)

Rs. 2,321

Total amount outstanding

Rs. 2,883,226?

15. The defendant in its reply dated 27th July, 2010 (Ex.P8) requested for extension of time for making the payment of the total outstanding amount to the plaintiff till 8th August, 2010. The plaintiff on 11th August, 2010 issued a reminder calling upon the defendant to make payment of the total outstanding dues of Rs. 34,52,314/-. Finally, on September 06, 2010, a legal notice was issued by the plaintiff to the defendant. The present suit was instituted thereafter based on the ledger account of the defendant in the books of the plaintiff Company. A bare glance at the said ledger account, which is for the period from 1st April, 2009 to 15th October, 2010, makes it abundantly clear that there are several entries to debit the defendant under various heads, viz., rental income, X-ray charges, cargo facility-reimbursement, de-stuffing charges, ULD-building-rebuilding-offloading, demurrage charges-bonded area, interest income, etc.

16. With the aforesaid factual background, it is proposed to first examine the contention of Mr. Wali that the application of the defendant u/s 8 of the Arbitration Act is liable to be dismissed at the threshold on the ground that the said application is not the first statement on the substance of the dispute by the defendant, as the defendant had earlier moved an application bearing IA No.7599/2011 under Order VIII Rule 1 read with Section 151 of the Code of Civil

Procedure, 1908 alleging that the instant suit of the plaintiff was frivolous and the claim made therein was baseless and misconceived. Mr. Wali's further contention is that the present application filed by the defendant is only a ploy to gain time in view of the fact that the defendant has failed to file its written statement within the stipulated time and even within the extended time granted by this Court. He pointed out that the Supreme Court in the case of *The State of Uttar Pradesh and Another Vs. Janki Saran Kailash Chandra and Another*, had considered an application for time to file written statement to be a step in the proceedings.

17. Indubitably, Mr. Wali is correct in his submission that it was so held by the Supreme Court in the case of *Janki Saran Kailash Chandra (supra)*, but it cannot be lost sight of that what was being considered by the Supreme Court in the said case was an application u/s 34 of the 1940 Act, and the Supreme Court in its subsequent decision in *Food Corporation of India and Another versus Yadav Engineer and Contractor 1983 (1) SCR 95* distinguished the aforesaid judgment, inter alia, stating that the view taken therein did not run counter to the view taken by it that interlocutory proceedings are only incidental to the main proceeding and, thus, any step taken in the interlocutory proceedings does not come within the purview of main proceedings.

18. Again, the Supreme Court while considering this aspect of the matter in *M/s. Sadhu Singh Ghuman Vs. Food Corporation of India and others*, wherein it was categorically stated that seeking a direction to the plaintiff to produce the original agreement does not amount to submitting to the jurisdiction of the Court, opined:-

.....The right to have the dispute settled by arbitration has been conferred by agreement of parties and that right should not be deprived of by technical pleas. The Court must go into the circumstances and intention of the party in the step taken. The Court must examine whether the party has abandoned his right under the agreement. In the light of these principles and looking to the substance of the application dated January 4, 1985, we cannot form an opinion that the defendants have abandoned their right to have the suit stayed and took a step in the suit to file the written statement.

19. In the case of *Vareed Jacob Vs. Sosamma Geevarghese and Others*, a distinction was drawn by the Supreme Court between incidental proceedings and supplemental proceedings referred to in Part III and Part VI of the Code of Civil Procedure. The said distinction came to be upheld in the case of *Rashtriya Ispat Nigam Ltd. (supra)*. In the said case, the question which came up for consideration before the Supreme Court was whether by opposing the prayer for interim injunction, the restriction contained in sub-section (1) of Section 8 was not attracted. Highlighting the contradistinction between supplemental and incidental proceedings which are not part of the main proceedings on the one hand, and the main proceedings on the other hand, the Supreme Court held that the aforesaid distinction must be borne in mind while dealing with an application

u/s 8 of the Arbitration and Conciliation Act, 1996. It would be apposite to extract the following observations made by the Supreme Court in the context:-

37. By opposing the prayer for interim injunction, the restriction contained in sub-section (1) of Section 8 was not attracted. Disclosure of a defence for the purpose of opposing a prayer for injunction would not necessarily mean that substance of the dispute has already been disclosed in the main proceeding. Supplemental and incidental proceeding are not part of the main proceeding. They are dealt with separately in the CPC itself. Section 94 of the CPC deals with supplemental proceedings. Incidental proceedings are those which arise out of the main proceeding. In view of the decision of this Court in Food Corporation of India (supra), the distinction between the main proceeding and supplemental proceeding must be borne in mind.

