
(2008) 10 BOM CK 0039

In the Bombay High Court

Case No : Appeal Against Order No. 61 of 2008

Kotak Mahindra Prime Limited

APPELLANT

Vs

Sanjeev Sadaram Chavare and Others

RESPONDENT

Date of Decision : 13-10-2008

Acts Referred:

Arbitration Act, 1940 — Section 20

Civil Procedure Code, 1908 (CPC) — Order 41 Rule 23, Order 43 Rule 1, Order 7 Rule 11, 100, 20

Constitution of India, 1950 — Article 136

Citation : (2008) 6 ALLMR 648 : (2009) 1 BomCR 130

Hon'ble Judges : Dharmadhikari B.P., J

Bench : Single Bench

Advocate : R.L. Khapre, for the Appellant; S.P. Kshirsagar and Ashirgade, for the Respondent

Final Decision : Allowed

Judgement

Dharmadhikari B.P., J.—By this appeal against order filed under provisions of Order 43, Rule 1(u) of the Civil Procedure Code, the appellant-original defendant No. 3 in Regular Civil Appeal No. 584 of 2007, challenges the judgment dated 9.4.2008 delivered by the District Judge-5, Nagpur, allowing that appeal and remanding the matter to trial Court to decide the issues on merits. Respondent No. 1 before this Court is the original plaintiff who availed vehicle loan from the present respondents No. 2 and 3. These respondents are defendants No. 1 and 2 in that civil suit. The civil suit came to be filed with prayers for grant of declaration and permanent injunction. The declaration sought is that the act of present appellant in seizing the financed motor vehicle viz., Truck having No. MH-31/AP-2240 was illegal and there was no privity of contract between him and present appellant. The further prayer was to direct present appellant to release his truck. In that suit the appellant moved an application at Exh. 17 under provisions of Section 9-A read with Order 7, Rule 11 of Civil Procedure Code, for dismissal of suit pointing out that there was arbitration agreement between the

parties and also Court at Nagpur has no territorial jurisdiction. The said objection was accepted by the trial Court vide its Order dated 31.10.1997. Vide said judgment on preliminary issues, 8th Joint Civil Judge, Junior Division, Nagpur, rejected the plaint observing that suit was not maintainable before the Civil Court and plaintiff before it should initiate arbitration proceedings at Mumbai. It continued interim order of status quo granted by it, for a period of one month. The plaintiff then approached the Appellate Court in Regular Civil Appeal No. 584 of 2007 and on 9.4.2008, by the impugned judgment, his appeal came to be allowed.

2. In this background, I have heard Shri Khapre, learned Counsel for the petitioner, Shri Kshirsagar, learned Counsel for respondent No. 1 and Shri Ashirgade, learned Counsel for the respondents No. 2 & 3.

3. During arguments, Shri Kshirsagar, learned Counsel in addition to raising a preliminary objection, stated that plaintiff has not disputed agreement with defendants No. 1 & 2 and also existence of arbitration clause therein. He stated that dispute was only in relation to alleged transfer of that clause by respondents No. 2 & 3 to present appellant and its legality. He further stated that as no cause of action accrued at Mumbai, the Court at Mumbai will not have any jurisdiction. In view of this, I was required to hear parties only in relation to these two questions.

4. The learned Counsel for the appellant has pointed out that agreement dated 11.12.2001 is between the plaintiff and respondent No. 2 & 3 i.e. Tata Finance Limited & Tata Motors Ltd. This agreement itself stipulates that Tata Finance Limited is owner and said expression has been clarified to include successors and assigns of Tata Finance Limited. He points out that existence of clauses about arbitration or exclusive jurisdiction of Mumbai Courts in this agreement is not in dispute and by Deed of Assignment dated 19.5.2006, respondents No. 2 & 3 have signed the agreement dated 11.12.2001 in favour of present appellant. He points out that it is for valuable consideration and all rights and benefits have been made over to assignee as per law. According to him, the assignment is, therefore, legal and binding upon present respondent No. 1 and lower Appellate Court has not correctly appreciated the situation in this respect.

5. While replying to preliminary objection raised by respondent No. 1, Shri Khapre, learned Counsel states that the appeal against order is very much maintainable in view of the provisions of Order 41, Rule 23 of CPC and the judgments sought to be relied upon by respondent No. 1 to show otherwise, have got absolutely no relevance.

