

(2009) 12 BOM CK 0094

In the Bombay High Court

Case No : Appeal No. 584 of 2009 in Notice of Motion No. 3461 of 2009 in Suit No. 1845 of 2009

JSW Steel Ltd.

APPELLANT

Vs

JFE Shoji Trade Corporation and Hampton Roads Testing Laboratories Inc.

RESPONDENT

Date of Decision : 18-12-2009

Acts Referred:

Arbitration Act, 1940 — Section 34

Arbitration and Conciliation Act, 1996 — Section 5, 8, 8(1), 8(2)

Citation : (2010) 2 ALLMR 162 : (2010) 3 MhLj 165

Hon'ble Judges : R.V. More, J;P.B. Majmudar, J

Bench : Division Bench

Advocate : Zubin Behramkumdin and Prashant Kalra, instructed by Amarchand and Mangaldas and S.A. Shroff and Company, for the Appellant; J.J. Bhatt and Gaurav Joshi, instructed by Federal and Rashmikan, for the Respondent

Final Decision : Dismissed

Judgement

P.B. Majmudar, J.—Admit. Learned Counsel appearing for respondent No. 1 waives notice of admission. So far as respondent No. 2 is concerned, in our view, they are not a necessary party for deciding this Appeal. In view thereof, appeal is taken up for hearing forthwith.

2. In our view, this is a thoroughly misconceived appeal filed by the appellant, original plaintiff, in Suit No. 1845 of 2009. By the impugned order dated 5th October, 2009, the learned single Judge rejected the prayer sought for by the plaintiff regarding injunction restraining defendant No. 1 from continuing with the arbitral proceedings.

3. The appellant herein has instituted the said suit for a declaration that it has validly cancelled the contract (Annexure A to the plaint) and hence it is not bound to take the third and final shipment there under. The plaintiff has also prayed for a declaration to the effect that the certificates issued by the second

defendant in connection with the quality of the goods are fraudulent and the same are issued in connivance with defendant No. 1 and the same are not binding and enforceable against the plaintiff. The plaintiff has also prayed that defendant No. 1 may be restrained by a perpetual injunction as well as by an anti suit injunction from initiating or instituting any suit or proceedings or arbitration proceeding or continuing with the same in any forum with respect to or in connection with the first or the second contracts. In the said suit, the plaintiff also claimed interim injunction restraining defendant No. 1 from initiating or instituting any suit or proceeding or arbitration proceeding or continuing the same in connection with the first contract or the second contract, copies of which are annexed as Exhibits A and B to the plaint.

4. The dispute is in connection with the supply of goods viz. Coking coal. An agreement was arrived at between the appellant, who is the original plaintiff in the suit, and respondent No. 1, original defendant No. 1, in the suit in connection with the supply of the said goods. The goods were supplied by way of various consignments. It is not in dispute that the goods viz. two shipments in the first contract and one shipment in the second contract were sent by defendant No. 1 to the plaintiff and the plaintiff utilised the said goods in question for the purpose of its business. Subsequently, the plaintiff refused to accept the final shipment and in connection with the same, defendant No. 1 has instituted arbitral proceedings before the International Chamber of Commerce, International Court of Arbitration, at London and the said proceedings are already commenced. Both sides have nominated Arbitrators and it is pointed out that the Presiding Arbitrator has not been appointed. In the present suit, the plaintiff pressed into service an injunction with a prayer that defendant No. 1 may be restrained from proceeding with the arbitration proceeding at London as, according to the plaintiff, the issue involved in the suit as well as before the Arbitral Tribunal are overlapping and part of the dispute is common and in view thereof it is prayed by the plaintiff that defendant No. 1 may be restrained from proceeding further with the arbitration proceedings. The learned single Judge, by the impugned order, rejected the said prayer by holding that such type of anti suit injunction can be granted only in exceptional cases. The learned Judge has come to the conclusion that even though such an injunction can be granted but it can be granted in exceptional circumstances only. The learned single Judge accordingly rejected the said prayer for interim injunction against which the present appeal has been filed by the appellant original plaintiff.

