

(2010) 05 CAL CK 0082
In the Calcutta High Court
Case No : F.M.A. 447 of 2010

Kapil Kumar Katyal and Another

APPELLANT

Vs

Praveen Chandra Bhanjdeo

RESPONDENT

Date of Decision : 06-05-2010

Acts Referred:

Arbitration and Conciliation Act, 1996 — Section 11, 11(6), 16, 2, 2(1)

Citation : AIR 2010 Cal 155

Hon'ble Judges : Kalidas Mukherjee, J; Ashim Kumar Banerjee, J

Bench : Division Bench

Advocate : Ashoke Kumar Banerjee, Sandip Bhattacharya, Suman Basu, Abdul Masood and Abdul Murshid, for the Appellant; Surajit Nath Mitra Saptangshu Basu and B. Jain, for the Respondent

Final Decision : Dismissed

Judgement

Ashim Kumar Banerjee, J.—The appellants were the landlords in respect of flat No. 2C, Bata May Fair, 3, May Fair Road, Kolkata measuring about 2920 square feet area. The appellants also owned car parking places being C6, C7 and C9. According to the appellants, they purchased the flat after obtaining financial assistance from ICICI Bank to the extent of Rs. 71, 10,177/- . The appellants had three daughters, all of them were of marriageable age. To meet the expenses to pay off the monthly instalments, the appellants let out the flat in question to the sole respondent vide licence agreement dated March 15, 2007 initially for a period of two years for a lump sum amount of Rs. 30, 00000/-. The said agreement also provided that after the expiry of the two years" period licensee would become liable to pay Rs. 2.25 lacs per month for a further period of eleven months and for that a sum of Rs. 7.5 lacs was kept as additional amount earmarked as security deposit. The said agreement contained an arbitration clause to the effect that in case of any dispute such dispute would be resolved by the sole arbitration of Shri Prabhat Shroff, an advocate of this Court. Dispute arose when the sole respondent stopped making payment of monthly

rent of Rs. 2.5 lacs after March 14, 2009. The appellants through their advocate's notice demanded rent which respondent refused to pay. According to the respondent, the appellants entered into an oral agreement for sale of the flat in question at and for a sum of Rs. 316 lacs out of which the initial payment of Rs. 30,00,000/- was to be adjusted as earnest money. Thereafter diverse sums were paid either by the respondents or by his nephew on his behalf leaving a balance sum of Rs. 1,36,00,000/- which they were ready and willing to pay on execution of the conveyance by the appellants. The respondents filed a suit for specific performance being Title Suit No. 904 of 2009 before the Civil Judge (Senior Division), 2nd Court, Alipure. The appellants filed an application u/s 5 and 8 of the Arbitration and Conciliation Act, 1996 inter alia praying for stay of the suit in view of the arbitration Clause contained in the licence agreement dated March 15, 2007 referred to above. The said application was heard by the learned Judge when the judgment was reserved. During pendency of the said proceeding the appellants filed an application u/s 9 of the said Act of 1996 being Miscellaneous Case No. 699 of 2009 before the same Judge inter alia praying for direction upon the respondents to make payment of the monthly rent at the rate of Rs. 2.25 lacs on and from July 14, 2009 after giving credit to the sums lying as security deposit. The respondent opposed both the applications inter alia on the ground that the parties had given a go by to the licence agreement which was substituted by a subsequent oral agreement for sale. Hence, there could be no arbitration as the original agreement did not subsist. The respondents also contended that the learned Civil Judge (Senior Division), 2nd Court, Alipure was not the appropriate Court to be moved u/s 9 of the said Act of 1996. The learned Judge negated the contentions of the respondent with regard to maintainability of the said application, however refused to grant any relief to the appellants u/s 9 on the ground that they should wait till a decision was taken by the Court in the application made u/s 5 and 8 of the said Act of 1996.

2. Being aggrieved, the appellants preferred the instant appeal before us which was heard by us on the above mentioned date. The respondent also filed cross-objection being aggrieved by the part of the order where their contention with regard to maintainability was rejected by the Court below.

