

(2018) 08 RAJ CK 0127

In the Rajasthan High Court

Case No : Arbitration Application No. 23 of 2017

**Damani Shipping Pvt. Ltd. @APPELLANT@Hash Hindustan Zinc Ltd.
Company**

Date of Decision : 23-08-2018

Acts Referred:

Arbitration and Conciliation Act, 1996 — Section 8, 8(1), 8(3), 11, 11(6A)
Code of Civil Procedure, 1908 — Order 7 Rule 10

Citation : (2018) 08 RAJ CK 0127

Hon'ble Judges : ARUN BHANSALI, J

Bench : Single Bench

Advocate : Jhamak Nagda, Sajjan Singh, Sachin Acharya

Final Decision : Dismissed

Judgement

This application under Section 11 of the Arbitration and Conciliation Act, 1996 (â??the Act of 1996â??) has been filed by the applicant seeking

appointment of appropriate arbitrator to resolve and settle the dispute between the parties.

The applicant, who is a custom house agent and carrying on its business of clearing goods from various ports, entered into the agreements dated

26/6/2003 and 30/6/2004 (Annex.2 and Annex.3 respectively), with the respondent company, who is a manufacturer of zinc at its various projects in

India. It is claimed that pursuant to the agreements, based on the activities undertaken by the applicant, as on 20/4/2011 a sum of Rs.1,89,28,120.72P.

was outstanding and payable by the respondent to the applicant. When notice issued in this regard was not satisfactorily responded, the applicant filed

a suit no.1723/2011 before the Bombay High Court. In the suit, the respondent filed an application questioning the maintainability of the suit at Mumbai

based on exclusive jurisdiction clause contained in the agreement. The

application was allowed by order dated 7/12/2016, whereby, the plaint was ordered to be returned to the plaintiff to be filed in the appropriate court at Udaipur.

Relevant portion of the order dated 7/12/2016 reads as under:

13. In view of the exclusive jurisdiction clause, the plaint is returned to the plaintiff to be filed in the appropriate court at Udaipur. All the contentions of the parties, including limitation are kept open.

14. The counsel for the plaintiff requests this court to fix a date for the appearance of the parties in which the plaint is proposed to be presented under Order 7 Rule 10(a) of the Code of Civil Procedure.

The parties to appear before the appropriate court in Udaipur on 13th February, 2017.

15. The plaintiff to give notice of not less than three weeks before 13th February, 2017 informing the defendant with the details of the court and the address where the plaint is going to be presented with the newly assigned suit number.

Pursuant to the order dated 7/12/2016, the applicant presented the suit before the District Judge, Udaipur on 3/2/2017.

Thereafter, the present application under Section 11 of the Act of 1996 has been filed by the applicant on 30/3/2017 before this Court inter alia with

the averments that in view of the provisions of clause 13 of the agreement dated 30/6/2004, which provides for arbitration, the suit is not maintainable

and, therefore, the applicant served a legal notice dated 6/1/2017 (Annex.1) upon the non-applicant invoking clause 13 of the agreement seeking

appointment of arbitrator. A submission has been made that in the event of allowing of the present application, the suit as filed would be deemed to be

withdrawn and that the applicant will take necessary steps in this regard. It is then indicated in the application that despite seeking appointment of

arbitrator in terms of clause 13 of the agreement, the respondent has not responded and, therefore, appropriate arbitrator be appointed.

The application has been vehemently contested by the respondent company by filing reply. It is inter alia indicated that the application is not

maintainable as the same seeks to raise a stale claim which is severely barred by limitation. The contract was entered into between the parties on

30/6/2004 and a legal notice dated 5/2/2010 was got issued demanding a sum

of Rs.1,16,15,975/-, whereafter, a suit was filed before the Bombay High Court claiming a sum of Rs.1,89,28,120.72P., which plaint has been ordered to be returned and has been filed before the courts at Udaipur.