5. Mr. Zubin Behramkumdin, learned Counsel appearing for the appellant, vehemently argued that the parties before the Arbitral Tribunal as well as in the suit are different and, therefore, the suit instituted by the plaintiff is a validly instituted one and some of the prayers in the suit are interconnected with the dispute pending with the Arbitral Tribunal and in view of the same, this Court should grant interim injunction prayed for by restraining defendant No. 1 from proceeding further with the arbitration. Learned Counsel further submitted that in view of the decision of the Supreme Court in the case of Sukanya Holdings

Pvt. Ltd. Vs. Jayesh H. Pandya and Another, the arbitration proceedings should not be allowed to proceed further as it may result into multiplicity of proceedings. The learned Counsel for the appellant further submitted that the quality of the goods supplied by defendant No. 1 was not upto the mark and the same were of inferior quality and defendant No. 2, who certified the quality of the goods, has given false certificates in collusion with defendant No. 1. It is submitted that defendant No. 2 has falsely given such certificates and, therefore, the suit for damages is filed against defendant No. 2 and the suit against No. 1 is filed in connection with the breach of contract for supplying inferior quality of the goods. Learned Counsel further submitted that ultimately even Arbitral Tribunal is required to consider the said aspect in the arbitral proceedings instituted by respondent No. 1 and, therefore, in the interest of justice, respondent No. 1 is required to be restrained from proceeding further with the arbitration as it may result into multiplicity of the proceedings especially when part of the subject matter of dispute is the same. The learned Counsel further submitted that in any case this Court may exercise its inherent powers and may restrain defendant No. 1 from proceeding further with the arbitration proceedings till the suit is decided. The learned Counsel, however, frankly submitted that there is no express provision in the Arbitration and Conciliation Act, 1996 for granting such relief by which the international arbitral proceedings can be stayed by this Court. He, however, submitted that he is basing his arguments mainly in view of the decision of the Supreme Court in the case of Sukanya (supra).

6. Mr. Bhatt, learned senior counsel appearing for respondent No. 1, on the other hand, submitted that the prayer pressed into service by the appellant in connection with the anti suit injunction is absolutely misconceived and the appellant has not approached the Court with a bona fide intention. Mr. Bhatt submitted that so far as the decision in the case of Suknya (supra) is concerned, the same is in connection with Section 8 of the Arbitration and Conciliation Act, 1996 (hereinafter for brevity sake referred to as "the Act of 1996) and the same has no application to the controversy raised in the instant appeal. Mr. Bhatt further submitted that voluminous letters were exchanged between the parties including emails which form part of the suit. It is submitted that defendant No. 1 even before the institution of the suit by the appellant had asked the plaintiff to take delivery of the last shipment failing which defendant No. 1 had also informed the plaintiff well in advance and much prior to the institution of the suit that defendant No. 1 will have to invoke the arbitration clause. Mr. Bhatt submitted that the plaintiff subsequently filed the suit with an ulterior motive to stall the arbitration proceedings. Mr. Bhatt submitted that defendant No. 1, after issuing the notice for arbitration, ultimately instituted the arbitral proceedings which are pending at London. Mr. Bhatt further submitted that looking to the conduct of the plaintiff, this Court may not exercise any discretion by granting injunction, even if it is found that such type of prayer is maintainable in the suit for interim injunction. Mr. Bhatt has taken us to various documents in the form of emails to justify his say that the ground raised by the plaintiff is absolutely

dishonest and only with a view to deprive the legitimate claim of defendant No. 1 towards the goods that these vexatious proceedings have been instituted in the form of present suit.

7. Mr. Bhatt has further submitted that though defendant No. 2 has nothing to do with the present proceedings, only with a view to see that the plaintiff can take benefit of the judgment of the Supreme Court in the case of Suknya (supra) that the plaintiff has joined defendant No. 2 in the suit as according to the learned Counsel, the contract is entered into between the plaintiff and defendant No. 1 and defendant No. 2 is not a contracting party in any manner and if the suit is dismissed against defendant No. 1, naturally no relief can be given defendant No. 2 in any manner. Mr. Bhatt submitted that if the parties are not allowed to proceed further with the arbitration, the international arbitration will be frustrated.

8. We have heard the learned Counsel appearing for the parties are great length. We have gone through the necessary documents and the case laws cited at the Bar.

