

(1999) 12 MAD CK 0090

In the Madras High Court

Case No : Application No's. 2789 and 2790 of 1999 in C.S. No. 80 of 1999

India Cements Capital Finance Ltd.

APPELLANT

Vs

Kwality Spinning Mills Ltd. and Others
Kwality Spinning
Mills Ltd. Vs Meyyappan

RESPONDENT

Date of Decision : 24-12-1999

Acts Referred:

Arbitration and Conciliation Act, 1996 — Section 5, 8

Citation : (2000) 102 CompCas 523 : (2000) 2 CTC 267

Hon'ble Judges : A. Ramamurthi, J

Bench : Single Bench

Final Decision : Allowed

Judgement

A. Ramamurthi, J.—Applications filed by the defendants under Order 14, Rule 8 of the Original Side Rules read with Section 8 of the Arbitration and Conciliation Act, 1996, and also u/s 22 of the Sick Industrial Companies Act.

2. The case in brief is as follows : The plaintiff instituted a suit for declaration that they are the sole and absolute owners of the suit schedule machinery, for a mandatory injunction directing them to deliver the schedule mentioned properties to them at Chennai, and also for permanent injunction. The existence of the alleged hire purchase agreement dated March 31, 1997, is denied. The transaction between the two companies is nothing but a loan transaction is evidently clear from the documents. The transaction was styled and named as "hire purchase agreement" so as to enable the plaintiff to obtain a tax benefit towards depreciation. The plaintiff not being the owner of the schedule mentioned equipment, is not entitled to re-possess the same. This court does not have the jurisdiction to entertain the suit in view of the valid arbitration agreement that has come into existence between the parties. The plaintiff caused a legal notice dated May 30, 1998, and the same was received on June 11, 1998. Clause 18(a) of the said hire purchase agreement also empowers the managing director of the plaintiff-company to appoint a sole arbitrator under the Arbitration

Act, 1940, to decide all disputes or claims arising out of the said agreement. The defendant also sent a reply dated June 23, 1998. The plaintiff had suggested that the dispute/claim be referred to arbitration under the 1996 Act by a sole arbitrator to be appointed by their chairman. The defendant replied that they are; not agreeable for having an arbitrator appointed by their chairman; but, however, communicated their willingness to refer the dispute u/s 11 of the Arbitration and Conciliation Act 1996. Section 11 deals with appointment of arbitrators. If the parties fail to agree on an arbitrator within 30 days from the receipt of a request by one party to the other, the appointment shall be made, upon request, by the Chief Justice. The plaintiff has ignored the reply dated June 23, 1998, in totality and filed the present suit before the court. An arbitration agreement means an agreement by the parties to submit to arbitration all or certain dispute which have arisen between them. According to Section 8 of the new Arbitration Act, the court has to refer the matters to arbitration and it is not mandatory. Hence, this court has no jurisdiction to entertain the suit and, as such, the matter has to be referred for arbitration.

3. The defendant also filed Application No. 2790 of 1999 for suspending all proceedings in the suit. The company has been declared a sick industry as contemplated u/s 3(1)(o) of the Sick Industrial Companies Act, 1985. In view of its declaration, all proceedings initiated against the defendant-company have to be suspended as per Section 22 of the Act. The defendant is possessed of vast properties. If during this time, the process of revival is hampered by various legal proceedings initiated against the defendant-company the object of the Act would be totally lost. If all the legal proceedings are suspended as contemplated u/s 22 of the Act, it would only be to the advantage of the creditors.

4. The respondent/plaintiff filed a separate counter and denied the various allegations. These applications have been filed with a mala fide intention to postpone the evil days, protract the suit and to delay payments of the lawful dues to the plaintiff. The parties intended and had actually gone for only hire purchase agreement. The transaction between the parties was not a loan transaction but a hire purchase re-transaction. Under Clause 18(a) of the hire purchase agreement, all disputes or claims arising out of the agreement are to be settled by arbitration under the provisions of the Arbitration Act, 1940. The plaintiff is not having a managing director in recent times. His functions are being carried out by the chairman and the president. In view of the technicalities involved and possible objections of the defendants, the plaintiff sent a notice on May 30, 1998, wherein they sought confirmation for referring the matter to arbitration under the new Act. They did not comply with the request and began to deny the hire purchase agreement and they signed in blank printed forms. They have mechanically denied the factual statements made in the notice and, as such, they are not entitled to take shelter u/s 11(5) of the Arbitration and Conciliation Act, 1996. When the agreement is questioned and challenged, Section 8 also will not apply: u/s 7(4)(b) of the Arbitration Act, 1996, only an exchange of letters, telex, telegrams or other means of tele-communications

which provide a record of the agreement would constitute an arbitration agreement in writing. When the agreement is alleged to be illegal, non-existent and ab initio void, the entire agreement along with the arbitration clause fails and no question of arbitration arises. There must be a valid and binding arbitration agreement between the parties to the legal proceedings. The application ought to have been made before filing a written statement or taking any other step in the legal proceedings. In this case, Application No. 2789 of 1999 has been filed by the defendant and they have also filed Application No. 2790 of 1999. Section 8 of the Arbitration Act is not applicable to the case on hand.

5. The main relief in the suit is one for declaration of ownership and possession of the leased equipment and it is not prohibited by a reference to the BIFR. Section 22 prohibits only proceedings for winding up of the industrial company or execution, distress or the like against the properties of the industrial company or for the appointment of receiver. The plaintiff had already filed Application No. 98 of 1999 to grant leave to file a separate suit for money. Even in a suit for recovery of money, the entire suit cannot be stayed u/s 22 of the Act, Section 22 will not apply to the facts of the case and there is no reason to suspend all proceedings in O. S. No. 80 of 1999.