A further submission has been made, during the course of arguments, that after filing of the plaint at Udaipur, based on the provisions of Commercial

Courts, Commercial Division and Commercial Appellate Division of High Courts Act, 2015 (â??the Act of 2015â??), the matter was transferred to

the Commercial Court which initially was established for the entire State at Jaipur and pursuant to the amendment introduced in the Act of 2015 by

Ordinance, 2018, now the matter shall be taken up by the Commercial Court at Udaipur.

It is inter alia further emphasized that without withdrawing the suit filed before the appropriate court, the present application was not maintainable and

that the applicant was indulging in forum shopping, which cannot be permitted.

A rejoinder has been filed by the applicant disputing the objections raised in the reply.

Learned counsel for the applicant submitted that from the documents on record, it is apparent that there is an arbitration clause between the parties

and that there exists a dispute, therefore, in terms of provisions of Section 11 (6-A) of the Act of 1996, an arbitrator be appointed for resolving the

dispute between the parties. Submissions were made that though the suit filed by the applicant is pending consideration before the Commercial Court,

in view of provisions of Section 8(3) of the Act of 1996 the present application can always be maintained by the applicant and, therefore, the

objections raised by respondent in this regard having no substance deserve to be rejected and the application deserves to be allowed.

Reliance was placed on Anil vs. Rajendra :Â (2015) 2 SCC 583 and Duro Felguera vs. Gangavaram Port Limited : (2017) 9 SCC 729.

Learned counsel for the respondent submitted that provision of Section 8(3) of the Act of 1996 has no application to the facts of the present case as

once the suit filed by the applicant himself is pending, it does not lie in the mouth of the applicant to contend on the one hand that suit is not

maintainable and simultaneously continue with the said suit and with the present proceedings parallelly and, therefore, the application deserves to be

dismissed.

I have considered the submissions made by learned counsel for the parties and have perused the material available on record.

Clause 13 of the agreement dated 30/6/2004 (Annex.3) reads as under:

13. Governing Law and Arbitration:

This work order Contract shall be construed in accordance with and governed by the laws of India. In the event of any litigation, the courts in Udaipur

(Rajasthan), India shall have the jurisdiction.

All disputes or differences whatsoever arising between the parties out of or relating to this work order shall be settled by arbitration in accordance

with procedures described in The Arbitration and Conciliation Act, 1996, with all the modifications and re-enactments thereto, as is prevalent in India.

The venue of Arbitration shall be Udaipur.

It is indeed surprising that despite presence of clause 13 in the agreement between the parties, first the applicant chose to file a suit before the

Bombay High Court, wherein, application was filed by the respondent questioning the territorial jurisdiction, which objection was upheld and by order

dated 7/12/2016 the plaint was ordered to be returned under Order VII Rule 10 CPC for being presented before the courts at Udaipur. Pursuant to the

said order dated 7/12/2016, the plaint has been presented before the District Judge, Udaipur and on account of provisions of the Act of 2015, the same

is now pending before the Commercial Court at Udaipur.

Even when the application was filed by the respondent before the Bombay High Court and the arbitration clause as well as the exclusive jurisdiction

clause came to the notice of the applicant, apparently no steps were taken to comply with the requirements of the said clause and the applicant

continued to contest the matter before the Bombay High Court, resulting in the order dated 7/12/2016.

Once the order was passed, for the reasons best known to the applicant, which cannot be deciphered from the application except for indicating that

the suit in view of the arbitration clause was not maintainable, the applicant issued notice for appointment of arbitrator to the respondent and,

thereafter, returned plaint was presented before the District Judge, Udaipur and subsequently the present application under Section 11 of the Act of

1996 has been filed.

The conduct and the submissions of the applicant are dichotomous inasmuch as on the one hand it has filed the suit ignoring the arbitration clause and now during the pendency of the said suit itself, the present application has been filed by claiming that the suit is not maintainable.

For maintaining the present application strong reliance has been placed on the provision of Section 8(3) of the Act of 1996.

The provisions of Section 8 of the Act of 1996 read as under:

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 to the arbitration

agreement or any person claiming through or under him, so applies not later than the date of submitting his first statement on the substance of the

dispute, then, notwithstanding any judgment, decree or order of the Supreme Court or any court, refer the parties to arbitration unless it finds that

prima facie no valid arbitration agreement exists.