9. In order to examine the controversy raised before us, certain factual aspects which are not in dispute are required to be taken into account. It is not in dispute that the plaintiff received goods i.e. Coking coal by way of various shipments. The plaintiff utilised the said goods but at the time when defendant No. 1 was about to dispatch the final shipment that a request was made by the plaintiff not to dispatch the same by sending the emails. Those emails are part of the proceedings and have been annexed by the plaintiff with the plaint. The relevant contents of the same are worth mentioning. The relevant contents of the email dated 28th August, 2008, are as under:

Thanks for your feedback on Oct. coal shipment. As explained to you, our coke oven plant has been delayed and expected to be commissioned in Jan. 09. Hence we requested you to postpone the shipment into Dec. 08. Since Shipper is not in a position to postpone the shipment and you are not able to sell it to your other customers, request you to explore the possibility of cancelling the shipment.

By email dated September 01, 2008 it is stated as follows:

We have studied what we can do for your request. Although we are still studying, we think "resale of the cargo" is not an easy option at this stage....

2. Timing of shipment. Since all the US coal terminals are working at full capacity, US shippers do not have flexibility about the timing of shipment. Therefore, can you be flexible about the timing of shipment, such as late November or January.

On reading the contents of the said emails, it is clear that the plaintiff had not raised any grievance about the quality of the goods in question at any point of time. It was not possible for defendant No. 1 to accept the request at such a last moment that ultimately plaintiff was obliged to adopt proceedings as per the

arbitration clause for getting damages in connection with the said shipment. It is not in dispute that so far as the claim of defendant No. 1 is concerned, it is arbitrable as per the arbitration clause and the learned Counsel for the appellant has also frankly conceded the said aspect that the claim of defendant No. 1 is arbitrable one as per the arbitration clause. Considering the case from the aforesaid background, it is required to be noted that defendant No. 1 went on making correspondence with the plaintiff regarding the dispute in connection with the fourth shipment and a letter was written on 5th December, 2008 wherein defendant No. 1 has stated thus:

We received your letter dated December 4, 2008 (Ref: JSW:MUM:COMML:200809) with great disappointment.

Frankly speaking, we were quite shocked by your letter, because we thought we were having a mutual discussion with you about the treatment of the final shipment. Despite of our proposal, upon many discussions with the shipper, your letter denies all our past correspondences.

As we repeatedly advised, we are not in a position to accept any of your claims related to the past delivered cargoes. We have fulfilled our contractual obligation to quality pursuant to Article 4 of the contract. On top of that, we have never admitted that our coal is not a coking coal. We cannot allow you to use our discussion on October 8, 2008 at your office with malicious intent.

We would like to know your real intention immediately. As informed, we have received several letters from the shippers' attorney. The shipper declared that they would initiate arbitration process against us depends on our reply.

Please give us your final reply as soon as possible; otherwise we will initiate arbitration process against JSW Steel Limited pursuant to Article 14 of the Contract.

10. It cannot be disputed that, therefore, prior to institution of the present suit, well in advance, defendant No. 1 informed the plaintiff that defendant No. 1 will invoke the arbitration clause in connection with the subject matter in dispute. Not only that in clear terms, defendant No. 1 informed the plaintiff that defendant No. 1 will have to invoke the arbitration clause. Subsequently, having realised that defendant No. 1 is going to invoke the arbitration clause that the plaintiff filed the suit and joined defendant No. 2 though, in our view, defendant No. 2 has nothing to do with the dispute in question in any manner, and in the said suit the plaintiff prayed for anti suit injunction restraining defendant No. 1 from proceeding with the arbitration.

11. Considering the aforesaid factual background of the case, the point which requires our consideration is as to whether the plaintiff is entitled to any such injunction as prayed for. In this connection, reference is required to be made to the decision of the Supreme Court in the case of Sukanya Holdings (supra). So far as the aforesaid case is concerned, the plaintiff in the said case had asked for

various reliefs in the suit and some of the reliefs were outside the ambit of the arbitration agreement. In the said case, the defendant submitted an application u/s 8 of the Act of 1996. The Court, while considering the scope of Section 8 of the Act of 1996, held that since some of the prayers were admittedly outside the arbitration agreement and if the suit is to be proceeded regarding some of the prayers and for some of the prayers where arbitration is required to be proceeded, it may result into multiplicity of proceedings. While considering the factual aspect of the said case, the Supreme Court has observed in paragraphs 12 and 13 as under:

