
(1999) 02 KL CK 0044

In the High Court Of Kerala

Case No : W.A. No's. 2715 etc. of 1998

Kesaria Tea Co. Ltd.

APPELLANT

Vs

State Bank of India and Others

RESPONDENT

Date of Decision : 24-02-1999

Acts Referred:

Constitution of India, 1950 — Article 226

Citation : (1999) 1 KLJ 615

Hon'ble Judges : K. Narayana Kurup, J;A.R. Lakshmanan, J

Bench : Division Bench

Advocate : K. Rajagopalan and C.J. Xavier, for the Appellant; P.P. Malhotra, (Sr. Advocate), T.P. Kelu Nambiar, (Sr. Advocate), K.C. John, (Sr. Advocate), M.C. Sen, S.K. Bramanandan, K. Rama Kumar, (Sr. C.G.S.C), Roy Chacko and George Thomas, for the Respondent

Judgement

A.R. Lakshmanan, J.—By consent of all parties all the Writ Appeals are taken up for final hearing. We have heard Mr. K. Rajagopalan for appellants in all the appeals, Mr. T.P. Kelu Nambiar, Senior Advocate for Reserve Bank of India, Mr. K. Ramkumar, Senior Central Government Standing Counsel for Union of India, Mr. P.P. Malhotra, Senior Advocate for the Bank of Foreign Economic Affairs of the U.S.S.R. and respective counsel for respondent No. 1 Bank in all the appeals. The unsuccessful petitioners are the appellants in the respective appeals. Original Petitions were filed against the order of rejection of the claim made by the appellants to repatriate the amount shown in the petition, being the amount retained from the date of export of pepper by the appellants to former U.S.S.R. remaining to be paid. The total amount of dues by the Union of India third respondent to former U.S.S.R. before its disintegration amounted to several crores of rupees. The prayer now made is for ordering payment of the amount of 3% retained from the export value of the goods made to Sujuzplodoimport, Moscow, the purchaser from the appellant. According to the appellants they have effected exports of pepper during February and September 1988 to the said importer in former U.S.S.R. and as per the terms of the contract 3% of the value

of goods was retained for the possible losses of the goods enroute. It is also submitted that the discount was a conditional one made as a precautionary measure to protect the interests of the buyers against possible shortages till the goods reach its destination. Contesting respondents in each Original Petition is the authorised dealer in foreign exchange. The State Bank of India and other banks have been impleaded as the first respondent in the respective original petitions, According to the Banks no amount is due to the appellants from the foreign buyer and that no repatriable amount is outstanding out of the exports made by the appellants and since the appellants were completely paid in terms of the bills drawn by it nothing remains to be realised by the foreign buyer and that the appellants cannot make any claim in the circular in question.

2. The second respondent viz., Reserve Bank of India have filed its counter through the General Manager, Exchange Control Department of the Reserve Bank of India, Kochi. According to the Reserve Bank of India the jural relationship between the appellants and M/s. Sojuzplodoimport, Moscow is purely contractual and for breach of any conditions in the said contract and for enforcing the rights thereunder or for getting redressal against recovery of the amounts pertaining to such contract the remedy of the appellants is to file a suit in the ordinary civil court and it is not open to the appellants to invoke the extraordinary jurisdiction vested in this Court under Art. 226 of the Constitution of India. A detailed counter affidavit has been filed adverting to all the submissions made in the Original Petition and also denying its liability. The third respondent, viz. Union of India have not filed any counter. Additional fourth respondent was impleaded as per earlier orders. They filed a separate affidavit denying their liability. By way of preliminary submission respondent No. 4 submitted that the appellant/petitioners have no right to get any amount as is claimed and if the appellants have any dispute with the contracting party, it is a contractual dispute for which a writ petition is not an appropriate remedy. It is submitted that the appellants have chosen to file the writ petition for some undrawn balance/retention money. It is also alleged that the appellants had received 97% of the money and 3% was kept as retention money by the Russian importer who has not been made a party in the present petition. Fourth respondent has also stated in the counter affidavit that the dispute if any is a contractual dispute between the appellants and M/s. Sojuzplodoimport, Moscow and the same cannot be raised and adjudicated herein particularly when neither Messrs Sojuzplodoimport is a party to the proceedings and also in view of the fact that as per the agreement between the parties there is an arbitration clause which reads as under:--

13. Arbitration:-- All disputes or differences which may arise out of this contract or in connection with it are to be settled by the Foreign Trade Arbitration Commission at the USSR Chamber of Commerce and Industry, Moscow, in accordance with the rules of this arbitration commission whose decisions are final and binding upon both parties.