(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.

Provided that where the original arbitration agreement or a certified copy thereof is not available with the party applying for reference to arbitration

under subsection (1), and the said agreement or certified copy is retained by the other party to that agreement, then, the party so applying shall file

such application along with a copy of the arbitration agreement and a petition praying the court to call upon the other party to produce the original

arbitration agreement or its duly certified copy before that court.

(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.

A perusal of the above provisions would indicate that the application under Section 8(1) of the Act is envisaged by the defendant only and that sub-

section (3) provides that even if application has been made under sub-section (1) and the issue is pending before the judicial authority, the arbitration

may be commenced, continued and arbitral award could be made. The said situation can only arise once an application under Section 8(1) of the Act,

1996 is pending before the judicial authority before which action is brought and the plaintiff itself after having filed the suit, without there being any

application by the defendant under Section 8 of the Act, cannot seek reference of the action/dispute to arbitration. The legal position regarding filing of

the application under Section 8 of the Act, 1996 is clear as laid down in Ardy International (P) Ltd. vs. Inspiration Clothes & U & Anr. : (2006) 1

SCC 417, wherein, the Honâ??ble Supreme Court inter alia laid down as under:

â??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 moto at the instance of the judicial authority, when the judicial authority comes to know of the existence of an arbitration agreement.â??

It is also well settled that so long as the defendant has chosen not to file an application under Section 8, the civil court is entitled to proceed to deal

with the matters at issue in the suit notwithstanding the existence of an arbitration clause in the contract.

So far as the judgment in the case of Anil (supra) is concerned, the said case arose in the circumstances wherein the application filed by the defendant

under Section 8(1) of the Act of 1996 was dismissed and, thereafter, application under Section 11 of the Act of 1996 was filed, which was accepted

by the High Court, which order was set aside by Honâ??ble Supreme Court holding that the dismissal of application under Section 8 of the Act would

operate as res judicata and application under Section 11 of the Act of 1996 was not maintainable. While interpreting the provisions of Section 8(3) of

the Act, 1996, it was observed as under:

â??11. Under Section 8(1) of the Act, either party is free to apply to the judicial authority within the prescribed time to refer the parties to arbitration,

in case the matter pending before it is the subject-matter of an arbitration agreement. Section 8(3) of the Act, however, makes it clear that

notwithstanding the application under Section 8(1) of the Act and the issue pending before the judicial authority, arbitration may be commenced or

continued and an arbitral award can also be made.Â In other words, despite the pendency of an application under Section 8(1) of the Act before the

judicial authority, Section 8(3) of the Act permits the parties to commence and continue the arbitration and the Arbitral Tribunal is free to pass an

award. That alone is what is contemplated under Section 8(3) of the Act.â??

The observations made by Honâ??ble Supreme Court cannot be interpreted to mean that even after filing of the suit pertaining to a contract

containing arbitration clause and wherein no application under Section 8 of the Act, 1996 is pending, the plaintiff itself can file an application under

Section 11 of the Act seeking reference of the dispute to arbitration, as sought to be projected by learned counsel for the applicant.

The judgment in the case of Duro Felguera (supra) interpreting the provisions of Section 11 (6-A) of the Act 1996 has no application to the

circumstances of the present case, wherein, the very maintainability of the application at the instance of plaintiff after filing a suit before the civil court

isÂ being examined.

The submissions made by the applicant in the application regarding deemed withdrawal of the suit and/or that the applicant will take necessary steps in

this regard in the event of present application being allowed by this Court are essentially putting the cart before the horse, which submission/proposal

has no meaning and as such cannot be permitted.

In view of the above discussion, it is apparent that the present application filed by the applicant during pendency of the suit before the civil court (now

Commercial Court) in which admittedly no application under Section 8 of the Act has been filed by the respondent, the initiation of the parallel

proceedings under Section 11 of the Act of 1996 cannot be countenanced.

Consequently, the application filed by the applicant has no substance and the same is, therefore, dismissed.