12. For interpretation of Section 8, Section 5 would have no bearing because it only contemplates that in the matters governed by Part I of the Act, the judicial authority shall not intervene except where so provided in the Act. Except Section 8, there is no other provision in the Act that in a pending suit, the dispute is required to be referred to the arbitrator. Further, the matter is not required to be referred to the Arbitral Tribunal, if (1) the parties to the arbitration agreement have not filed any such application for referring the dispute to the arbitrator; (2) in a pending suit, such application is not filed before submitting first statement on the substance of the dispute; or (3) such application is not accompanied by the original arbitration agreement or duly certified copy thereof. This would, therefore, mean that the Arbitration Act does not oust the jurisdiction of the civil court to decide the dispute in a case where parties to the arbitration agreement do not take appropriate steps as contemplated under Sub-sections (1) and (2) of Section 8 of the Act.

13. Secondly, there is no provision in the Act that when 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.

12. It is required to be noted that considering the scheme of the Arbitration Act of 1996, there is nothing in the Act which suggests that the Court can restrain a party from proceeding with the arbitration when the arbitration clause exist with a forum selected by the parties and the subject matter is arbitrable one. In the present case, we are not dealing with the application u/s 8 of the Act of 1996. As stated earlier, it is not in dispute that the claim of defendant No. 1 before the Arbitrator is perfectly maintainable in view of the arbitration clause. The defendant No. 1 has validly exercised its rights as per the agreement and simply because the plaintiff has filed the suit on the ground that the goods in question were of inferior quality and for which parties, even defendant No. 2, have been joined in the suit, it cannot be said that the proceedings before the Arbitral Tribunal which are absolutely independent in nature are required to be thwarted in any manner. It cannot also be disputed that the scope of both the proceedings are totally different. Defendant No. 1 has taken out arbitration proceedings in connection with the breach of the contract on the part of the plaintiff in

connection with the fourth shipment. The plaintiff, on the other hand, after utilising the goods in question regarding three shipments, has filed the suit that the goods in question were of inferior quality. We are not examining the merits of the plaintiff's case at this stage but suffice it to say that defendant No. 2 has been joined in the suit only with a view to see that the arbitral proceedings initiated by defendant No. 1 can be thwarted by the plaintiff by way of the present suit and tried to halt the said proceedings basing its claim on the basis of the judgement of the Supreme Court of India in the case of Suknya (*supra*). As pointed out earlier, in the present case, we are not dealing with application u/s 8 of the Act of 1996. The Court is only required to consider as to whether anti suit injunction claimed by the plaintiff can be granted in the facts and circumstances of the case.

13. We are in agreement with the submission of the learned Counsel for respondent No. 1 that in a given case, a plaintiff may file a suit to frustrate the arbitration proceedings by joining some additional parties in the suit, who may not be directly concerned with the dispute in question only with a view to see that since additional parties are there, the arbitration proceedings should not go on. Ultimately each case is required to be decided on its own merits. At this stage reference is required to be made to a decision of the Supreme Court in the case of Modi Entertainment Network and Another Vs. W.S.G. Cricket PTE. Ltd., In the said case, while examining the question about anti injunction, the Supreme Court has observed as under.

23. Our attention was also invited to a decision of the Court of Appeal in SABAH Shipyard (Pakistan) Ltd. v. Islamic Republic of Pakistan and Karachi Electrics Supply Corporation. Ltd. (2002) EWCA Civ 1643 (CA). In that case SABAH, a limited company incorporated in Pakistan by its Malaysian parent, entered into an agreement with a State owned Corporation KESC, in regard to the design, construction, operation and maintenance of a bargemounted electricity generation facility at Karachi. The Government of Pakistan (GOP) entered into a guarantee in favour of SABAH which, inter alia, provided that the parties consented to the jurisdiction of the courts of England for any action under the agreement to resolve any dispute between them and waived the defence of inconvenience of forum in any action or proceeding between them in the courts of England. GOP brought an action in the Court of Senior Judge, Islamabad and obtained an antisuit injunction against SABAH. However, SABAH also brought an action in the English court and sought an antisuit injunction which was granted restraining GOP from continuing proceeding in the Court of Senior Judge, Islamabad. Against the order continuing the injunction, GOP went in appeal before the Court of Appeal. Waller, L.J. With whom the other members of the Court of Appeal agreed in reaffirmation of the principles laid down in SNI Aerospatiale case held that the learned Judge in the first instance was right in construing that the clause in the agreement was a nonexclusive jurisdiction clause and that as GOP had agreed to submit any disputes between the parties to the jurisdiction of the English court and to waive any objection that any action