20. Nearly, a century ago Ridley, J. in Austin and Whiteley Ltd. vs. S. Bowley and Son (1913) 108 LT 921 (F) enunciated the law in this regard as follows:-

In my opinion what is intended by a step in the proceedings is some step which indicates an intention on the part of a party to the proceedings that he desires that the action should proceed and has no desire that the matter should be referred to arbitration.

21. In the Indian context, Tendolkar, J. in Nuruddin Abdulhusein Vs. Abu Ahmed Abdul Jalli, held that the real test was whether an act displays an unequivocal intention to proceed with the suit and to give up the right to have the matter disposed of by arbitration.

22. In view of the aforesaid well settled legal position, I am not inclined to hold that the defendant's application seeking enlargement of time for filing written statement can be construed in such a manner as to lead to the conclusion that the defendant had thereby disclosed and declared its unequivocal intention to proceed with the suit. As a corollary, the present application is held to be maintainable.

23. Adverting to the next issue as to whether the present claim of the plaintiff is or is not the subject matter of the Cargo Handling Agreement, there is no gainsaying that the plaintiff has claimed various reliefs in the suit under various heads such as "License Fee", "Cargo Services Fees" and "Utility Charges". A bare glance at the Cargo Handling Agreement would suffice to show that the said Agreement does not cover the entire gamut of disputes between the parties and is confined to cargo handling charges alone. Also, the admitted position is that the parties never entered into a written contract for license fee. It is also undeniable that the Cargo Handling Agreement on which the claim of the defendant for arbitration is predicated was for a period of one month only, though cargo handling services continued to be rendered to the defendant by the plaintiff, with the concurrence of the defendant, for the entire period during which the defendant remained in the premises of the plaintiff. It is also not in dispute that the electricity charges and various other charges as set out in ledger

account referred to hereinabove were payable by the defendant to the plaintiff. For the purpose of referring the dispute for cargo handling charges payable by the defendant to the plaintiff to arbitration, indubitably the part of the cause of action relating to cargo services fees would have to be split from the remaining part of the claim of the plaintiff. It is perhaps for this reason that in the rejoinder filed by it to the plaintiff's reply the defendant itself has pleaded that "in the event this Hon"ble Court is of the view that the entire claim cannot be referred for arbitration then such part of the claim as is covered by the terms of Arbitration Agreement be referred to arbitration."

24. In *Sukanya Holdings Pvt. Ltd.*, the Supreme Court laid down the law as follows:- (SCC, Page 535)

.....there is no provision in the Act that when the subject matter of the suit includes subject-matter of the arbitration agreement as well as other disputes, the matter is required to be referred to arbitration. There is also no provision for splitting the cause or parties and referring the subject matter of the suit to the arbitrators.

It further held:- (SCC, Page 536)

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 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.

Secondly, such bifurcation of suit in two parts, one to be decided by the Arbitral Tribunal and other to be decided by the civil court would inevitably delay the proceedings. The whole purpose of speedy disposal of dispute and decreasing the cost of litigation would be frustrated by such procedure. It would also increase the cost of litigation and harassment to the parties and on occasions there is possibility of conflicting judgments and orders by two different forums.

25. In view of the aforesaid delineation of the law by the Supreme Court, there is no manner of doubt that bifurcation of causes of action should ordinarily not be resorted to. Such a practice could prove to be unwholesome and liable to result in inevitable delays and mounting of cost of litigation, apart from preventable harassment to the parties and their witnesses. The possibility of conflict of judgments between the Court and the Arbitral Tribunal also cannot be ruled out if only a part of the disputes is referred to the Arbitral Tribunal by the Court and the Court chooses to retain fractional disputes for adjudication at its own end.

There is, therefore, no plausible reason to impel me to bifurcate the dispute relating to cargo handling charges and to refer the same to arbitration and at the same time retain the remaining dispute relating to license fee, utility charges, etc. before this Court, more so, in view of the fact that the evidence is likely to be common, and retaining the dispute in the Court may prevent avoidable delay.

26. For the aforesaid reasons, the prayer of the defendant for reference of the dispute to arbitration is hereby declined.

27. IA No. 9268/2011 is dismissed.

28. List this case before the Joint Registrar for further proceedings on 12th March, 2011.