3. Appearing for the appellants Mr. Ashok Kumar Banerjee, learned senior advocate contended as follows:

i) In view of the non-obstante clause contained in Section 42 of the said Act of 1996, the application u/s 9 was perfectly maintainable before the learned Judge before whom application u/s 5 and 8 of the said Act of 1996 was pending.

ii) Section 9 empowered a party to the arbitration agreement to seek interim relief before the Court of law. In terms of the agreement the respondent was liable to pay the monthly occupation charges which they failed and neglected. Hence, the appellants were entitled to pray for interim direction on that score.

iii) The plea that the part payment was made by a third party not being a party

to the agreement, was not tenable in the eye of law being barred by the Benami Transaction (Prohibition) Act, 1988.

4. Mr. Banerjee, to support his contentions, relied on the following decisions:

a) 2004 AIR SCW 366 (Firm Ashok Traders and Anr. v. Gurumukh Das Saluja and Ors.)

b) 2005 AIR SCW 5932 (S.B.P. & Co. v. Patel Engineering Ltd. and Anr.)

c) 2006 AIR SCW 3966 (Rashtriya Ispat Nigam Ltd. and Anr. v. Verma Transport Company)

5. Opposing the appeal Mr. Surojit Nath Mitra, learned senior advocate contended as follows:

i) Proceeding u/s 5 and 8 in the said Act of 1996 was rightly filed before the Court where the suit was pending. However, that Court could not be said to be the "Court" within the meaning of Section 2(1)(e) of the said Act of 1996.

ii) Assuming that the concerned Court had jurisdiction to entertain the application u/s 9, in absence of indication of any dispute referable to arbitration, the said application was not maintainable.

iii) Pre-requisite to Section 9 was to indicate not only the nature of the dispute but also the willingness to refer the dispute to arbitration. None of the said ingredients was available in the said application made u/s 9.

iv) The relief claimed in the said application was final in nature and would amount to awarding the claim of the appellants in the arbitration.

6. To support his contention Mr. Mitra relied upon the following decisions:

a) P. Anand Gajapathi Raju and Others Vs. P.V.G. Raju (Died) and Others, Cases Page 539 (P. Anand Gajapathi Raju and Ors. v. P.V.G. Raju (Dead) and Ors.)

b) Firm Ashok Traders and Another etc. Vs. Gurumukh Das Saluja and Others etc., Cases Page 155 (Firm Ashok Traders and Anr. v. Gurumukh Das Saluja and Ors.)

c) 2007 Volume II Arbitration Law Reporter Page 362 (Fountain Head Developers v. Maria Arcangela Sequeira (Since deceased through LRS.) and Ors..

7. On perusal of the records we find that the respondent first filed the Title Suit before the learned Civil Judge (Senior Division), 2nd Court, Alipure. The appellants filed the application for stay of the suit before the said Court on April 17, 2009. Subsequently, on June 30, 2009 the appellants filed the application u/s 9.

8. Let us first deal with the plea of maintainability raised by the respondent.

9. To appreciate the point in controversy let us understand the provisions of law.

10. The Section 2(1)(e) and Section 42 being relevant herein are quoted below:

"Court" means the principal Civil Court of original Jurisdiction in a district, and includes the High Court in exercise of its ordinary original civil jurisdiction, having jurisdiction to decide the questions forming the subject-matter of the arbitration if the same had been the subject-matter of a suit, but does not include any civil court of a grade inferior to such principal Civil Court, or any Court of Small Causes"

42. Jurisdiction.- Notwithstanding anything contained elsewhere in this Part or in any other law for the time being in force, where with respect to an arbitration agreement any application under this Part has been made in a Court, that Court alone shall have jurisdiction over the arbitral proceedings and all subsequent applications arising out of that agreement and the arbitral proceedings shall be made in that Court and in no other Court.

11. Let us first examine how the learned Judge of the Court below decided the issue. The learned Judge of the Court below examined the provisions of Sections 2(1)(e) and 42 of the said Act of 1996. He then relied upon the decision in the case of S.B.P. and Company v. Patel Engineering Limited reported in 2005 AIR SCW 5932 and then came to a conclusion that when the matter was entrusted to a Civil Court in ordinary hierarchy of Courts without anything more the procedure of that Court would govern the adjudication. According to the learned Judge, the dispute relates to flat 2-C within the territorial jurisdiction of the said Court. A Title Suit was pending before the said Court. One of the parties raised the plea of arbitration under the agreement relating to the said flat in question and prayed for stay of suit u/s 5 and 8 which was pending before the Court. Hence, the prayer of that party on interim relief u/s 9 was maintainable before the same Court.