6. Shri Ashirgade, learned Counsel for respondents No. 2 & 3 also supports the arguments of Shri Khapre, learned Counsel and he points out that in the agreement dated 11.12.2001, there is express stipulation that courts at Mumbai alone will have jurisdiction and arbitration also will be conducted at Mumbai. He, therefore, states that even on this count, the Court at Nagpur could not have

taken any cognizance of the Suit.

7. Shri Khapre as also Shri Ashirgade, learned Counsel point out that respondents No. 2 & 3 as also present appellant have got their registered offices at Mumbai only. They have placed reliance upon certain judgments and I find it convenient to refer to these judgments little later.

8. Shri Kshirsagar, learned Counsel for respondent No. 1 (original plaintiff) has stated that there is no remand in the present matter and hence appeal against order is not maintainable. According to him, the issue of territorial jurisdiction and the effect of arbitration clause was only considered by the trial Court and plaint came to be rejected. However, the lower Appellate Court has in the impugned judgment dated 9.4.2008 found said observations and conclusion of trial Court to be incorrect and as suit was not tried earlier on merits, the suit has been sent back for trial of other issues and not these two aspects. These two issues are thus finally decided and said decision being a decree, must be challenged in second appeal only. He, therefore, argues that there is no remand in the matter and appeal against order is liable to be dismissed.

9. On merits, he points out that respondent No. 1/plaintiff had handed over 35 blank cheques to respondent No. 2 Tata Finance Limited and none of the cheques were dishonoured. He was not given any notice or intimation about any dishonour and he was also not informed of assignment in favour of present appellant. He argues that respondent No. 1 is not party to said assignment and assignment, therefore, is not binding on him. He further states that with present appellant, there is no arbitration agreement and hence he rightly filed Civil Suit after his truck was detained by the appellant. His argument is that even if assignment between respondents No. 2 & 3 on one hand and present appellant on other hand is perused, it shows that what is transferred is only the debt and its recovery. The arbitration agreement has not been transferred and also could not have been transferred. He states that arbitration is basically a matter of contract between two willing parties and hence there is no question of arbitration agreement between respondent No. 1 and respondent No. 2 being transferred to present appellant. He further states that by merely mentioning that Court at Mumbai alone will have jurisdiction, the parties cannot confer jurisdiction on said Courts at Mumbai because no cause of action accrued at Mumbai. He argues that respondents No. 2 & 3 have their offices and branches at Nagpur. Similarly, present appellant also has got branch at Nagpur. The cause of action has accrued at Nagpur and hence Court at Nagpur alone has got jurisdiction. In support of his contentions, he has relied upon various judgments and I find it convenient to refer to these judgments while discussing the controversy.

10. The first question to be decided is about maintainability of this appeal. Shri Kshirsagar, learned Counsel has pointed out the judgment of the Hon'ble Apex Court in the case of Narayanan Vs. Kumaran and Others, , to urge that the present Appeal against order is not maintainable. I am not in a position to read any such law or ratio in the said judgment of the Hon'ble Apex Court. The

Hon''ble Apex Court has held that the Appellate Court can remand the case even when suit has not been disposed of on preliminary point and such power cannot be exercised lightly by the Appellate Court. These observations are in para 24 after considering the provisions of Order 41, Rule 23 of C.P.C. as amended in Kerala and Madras. The Hon''ble Apex Court has found that an appeal will lie under Order 43, Rule 1(u) from an order of remand only and has clarified that it will be maintainable only in those cases in which an appeal would lie against the decree, if such Appellate Court instead of making an order of remand had passed a decree on the strength of the adjudication on which the order of remand was passed. In present circumstances, the argument is, there is no remand at all. The argument is difficult to accept. The provisions of Order 41, Rule 23 of C.P.C. expressly contemplate a situation in which suit was disposed of by the trial Court on preliminary points and such disposal has been reversed in appeal. The contention of Shri Kshirsagar, learned Counsel is that remand is possible only when the controversy is required to be reconsidered. In other words, he says that when the lower Appellate Court has sealed the controversy regarding effect of arbitration agreement or territorial jurisdiction, sending of matter back to trial Court for adjudication of other issues is not a remand. The contention cannot be accepted as it is against express language of Order 41, Rule 23 itself.

