

(2019) 03 CAL CK 0026

In the Calcutta High Court

Case No : General Application (GA) No. 137, 513, 650, 655, Of 2016, 2863 Of 2018, Civil Suits (CS) No. 11 Of 2016

Good Earth Minmet Pvt. Ltd

APPELLANT

Vs

Chandra Mohan Gupta

RESPONDENT

Date of Decision : 06-03-2019

Acts Referred:

Arbitration And Conciliation Act, 1996 — Section 8, 8(1), 11(6A)
Arbitration And Conciliation (Amendment) Act, 2015 — Section 4

Citation : (2019) 03 CAL CK 0026

Hon'ble Judges : Arindam Sinha, J

Bench : Single Bench

Advocate : Anindya Mitra, Abhrajit Mitra, Shaunak Mitra, Iram Hassan, Debayan Sen, S.N. Mookherjee, Samik Kanti Chakraborty, Debasish De, Debanjan De

Judgement

Arindam Sinha, J

This suit and applications were specially assigned to this Bench. Of four applications two have been heard and are being dealt with by this judgment. The first is GA 650 of 2016 made by defendant invoking section 8 of Arbitration and Conciliation Act, 1996 as amended, for stay of suit and referring parties to arbitration. The other is GA 2863 of 2018 made by plaintiff for amendment of the plaint. Mr. Mookherjee, learned senior advocate appears on behalf of applicant and had on earlier occasions made submissions. He referred to paragraphs 4, 5 and 17 of the plaint to show that plaintiff had pleaded an agreement between itself and his client to give effect to which, agreement dated 22nd May, 2008 was executed also between the parties. Subsequently, raising contracts were also executed between his client and one other in which plaintiff was a confirming party. Claims in the plaint are made for money against defendant where said other person has not been made party to the suit.

He submitted, by Arbitration and Conciliation (Amendment) Act, 2015 section 4 therein, amendment was made to section 8 of the Act of 1996. Sub-section (1)

of section 8 in 1996 Act was substituted to become present provision where a judicial authority, before which an action is brought in a matter which is the subject matter of an arbitration agreement shall, if, inter alia, a party to the arbitration agreement applies not later than the date of submitting his first statement on the substance of the dispute, then, notwithstanding any judgement, decree or order of the Supreme Court or any Court, refer the parties to arbitration unless it finds that prima facie no arbitration agreement exists.

He drew attention to clause 11 in agreement dated 22nd May, 2008, which is reproduced below:

"11. That if any difference or dispute arises in respect of the terms of this agreement or any work done under this agreement, the same will be referred to an arbitrator who will resolve the dispute in terms of the Arbitration and Conciliation Act, 1996."

His client is a party to said arbitration agreement contained in a document, which according to plaintiff, was executed to give effect to agreement alleged in the plaint also made between the parties. His client having had made this application, it is for plaintiff to show prima facie that there is no valid agreement for arbitration between the parties. In paragraph 4 of the plaint, statement has been made that the agreement pleaded was entered into between the parties some time in or around the first half of May, 2008 as would also be borne out from, inter alia, documents referred thereafter. Statements in paragraph 5 are to the effect that there was a document dated 22nd May, 2008 which is a part of the oral agreement. This document is written agreement, clause 11 in which is arbitration agreement between the parties. He submitted, in paragraphs following paragraphs 4 and 5 in the plaint, there is no other document that could be one as would bear out oral agreement pleaded in the plaint. It is, therefore, this agreement dated 22nd May, 2008 which is the agreement between the parties. In event there are matters, fringe or otherwise, that is for consideration by the Arbitral Tribunal.

He relied on amended section 8 to submit, intention of Legislature is, where there is an arbitration agreement, parties must be compelled to go for arbitration and all disputes are to be decided in arbitration. He relied on judgment dated 3rd May, 2018 of Supreme Court in Civil Appeal 4690 of 2018 (Ameet Lalchand Shah and Ors. Vs. Rishabh Enterprises and Ors.), reported in (2018)15 SCC 678. He placed paragraphs 2 to 8, 18, 22, 23, 25 to 27, 33 and 35 of Manupatra print. He submitted, facts in that case were that in matter of commercial transactions to commission Photovoltaic Solar Plant there were inter-connected agreements, some containing arbitration agreements and others without. He submitted, Supreme Court declared the law, in such facts, to be that amended section 8 would compel all parties to arbitration. He submitted, there is inter-connection between oral agreement pleaded in the plaint and written agreement dated 22nd May, 2008 containing arbitration agreement. Position of law has evolved to be that only existence and validity of arbitration agreement is what needs to be

looked at by Court in matters of arbitration. Amended section 11(6A) confines requirement of enquiry to existence of arbitration agreement while section 8 restricts the enquiry to prima facie finding of validity of existing arbitration agreement.