Submissions of disputes under the present contract to general court is excluded.

It is therefore submitted by the Learned Counsel for respondent No. 4 that the writ petition is not maintainable and therefore the Writ Appeals filed against the judgment of the learned single Judge are liable to be dismissed.

4. Appellants filed reply affidavits to the counter affidavits of the respective respondents. According to the appellants the party to the contract in Moscow is no longer in existence and that the additional fourth respondent who has been impleaded as successor-in-interest to the importer is liable to answer the claim which is denied by the additional fourth respondent in its counter affidavit and also at the time of hearing. In support of the contention regarding maintainability of the writ petition reliance was placed on the judgment of the Supreme Court of India reported in State of U.P. and others Vs. Bridge and Roof Co. (India) Ltd., . The relevant passage occurs at page 31 (paragraph 21). It is beneficial to reproduce the said paragraph:--

21. There is yet another substantial reason for not entertaining the writ petition. The contract in question contains a clause providing inter alia for settlement of disputes by the reference to arbitration (clause 67 of the contract). The arbitrators can decide both questions of fact as well as questions of law. When the contract itself provided for a mode of settlement of disputes arising from the contract, there is no reason why the parties should not follow and adopt that remedy and invoke the extraordinary jurisdiction of the High Court under Art. 226. The existence of an effective alternative remedy--in this case, provided in the contract itself -- is a good ground for the court to decline to exercise its extraordinary jurisdiction under Art. 226. The said article was not meant to supplant the existing remedies at law but only to supplement, them in certain well organised situations. As pointed out above, the prayer for issuance of a writ of mandamus was wholly misconceived in this case since the respondent was not seeking to enforce any statutory right of their nor was it seeking to enforce any statutory obligation cast upon the appellants. Indeed, the very resort to Art. 226--whether for issuance of mandamus or any other writ, order or direction--was misconceived for the reasons mentioned supra.

In view of the above ruling we are of the opinion that the writ petitions filed by the appellants is not maintainable under Art. 226 of the Constitution of India since the writ petitions raise disputes relating to terms of private contract. We are therefore of the opinion that the proper course would be reference to arbitration or institution of a suit and not writ petition. We have already referred to Clause 13 of the Arbitration Agreement. The said agreement was entered into between the writ petitioners referred to as the seller on the one hand and All-Union Self-Supporting Foreign Trade Association (SOJUZPLODOIMPORT, 32-34 Smolenskaya Sennaya PI, Moscow 121200 (U.S.S.R.) referred to as the buyer on the other. Though several contentions have been raised by both parties we are not adverting to any of the contentions raised and argued by both parties, in view of the directions which we now give relegating both parties to the remedy of arbitration. Clause 13 of the Contract states that all disputes or differences which

may arise out of the contract in connection with it are to be settled by the foreign trade arbitration commission at the USSR Chamber of Commerce and Industry, Moscow in accordance with the rules of arbitration commission whose decisions are final and binding upon both parties. It is not in dispute that the petitioners in the respective petitions are parties to this contract and therefore they are bound by the terms of the contract. It is therefore for the petitioners how to raise a dispute or differences under the contract in question or in connection with it before the appropriate forum. As already stated that the additional fourth respondent has filed its counter and denied its liability under the contract. It is their case that they are not the successor-in-interest of the importer and they are not liable for any claim. This question also may be one of the issue before the arbitrators for their decision. In view the above we are of the opinion that the writ petitions are not maintainable and the appellants are at liberty to either invoke the arbitration clause or to file a suit before the appropriate forum by impleading all necessary proper and appropriate parties as opposite parties. All the Writ Appeals are disposed of accordingly. No costs. In view of our judgment the findings rendered by the learned single judge are hereby vacated. All the contentions are left open and the appellants/petitioners may invoke the Arbitration Clause under the agreement or to file a suit irrespective of the orders impugned in the Original Petitions.