brought in England was in an inconvenient forum, therefore, it could not have been the intention of the parties that if proceedings were commenced in England, parallel proceedings could be pursued elsewhere unless there was some exceptional reason for doing so. The action of GOP in seeking to prevent SABAH in commencing proceedings in the agreed jurisdiction was construed as a clear breach of contract and it was observed that the proceedings in Pakistan might also be vexatious if commenced after the English proceedings and/or simply to attempt to frustrate the jurisdiction clause which expressly dealt with the forum conveniens aspect so as to enable England to be the most likely forum for resolution of disputes and that England was the agreed jurisdiction to which neither party could object. It was noted that GOP could not show any exceptional reason why parallel proceedings were justified and that the fact that GOP commenced the proceedings first, did not change the position because they did so as a preemptive strike.

24. From the above discussion, the following principles emerge:

(1) In exercising discretion to grant an antisuit injunction the court must be satisfied of the following aspects:

(a) the defendant, against whom injunction is sought, is amenable to the personal jurisdiction of the court;

(b) if the injunction is declined, the ends of justice will be defeated and injustice will be perpetuated; and

(c) the principle of comity - respect for the court in which the commencement or continuance of action/proceeding is sought to be restrained - must be borne in mind.

(2) In a case where more forums than one are available, the court in exercise of its discretion to grant antisuit injunction will examine as to which is the appropriate forum (forum conveniens) having regard to the convenience of the parties and may grant antisuit injunction in regard to proceedings which are oppressive or vexatious or in a forum non-conveniens.

(3) Where jurisdiction of a court is invoked on the basis of jurisdiction clause in a contract, the recitals therein in regard to exclusive or nonexclusive jurisdiction of the Court of choice of the parties are not determinative but are relevant factors and when a question arises as to the nature of jurisdiction agreed to between the parties the court has to decide the same on a true interpretation of the contract on the facts and in the circumstances of each case.

(4) A court of natural jurisdiction will not normally grant antisuit injunction against a defendant before it where parties have agreed to submit to the exclusive jurisdiction of a court including a foreign court, a forum of their choice in regard to the commencement or continuance of proceedings in the court of choice, save in an exceptional case for good and sufficient reasons with a view to prevent injunctive in circumstances such as which permit a contracting party to

be relieved of the burden of the contract; or since the date of the contract the circumstances or subsequent events have made it impossible for the party seeking injunction to prosecute the case in the court of choice because the essence of the jurisdiction of the Court does not exist or because of a vis major or force majeure and the like.

(5) Where parties have agreed, under a nonexclusive jurisdiction clause, to approach a neutral foreign forum and be governed by the law applicable to it for the resolution of their disputes arising under the contract, ordinarily to antisuit injunction will be granted in regard to proceedings in such a forum conveniens and favoured forum as it shall be presumed that the parties have thought over their convenience and all other relevant factors before submitting to the nonexclusive jurisdiction of the court of their choice which cannot be treated just as an alternative forum.

(6) A party to the contract containing jurisdiction clause cannot normally be prevented from approaching the court of choice of the parties as it would amount to aiding breach of the contract; yet when one of the parties to the jurisdiction clause approaches the court of choice in which exclusive or nonexclusive jurisdiction is created, the proceedings in that court cannot per se be treated as vexatious or oppressive nor can the court be said to be forum non-conveniens.

(7) The burden of establishing that the forum of choice is a forum non-conveniens or the proceedings therein are oppressive or vexatious would be on the party so contending to aver and prove the same.