Mr. Anindya Mitra, learned senior advocate appeared on behalf of plaintiff in opposing the application for reference. He submitted, substituted section 8 still requires, for purpose of compelling the parties to arbitration, that the action brought before a judicial authority is in a matter which is the subject of an arbitration agreement. His client, while does not dispute validity of arbitration agreement contained in document dated 22nd May, 2008 but, contends that said arbitration agreement does not cover subject matter of the suit as it is very narrow in scope being in relation to work done under it.

He referred to oral agreement pleaded in paragraph 4 of the plaint. Clauses pleaded in that paragraph, except clause (d), are outside scope of agreement dated 22nd May, 2008. Claims of plaintiff are for money on account of total failure of consideration regarding, inter alia, agreement to transfer the mine and consequential damages suffered thereby. Agreement dated 22nd May, 2008, as would appear from it, is in relation to sale of bauxite excavated from the mine. Arbitration clause in that agreement is confined to disputes or differences arising in respect of terms of that agreement or any work done thereunder. There is no averment in the application regarding any dispute arisen on subject of the suit.

He relied on judgement of a learned Single Judge of this Court in Ganapatrai Gupta vs. Moody Brothers Ltd. reported in (1949) 85 CLJ 136 to following view expressed therein :

"Arbitration agreements should be strictly construed. Clear language should be introduced into any contract which is to have the effect of ousting the jurisdiction of the Courts and compelling the parties to have recourse to arbitration for decision of disputes....."

He then relied on Sukanya Holdings (P) Ltd. vs. Jayesh H. Pandya & Anr. reported in (2003) 5 SCC 531, to paragraphs 15 and 16 therein for law declared by Supreme Court to be as follows :

"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 under Section 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."

He submitted, this view was affirmed *Sundaram Finance Ltd. & Anr. vs. T. Thankam* reported in (2015) 14 SCC 444.

At this juncture, by order dated 20th September, 2018, two queries were put to plaintiff. Relevant extract from said order is reproduced below :

"Court put two queries to him being firstly, whether statement in paragraph 5 of plaint that written agreement is part of oral agreement to be taken as correct at this stage? Secondly, whether there is any reference to oral agreement in the written agreement?

Mr. Mitra submits, written agreement relates only to clause (d) in paragraph 4 of the plaint. This needs to be better stated in the plaint for which he seeks adjournment. He submits, an order of reference made under section 8 of Arbitration and Conciliation Act, 1996 would, in fact, non-suit his client. He is entitled to take all steps necessary to prevent that. He relies on judgment of Supreme Court in *Rukhmabai Vs. Laxminarayan* reported in AIR 1960 SC 335, to paragraph 30". Plaintiff then filed said application GA 2863 of 2018 for amendment of the plaint.

Mr. Abhrajit Mitra, learned senior advocate appears in support of amendment application and on earlier occasion submitted, amendments sought are in paragraphs 5 and 9 of the plaint as indicated in proposed amended plaint annexed. He relied on judgment of Supreme Court in *Ram Niranjana Kajaria vs Sheo Prakash Kajaria* reported in (2015) 10 SCC 203, to, inter alia, paragraphs 20,23,24 and 26 for submission that the amendments be allowed. This day he relies on judgment dated 10th December, 2018 of Supreme Court in *Emaar MGF Land Ltd. vs Aftab Singh* (Civil Appeals 23512-23513 of 2017), paragraph 52 in Manupatra print to submit, amended section 8 did not override *Sukanya Holdings (P) Ltd.* (supra).

Today Mr. Mookherjee submits, amendments sought are not imperative for proper or effective adjudication of the case. The application for amendment is mala fide. Thus two principles, of six extracted from judgement of Supreme Court in *Revajetu Builders and Developers Vs. Narayanaswamy and Sons* reported in (2009) 10 SCC 84 reproduced in paragraph 20 in *Ram Niranjana Kajaria* (supra), must be answered against plaintiff. Though his client's

application for reference to arbitration was filed on 2nd March, 2016 and several hearings held by earlier Bench having determination as well as this, it is only on and after 20th September, 2018, when queries were put to plaintiff, it came up with its amendment application. This fact alone demonstrates that amendments sought are on afterthought, thus mala fide. He submits, his client's application for reference to arbitration should be dealt with before adjudication of plaintiff's application for amendment.