11. The other judgment relied upon by Shri Kshirsagar, learned Counsel is in the case of (Jagjivan Mulchand Chokshi v. Soni Dineshbhai Manilal) reported at 2008(3) C.L.J. 65. In this case, instead of entertaining an appeal against order, High Court entertained the challenge as second appeal, framed questions of law and decided it. The contention was then raised before the Hon''ble Apex Court that because of Order 43, Rule 1(u), Second Appeal was not maintainable. The Hon''ble Apex Court notices that though Second Appeal was not maintainable, as the matter was pending for more than 40 years and considering the nature of dispute and quantum of amount involved, it was not a fit case where it should exercise its discretionary jurisdiction under Article 136 of the Constitution of India. The Hon''ble Apex Court has found in paragraph 23 that scope of Second Appeal u/s 100 of C.P.C. was narrower than scope of appeal under Rule 1(u) of Order 43. This judgment, therefore, again does not in any way advance the arguments of Shri Kshirsagar, learned Counsel for respondent No. 1.

12. The admitted position on record here is that the trial Court rejected the plaint, accepting the objections about territorial jurisdiction and availability of arbitration agreement. The lower Appellate Court found conclusions of trial Court to be incorrect and as trial Court had decided the matter only on preliminary points, it remanded the matter to trial Court for considering the controversy on merits. The appeal under Order 43, Rule 1(u) C.P.C., therefore, is maintainable.

13. The next controversy to be resolved is about the place of suing. The agreement dated 11. 12. 2001 between present appellant and respondent No. 2/3 clearly states that the agreement has been negotiated at Mumbai and amounts thereunder are also payable at Mumbai. It further states that its terms

and conditions so far as possible be performed and carried out at Mumbai. The Courts at Mumbai alone will have exclusive jurisdiction in respect of any matter, claim or dispute arising out of or in any way relating to said agreement. Before me, it is not in dispute that Deed of Assignment entered into between respondents No. 2 & 3 and present appellant on 19.5.2006, is again executed at Mumbai and again vide its Clause 10.8, the agreement stipulates that assignor and assignee agree to any legal action being brought before Mumbai Courts only. It is also not in dispute that appellant as also respondents No. 2 & 3 have got their respective branch offices at Nagpur.

14. In this respect, the judgment in the case of Shin Satellite Public Co. Ltd. Vs. Jain Studios Limited, , pointed out by Shri Ashirgade, learned Counsel, shows that before the Hon''ble Apex Court, request was made to refer the matter to arbitration either in London or in Singapore. The Hon''ble Apex Court noticed that arbitration clause provided Delhi as the venue and since that part of the agreement is enforceable, request to have arbitration in London or Singapore was turned down. The judgment, therefore, is not relevant for deciding the present controversy. He has also relied upon the judgment of the Hon''ble Apex Court in the case of Hanil Era Textiles Ltd. Vs. Puromatic Filters (P) Ltd., . There the clause relating to jurisdiction provided that Courts at Mumbai will alone have jurisdiction. The Hon''ble Apex Court in paragraph 6 notices the fact that the offer to purchase goods was made by defendants at Bombay and it was accepted by the plaintiffs branch office at Bombay. The advance payment was also made at Bombay. Therefore, part of cause of action agreed at Bombay. The plaintiff contended that the goods were dispatched from Delhi after receipt of Form CT-3 sent by defendant and therefore part of cause of action accrued at Delhi. In this background in paragraph 7, the judgment of the Hon''ble Apex Court in the case of Hakam Singh v. Gamon (India) Ltd., has been pointed out and thereafter in paragraph 9, it has been held that as part of cause of action agreed at Bombay, the Court of Additional District Judge, Delhi had no territorial jurisdiction in view of agreement between the parties. In the case of Hakam Sing Vs. Gammon (India) Ltd., , the Hon''ble Apex Court has found in paragraph 4 that it was not open to the parties by agreement to confer jurisdiction on a Court which said Court does not get under the provisions of Civil Procedure Code. The Hon''ble Apex Court noticed that after dispute arose, the petition was filed in the Court of Subordinate Judge at Varanasi for an order u/s 20 of Indian Arbitration Act. The respondent contended that the Civil Court at Bombay alone had jurisdiction because of Clause 13 in the agreement between the parties. The trial Judge rejected that contention observing that Clause 13 which stipulated the term that the "contract shall be deemed to have been entered into between the parties concerned in city of Bombay" had no meaning unless the contract was actually entered into city of Bombay. The High Court in revisional jurisdiction held that Courts at Bombay had jurisdiction under the General law. In paragraph 7, the Hon''ble Apex Court further notices that as the application for filing an award in respect of dispute arising out of terms of agreement could be filed in Courts in