12. In our view, the decision in the case of Patel Engineering (Supra) dealt with the scope of Section 11 and 16 and the majority view as prevailed in the said decision was that the power of the Chief Justice as derived u/s 11(6) was a judicial power and not an administration power. Mr. Banerjee also relied upon this decision before us to sustain the judgment and order of the Court below. He relied upon paragraph 18 where Section 8 was considered. The said paragraph is quoted below:

It is also not possible to accept the argument that there is an exclusive conferment of jurisdiction on the arbitral tribunal, to decide on the existence or validity of the arbitration agreement. Section 8 of the Act contemplates a judicial authority before which an action is brought in a matter which is the subject of an arbitration agreement, on the terms specified therein, to refer the dispute to arbitration. A judicial authority as such is not defined in the Act. it would certainly include the court as defined in Section 2(e) of the Act and would also, in our opinion, include other courts and may even include a special tribunal like the Consumer Forum (See M/s. Fair Air Engineers Pvt. Ltd. and another Vs. N.K.

Modi, . When the defendant to an action before a judicial authority raises the plea that there is an arbitration agreement and the subject matter of the claim is covered by the agreement and the plaintiff or the person who has approached the judicial authority for relief, disputes the same, the judicial authority, in the absence of any restriction in the Act, has necessarily to decide whether, in fact, there is in existence a valid arbitration agreement and whether the dispute that is sought to be raised before it, is covered by the arbitration clause. It is difficult to contemplate that the judicial authority has also to act mechanically or has merely to see the original arbitration agreement produced before it, and mechanically refer the parties to an arbitration. Similarly, Section 9 enables a Court, obviously, as defined in the Act, when approached by a party before the commencement of an arbitral proceeding, to grant interim relief as contemplated by the Section. When a party seeks an interim relief asserting that there was a dispute liable to be arbitrated upon in terms of the Act, and the opposite party disputes the existence of an arbitration agreement as defined in the Act or raises a plea that the dispute involved was not covered by the arbitration clause, or that the Court which was approached had no jurisdiction to pass any order in terms of Section 9 of the Act, that Court has necessarily to decide whether it has jurisdiction, whether there is an arbitration agreement which is valid in law and whether the dispute sought to be raised is covered by that agreement. there is no indication in the Act that the powers of the Court are curtailed on these aspects. On the other hand, Section 9 insists that once approached in that behalf, "the Court shall have the same power for making orders as it has for the purpose of and in relation to any proceeding before it". Surely, when a matter is entrusted to a Civil Court in the ordinary hierarchy of Courts without anything more, the procedure of that Court would govern the adjudication [See AIR 1948 12 (Privy Council)]

13. The majority view, as expressed by the Apex Court in the said decision, as per the said paragraph was that Section 8 contemplates judicial authority before whom any action was pending relating to the arbitration agreement. According to the Apex Court such judicial authority, although not defined under the said Act, would certainly include the "Court" within the meaning of Section 2(1)(e) and also include Special Tribunals like Consumer Forum etc. The said paragraph also dealt with Section 9 and according to the Apex Court, Section 9 empowered a Court, if approached by a party under the agreement, to grant interim relief as contemplated by the said Section. Subject controversy, in our view, is not covered by the subject paragraph quoted above, although we get great assistance while interpreting Section 2(1)(e) and Section 9.