6. Heard the learned counsel of both sides.

7. The points that arise for consideration are : (1) Whether there are any valid and sufficient cause to dismiss O. S. No. 80 of 1999 ? (2) Whether there are just cause to suspend all further proceedings in the suit ? and (3) Whether the dispute between the parties has to be referred for arbitration ?

Points.--The applicant is the defendant and it filed an application u/s 8 of the Arbitration and Conciliation Act, 1996, to dismiss C. S. No. 80 of 1999. The respondent/plaintiff filed the suit for a declaration that they are the sole and absolute owners of the suit schedule machinery, for mandatory injunction to deliver the schedule mentioned properties and also for permanent injunction. Learned counsel for the applicant stated that the suit has been filed by the plaintiff on the basis of an alleged hire purchase agreement. On the other hand, the transaction between the parties is one of loan and not hire purchase agreement. It is further stated that blank signatures have been taken by the plaintiff and now it appears that they must have been used for the purpose of creating a hire purchase agreement. Learned counsel for the applicant further stated that already the plaintiff issued a legal notice dated May 30, 1998, and for which, a reply was also sent on June 11, 1998 ; ultimately agreeing to refer the matter for arbitration u/s 11(5) of the Arbitration Act. According to Clause 18(a) of the alleged hire purchase agreement dated March 31, 1997, the managing director of the plaintiff-company is empowered to appoint a sole arbitrator to decide all disputes or claims arising out of the agreement. Now, instead of having recourse to the process of arbitration as contemplated under Clause 18(1), the plaintiff has come forward with a suit ignoring the alleged clause and under the

circumstances, the plaintiff has to be directed to seek his remedy only by way of arbitration and the suit ought to be dismissed.

8. Learned counsel for the plaintiff contended that no doubt, there is a Clause under 18(2) to refer the matter for arbitration even in the notice sent at the earliest point of time dated May 30, 1998, it was referred to ; but, on the other hand, the applicant alone disputed the existence of the arbitration clause as well as denied the execution of the hire purchase agreement itself, and was not willing to go for arbitration proceedings as proposed in the notice dated May 30, 1998. Under the circumstance only, the plaintiff was constrained to file a suit and the applicant had also not filed any original petition invoking Section 11(5) of the Arbitration Act.

9. It is admitted by both sides that in the hire purchase agreement dated March 31, 1997, there is a Clause 18(2) empowering the managing director of the plaintiff-company to appoint a sole arbitrator under the Arbitration Act. In fact, the plaintiff in the legal notice dated May 30, 1998, sent to the defendant has stated that as there is no managing director on the said date, the chairman of the company will nominate the arbitrator. In the reply notice sent by the applicant dated June 11, 1998, they have denied the existence of the hire purchase agreement and alleged that their signatures were taken in blank forms. However, in the end, they have expressed their willingness to refer the dispute to an arbitrator appointed by the court u/s 11(5) of the Act. Now, the short question that has to be decided is whether the filing of the suit by the plaintiff without invoking the provisions of the Arbitration Act is proper and correct or whether the plaintiff was justified in filing the suit.

10. Section 5 of the Arbitration and Conciliation Ordinance Act, 1996 (hereinafter referred to as "the Act"), relates to the extent of judicial intervention, wherein it is observed that notwithstanding anything contained in any other law for the time being in force, in matters governed by this part, no judicial authority shall intervene except where so provided in this part. Section 7 relates to arbitration agreement, which means an arbitration by the parties to submit to arbitration all or certain disputes which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not. According to Sub-clause (3), an arbitration agreement shall be in writing. According to Sub-clause (4), an arbitration agreement is in writing if it is contained in a document signed by the parties. If that is taken into consideration, the signature of the applicant in the document is not disputed, but according to the applicant, it was signed in blank forms. However, considering the fact that there is an arbitration agreement between the parties, prima facie it is clear that the parties should resort only to arbitration. Section 8 relates to power to refer parties to arbitration where there is an arbitration agreement. According to Sub-clause (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 so applies not later than when submitting his first statement on the substance of the dispute, refer the parties to

arbitration. The language employed "shall" is relevant to be considered. There is vast difference between the language employed u/s 34 of the old Act and u/s 8 of the new Act. When there is a clause for arbitration in the agreement between the parties, it is mandatory and this is one more circumstance to show that the plaintiff ought to have referred the matter for arbitration invoking the provisions of the said Act.

11. However, learned counsel for the plaintiff would contend that the applicant has taken part in the proceedings and has also filed counter in some of the applications and, as such, it can be deemed that he should have waived his right for invoking the provisions of the said Act. It is necessary to state that the applicant has not filed any written statement in the suit; on the other hand, the applicant alone has filed the application u/s 8 of the Act. There is no material to come to the conclusion that the applicant has participated in the proceedings or deemed to have waived his valuable right under the said Act.

12. Learned counsel for the respondent/plaintiff also relied upon U.P. Rajkiya Nirman Nigam Ltd. Vs. Indure Pvt. Ltd. and others, , but this decision has no application to the case on hand. Having regard to the facts and circumstances of the case and the language employed u/s 8, viz., "shall", I am of the view that the plaintiff has to be directed to refer the matter for arbitration only. Simply because the applicant has disputed the existence of any hire purchase agreement or any clause therein, it will not empower the plaintiff to ignore Clause 18 in the hire purchase agreement and file suit of this type.

13. For the reasons stated above, Application No. 2789 of 1999 is ordered, directing the plaintiff to resort to arbitration proceedings in accordance with the Arbitration Act, 1996, and the suit is not maintainable. In view of the orders passed in Application No. 2789 of 1999, Application No. 2790 of 1999 is dismissed as unnecessary.