Decision on issue of reference would turn on declaration of law made in Ameet Lalchand Shah (supra). Supreme Court in making this judgement took note of Sukanya Holdings (P) Ltd. (supra) to say that although there are different agreements involving separate parties, it is a single commercial project namely, operating 2 MWp Photovoltaic Solar Plants, commissioning of which was commercial understanding between parties effected through several agreements. Supreme Court held, since all agreements had purpose of commissioning the project, concerned High Court erred in not keeping in view various clauses in all three agreements which make them an integral part of principal agreement for purpose of amended section 8. He submits, in paragraph 25 Supreme Court outlined 4 amendments made to section 8 being, amplification of relevant party, scope of examining by judicial authority as restricted, cut off date by which an application under section 8 is to be presented and that the provision is to apply notwithstanding any prior judicial precedent. He draws attention to paragraph 26. He submits, amendments to section 8, Supreme Court said, are to be seen in the background of recommendations set out in 246th Law Commission Report. In any event, there is only one agreement as cannot be disputed by plaintiff, since in paragraph 4 of the plaint it has referred to 'an' agreement. As such, his client's case for reference of parties to arbitration be accepted. Mr. Mookherji submits, even on plaint case, purpose of agreement pleaded therein is to have access to bauxite for consideration.

On Emaar MGF Land Limited (supra) he submits, Supreme Court while again interpreting amended section 8, in paragraph 52 thereof said, the amendment making the provision applicable notwithstanding any judgment, decree or order of the Supreme Court or any Court was meant only at precedents on unamended section where parties were not referred to arbitration considering, inter alia, subject matter of the arbitration. According to him, the decision does not stand in the way of applying amended section 8 to refer parties to arbitration.

Plaintiff in paragraph 4 of the plaint has pleaded an agreement. Sub-paragraphs in said paragraph are reproduced below :

"4. Thereafter pursuant to the negotiations between the parties, an agreement was reached on the following lines :

a] That the mining lease for the said mine would be transferred to the plaintiff and the defendant would do all things necessary in this regard;

b] The defendant would join the plaintiff as director so as to facilitate the transfer

of the mining lease. The plaintiff upon becoming the lease of the mine would also be in a position to avail of the expertise of the defendant in sitting up and carrying on mining and allied business;

c] That all the infrastructure and all the mine development so far would also be transferred by the defendant to the plaintiff;

d] It was also agreed that pending transfer of the said mining lease to the plaintiff, the defendant was to sell the entire bauxite excavated from the said mine to the plaintiff. Rs.5,00,000/- [Rupees Five Lakhs] only was the security deposit agreed to be made by the plaintiff with the defendant against the purchase of the entire production from the said mine pending transfer of the mining lease;

e] That the application for transfer of the mine would have to be made by the defendant as the lessee and all things needful in this regard would also have to be done by the defendant as lessee. The defendant upon becoming a director of the plaintiff would be able to do all things required to be done by the plaintiff as proposed transferee in order to have the mine transferred. In other words, the defendant would discharge all functions both in his capacity as transferor of the mining lease and as director of the plaintiff as the proposed transferee and the defendant would ensure that this mining lease would be transferred to the plaintiff;

f] Rs.75,00,000 [Rupees Seventy Five Lakhs] only was a part of the consideration for transfer of the mining lease and the plaintiff starting mining business. The defendant was to bring about the transfer and upon the defendant joining the plaintiff's board of directors he would render services in connection with mining operations that would be carried out by the plaintiff upon transfer of the mining lease for the said mine. Rs.75,00,000/- [Rupees Seventy Five Lakhs] only was to be paid for this. Further Rs.1,00,000/- [Rupees One Lakh] only is the agreed reimbursement of the cost of infrastructure including expenses that have already been incurred by the defendant towards infrastructure development and exploration at the said mine;

The aforesaid agreement was entered into between the parties some time in or around the first half of May, 2008 and would also be borne out from the dealings and transactions between the parties including the documents referred to hereinafter. The said agreement was entered into at the plaintiff's registered office at Gulmohr, 6C Middleton Street, Kolkata 700071, within the jurisdiction aforesaid. The said agreement was brought about in course of negotiations between the plaintiff's director Mr. Sunil Saraogi on the one hand and the defendant on the other hand. To be noted in this connection is that the defendant is a permanent resident of premises No.3 Anil Roy Road, Kolkata 700029 and he is also assessed to income tax in Kolkata, I.T.O., Ward No.30[2], Kolkata, where his permanent address is at premises No.3 Anil Roy Road, Kolkata 700029 above. He also has a place of work in Ranchi."

In paragraph 5 of the plaint, plaintiff went on to further say as follows :

"5. Documents were subsequently executed between the parties to give effect to the terms and conditions of the said agreement. There was a document dated 22nd May, 2008, executed by the parties a copy whereof is annexed hereto and marked with the letter "A". This is a part of the oral agreement recorded in the form of an agreement a document executed at the plaintiff's registered office within the jurisdiction aforesaid. The document is on stamp paper purchased by the defendant and prepared at his office at Ranchi outside the aforesaid jurisdiction and forwarded to the plaintiff. The document was thereafter executed at the plaintiff's registered office within the jurisdiction aforesaid by both sides."