14. In the case of P. Anand (Supra), the application u/s 8 was made before the Court of appeal. The Apex Court held that such application was maintainable. However, while doing so, the Apex Court observed that subsequent proceedings would be before the Court within the meaning of Section 2(1)(e). Paragraph 8 of the said decision being relevant herein is quoted below:

In the matter before us, the arbitration agreement covers all the disputes between the parties in the proceedings before us and even more than that. As already noted, the arbitration agreement satisfies the requirements of Section 7 of the new Act. the language of Section 8 is peremptory. It is, therefore, obligatory for the Court to refer the parties to arbitration in terms of their arbitration agreement. nothing remains to be decided in the original action or the appeal arising therefrom. There is no question of stay of the proceedings till the arbitration proceedings conclude and the award becomes final in terms of the provisions of the new Act. All the rights, obligations and remedies of the parties would now be governed by the new Act including the right to challenge the award. The court to which the party shall have recourse to challenge the award would be the court as defined in Clause (e) of Section 2 of the new Act and not the court to which an application u/s 8 of the new Act is made. An application before a court u/s 8 merely brings to the court's notice that the subject-matter of the action before it is the subject-matter of an arbitration agreement. this would not be such an application as contemplated u/s 42 of the Act as the court trying the action may or may not have had jurisdiction to try the suit to start with or be the competent court within the meaning of Section 2(e) of the new Act.

15. In the case of Fountain Head Developers (Supra), the Full Bench of the Bombay High Court dealt with the question while interpreting Section 2(1)(e). There the Bombay High Court considered Patel Engineering (Supra) and ultimately came to a conclusion that the District Judge alone could be the principal Civil Court and not any other Judge subordinate to him.

16. Section 2(1)(e) defines the meaning of "Court" for the purpose of any proceeding under the Act of 1996. On a plain reading it is clear it should be the principal Civil Court which would have otherwise jurisdiction to treat a civil controversy arising out of the agreement had there been no arbitration Clause. Section 42 says that once the "Court" within the meaning of the said Act of 1996 is approached under any provision of the said Act of 1996 subsequent approach to Court must be made before the same Court and no other Court irrespective of what is provided under the said Act of 1996 or any other law for the time being in force.

17. Section 8 inter alia provides that if any action is brought on a controversy before any "judicial authority" such judicial authority must refer the dispute to arbitration if any of the parties to such action satisfies the judicial authority that the subject controversy is covered by an arbitration agreement. In short, if a controversy is covered by an arbitration Clause no judicial authority is empowered to proceed further with any civil action pending before it. He has to stop the proceeding and refer it to arbitration in accordance with the agreement. The legislature consciously did not use the word "Court" in Section 8. The Apex Court filled up the gap by observing that phrase "judicial authority" must include "Court" within the meaning of Section 2(1)(e) as well as other Tribunals being quasi judicial authorities. However, such authority did not assume jurisdiction

under the said Act of 1996 for any other purpose to come within the scope and ambit of the phrase "Court" within the meaning of Section 2(1)(e) of the said Act of 1996. The Court below misconstrued the observation of the Apex Court in the case of Patel Engineering (Supra). In our view, Patel Engineering gave a wide connotation of the phraseology "judicial authority" dealing with proceeding u/s 5 and 8 of the said Act of 1996. While doing so, as and by way of example Apex Court referred to Section 9, however did not say that such judicial authority assuming jurisdiction u/s 5 and 8 would also be entitled to deal with further proceeding u/s 9. Here we may refer to the decision in the case of P. Anand (Supra) where the Apex Court made it clear that subsequent proceedings under the said Act of 1996 would be before the "Court" within the meaning of Section 2(1)(e) and Section 42, in that case, would have no application. Mr. Banerjee tried to distinguish this decision by saying that the Apex Court intervened in a case where Court of appeal was approached u/s 5 and 8. We do not find any such distinction as we are of the view that the Apex Court made such observation as a general proposition of law. We thus hold that the application made u/s 9 was not maintainable before the learned single Judge (Senior Division), as the Court of District Judge, Alipure was the "principal Civil Court" within the meaning of Section 2(1)(e).

18. In view of such finding we do not wish to go into the merits of the matter and leave it open for the learned District Judge to consider if and when approached u/s 9.

19. The appeal being FMA 447/10 fails and is dismissed. The C.O.T being 16 of 2010 succeeds and is allowed. The judgment and order dated December 22, 2004 is set aside to the extent where the Court below held that the application u/s 9 was maintainable before the said Court. The parties would be at liberty to approach the appropriate principal Civil Court on the self same cause of action if they are so entitled to in law.

20. Urgent xerox certified copy would be given to the parties, if applied for.

Kalidas Mukherjee, J.

21. I agree.