14. It is also required to be noted that in the present proceedings, this Court is required to consider as to whether interim injunction can be granted restraining respondent No. 1 from proceeding before the Arbitral Tribunal at London. So far as the judgment in Modi's case (supra) is concerned, the Supreme Court has considered the question about anti suit injunction in connection with the suit and other proceedings pending before the Court and the point in issue regarding proceeding before the Arbitral Tribunal was not the subject matter. It is required to be noted that in the Act of 1996, there is no such provision for granting such an injunction and even as per the provisions of Section 8 of the Act of 1996, it is provided that during pendency of such application, even proceedings before the Arbitral Tribunal cannot be stayed. As pointed out earlier, the present case is not in connection with the proceedings u/s 8 of the Act of 1996. Simply because some parties are joined in the suit is no ground for granting injunction from proceeding further with the arbitration. Defendant No. 1 is, therefore, entitled to proceed with the arbitration in view of the clear cut agreement between the parties.

15. In this connection, reference is also required to be made to the observations of the Andhra Pradesh High Court in the case of Srivenkateswara Constructions and Others Vs. The Union of India, wherein the subject matter, of course, was in connection with the proceedings initiated u/s 34 of the Indian Arbitration Act. In

para 9, the Court has observed as under:

9. It often happens that in order to circumvent an arbitration clause a plaintiff adds some unnecessary parties to the suit and in such cases it has been held that the Court can grant stay of proceedings. In *Cekop v. Asian Refractories Ltd.* (1969) 73 CWN 192 it was laid down that a party to an arbitration agreement cannot defeat the agreement between the parties merely by joining a third party in the suit against whom no relief is claimed. Following the said decision, a Bench of this Court, of which one of us (Krishnarao, J.) was a member in C.M.A. No. 467 of 1966, D/18121969 (Andh.Pra.) held that though the plaintiff added a prayer as against an unnecessary defendant who was not a party to the agreement it was nevertheless a case for granting stay. We have no doubt that this case comes within the last principle stated by us. The contractor 1st plaintiff can get a decree for the entire amount even without impleading the 3rd plaintiff or the 2nd plaintiff. The addition of the 3rd plaintiff in the present suit does not introduce a different cause of action or a different subject matter at all. This is, therefore a clear case where the plaintiffs adopted the ingenious devise of bringing in unnecessary parties into the arena of dispute, obviously for the purpose of preventing the 1st defendant from invoking the arbitration clause. The learned Counsel for the appellants contended that the joining of the 3rd plaintiff in the suit was quite necessary as it is provided under the guarantee bond executed by the 2nd defendant in favour of the 1st defendant that as soon as a demand is made by the Government the Bank should pay the amount without any demur. It is therefore submitted that irrespective of any breach on the part of the contractor the amount becomes payable by the bank to the Government. But the plaint again proceeds on the footing that the enforcement of the bonds is only a consequence of the main question as to who committed the breach. A perusal of the guarantee bond Ex. B14 does not show that the amount should be paid merely on demand. It says that the amount should be paid on demand only by reason of a breach by the contractors. Hence the question whether breach was committed by the contractor or not is a collateral fact which has got to be adjudicated either by the arbitrator or by the Court. It is, therefore, clear from the very guarantee bond executed by the Bank in favour of the Government that the question of demand and payment arises only in case of breach and not simply on a demand, for the demand arises only when a breach is established. There is, therefore, no independent cause of action for the 3rd plaintiff to join in this suit and as we have already pointed out there was no relief sought with respect to the guarantee bond dated 1351969 executed by the plaintiffs in favour of the 2nd defendant.

16. Considering the aforesaid aspect, we are totally convinced that the application for injunction has been filed by the plaintiff only with a view to delay the proceedings before the arbitral tribunal and it cannot be said to be a genuine and bona fide application at all. Looking from all angles, in our view, the learned single Judge was absolutely justified in rejecting the prayer for injunction and rightly not exercised his discretion in view of the facts and circumstances of the

case. Learned Counsel for the appellant at this stage submits that the appellant will file its reply in the arbitration proceedings on or before 10th January, 2010. It is for the appellant to file such a reply before the arbitral tribunal and to cooperate with the arbitration proceedings thereafter.

17. Subject to what is stated above, the Appeal is dismissed with costs quantified at Rs. 25,000/. Costs to be paid to respondent No. 1.