Inter alia, on these pleadings plaintiff claims decrees for money as pleaded in paragraphs 28 and 37 in the plaint, in that order. Paragraph 37 alleges total failure of consideration while paragraph 28 carries allegation of defendant having sold bauxite to third parties and reasonable estimate of compensation therefor.

It appears from a reading of paragraphs 4, 5, 28 and 37 that plaint case is of agreement to transfer mining lease and pending transfer, sale of entire bauxite excavated by defendant from the mine, to plaintiff. While claim (a) decree for money is for total failure of consideration, claim (b) decree for money relates to sale of bauxite. In this context, Court has perused defendant's application under section 8, to discern the party's understanding of agreement pleaded by plaintiff. Clear case of defendant is that plaintiff has sought money decree on basis that defendant has committed breach of agreement dated 22nd May, 2008. In paragraph 5 of the application defendant said as follows :

"5. The instant suit is the subject matter of the said arbitration agreement. The disputes raised in the instant suit are covered by such arbitration agreement. In the premises it is mandatory that this Hon'ble Court should refer the entire disputes as contained in the plaint to arbitration and/or the instant suit to arbitration."

Defendant has moved Court invoking section 8 before it has pleaded its first statement as to the substance of disputes. As such, it has not committed itself to a position taken on allegations made in paragraph 4 of the plaint. However, in paragraph 5 of the application, the word 'entire' has been used to describe disputes as contained in the plaint. Concise Oxford English Dictionary, 11th Edition gives one of the meanings of the word to be 'with no part left out; whole'. Agreement dated 22nd May, 2008 states agreement between parties for sale of entire mineral excavated from leasehold area of defendant solely and exclusively to plaintiff. Plaintiff in paragraph 12 of the plaint said, inter alia, as follows :

" 12.Be that as it may, no part of the bauxite excavated from the said mine was either supplied to the petitioner or the sale proceeds thereof made over to the petitioner."

There is, in addition to claim for total failure of consideration a separate money

decree claimed as compensation for sale of bauxite to third parties as alleged to have been made by defendant. In context of above pleadings, allegation of plaintiff is of there having been no sale whatsoever made to plaintiff contributing to total failure of consideration. This Court thus has before it two separate claims made by plaintiff in which one includes part of it for total failure of consideration on allegation that it relates to breach by defendant to transfer the mine and, at least, acknowledgement of defendant that disputes are in parts for entirety of them to be referred.

Section 8 had its unamended provision substituted by amendment made and given retrospective effect from 23rd October, 2015. Between unamended provision and substituted provision by amendment, there is no change in the section to the extent - 'a judicial authority, before which an action is brought in a matter which is the subject matter of an agreement shall,...'. Court finds subject matter of suit cannot be said to be subject matter of arbitration agreement between parties. The arbitration agreement is contained in agreement dated 22nd May, 2008. Neither party has asserted arbitration agreement in oral agreement pleaded in paragraph 4 of the plaint. Defendant's assertion that entire disputes be referred to arbitration as arising out of agreement dated 22nd May, 2008, Court is unable to accept for reasons aforesaid.

In *Ameet Lalchand Shah* (supra) there was a principal agreement and other agreements between parties. Concerned High Court found other agreements are not inter connected with principal agreement. Arbitration agreement was contained in principal agreement. Supreme Court in paragraph 22 said all the parties can be covered by arbitration clause in the main agreement. On that and other facts Supreme Court referred parties to arbitration. In paragraph 18, earlier judgment of said Court in *Sukanya Holdings* (supra) was noticed. Paragraphs 15 and 16 from *Sukanya Holdings*(supra) were extracted and reproduced.

In said paragraph 18 Supreme Court did not say that view taken in *Sukanya Holdings*(supra) was an erroneous view. *Ameet Lalchand Shah* (supra) was subsequently rendered by Bench of even strength, which noticed the earlier decision but did not refer same to larger Bench. This is being said in context of submissions made on behalf of defendant that *Ameet Lalchand Shah* (supra), in spite of considering *Sukanya Holdings* (supra) had referred parties to arbitration agreement and others as involved in several agreements, to arbitration on applying amended section 8. Between parties herein, part of the subject matter of suit is not covered by their arbitration agreement, hence, Court will not refer them to arbitration. GA 650 of 2016 is therefore dismissed.

So far as application for amendment is concerned, Court finds on perusal of amendments sought, they do not offend principles reiterated by Supreme Court in paragraph 20 of *Ram Niranjana Kajaria* (supra). In stating facts pleaded, with elucidation as by proposed amendments, plaintiff has not consequently asked for any amendment to claims made in the plaint. Court is inclined to allow the

application. It is accordingly allowed.

There will be order in terms of prayers (a), (b) and (c). Amended copy of plaint will be served on defendant for it to thereafter to file written statement.

The other applications be listed on 13th March, 2019.