city of Bombay, both because of terms of Clause 13 of agreement and because the respondents had their Head Office at Bombay, the agreement between parties that the Court in Bombay shall have jurisdiction was binding between them. The appeal was, therefore, dismissed.

15. In the case of M/s. Patel Roadways Limited, Bombay Vs. M/s. Prasad Trading Company, , the larger Bench of the Hon''ble Apex Court considers this judgment of Hakam Singh v. Gammon (India) Ltd. (supra) in para 7. The facts there disclose that Cardamom was entrusted to the appellant at its subordinate office in Tamil Nadu for its delivery at Delhi. The goods were transported to Delhi by the appellant and got destroyed and damaged in his godown at Delhi. Consignee, therefore, refused to take delivery. The respondent, who had delivered the goods to the appellant instituted a suit in the Court of Subordinate Judge at Periakulam within whose territorial jurisdiction, the subordinate office of the appellant accepting the goods was situate. The facts of second suit considered by the Hon''ble Apex Court are also identical but then there the delivery to the appellant was at its subordinate office at Madras and respondent who delivered the goods instituted suit before Madras Court. In both these suits, the appellant pointed out agreement and contended that jurisdiction to decide the dispute was only with Mumbai Courts and hence Courts in Madras where two suits were filed had no jurisdiction. Both trial Courts rejected that plea and Madras High Court dismissed appellant's revision. The Hon''ble Apex Court in paragraph 8 found that in facts before it, the Courts at Bombay did not have any jurisdiction and agreement between the parties conferring exclusive jurisdiction at Bombay was, therefore, of no avail. The Hon''ble Apex Court in paragraph 9 noticed that in view of the arrangement of Section 20 of Civil Procedure Code, the first part of explanation applied only to such a Corporation which has its Principal office at particular place and Court having jurisdiction over that office/place will also have jurisdiction inasmuch as even if the defendant may not be carrying on business at that place, it will be deemed to do so at that place. The later part of explanation of Section 20 is held to be applicable when said Principal office is at one place and a subordinate office at another place. The Hon''ble Apex Court has found that if the case falls within later part of explanation, it is not the Court within whose jurisdiction the Principal office of defendant situates, but the Court within whose jurisdiction it has a subordinate office, alone shall have jurisdiction in respect of any cause of action arising at any place where it has also a subordinate office.

16. The facts of present case show that the present appellant as also respondents No. 2 & 3 have got their subordinate offices at Nagpur. So far as relief in the suit is concerned, respondent No. 1 plaintiff has not claimed any relief against respondents No. 2 & 3. His relief is only against present appellant. He has not negotiated any agreement with the appellant at Mumbai and in any case in view of the availability of Branch office at Nagpur and also accrual of cause of action at Nagpur, it is clear that no cause of action accrued in favour of present respondent No. 1/plaintiff at Mumbai. It is, therefore, not possible to hold that Courts at Mumbai alone have jurisdiction to take cognizance of suit of

such nature. Civil suit as instituted at Nagpur therefore does not suffer from vice of lack of territorial jurisdiction.

17. The last question to be decided is about the existence of Arbitration agreement between the parties. Shri Kshirsagar has relied upon the judgment of the Hon''ble Apex Court in the case of Alimenta S.A. Vs. National Agricultural Co-operative Marketing Federation of India Ltd. and Another, , which considers incorporation of arbitration clause in existing agreement by making reference to an earlier contract containing such clause. The Hon''ble Apex Court has held that such incorporation is possible if it is not inconsistent with the terms of contract in which it is incorporated. In paragraph 12, the Hon''ble Apex Court has held that merely because subject-matter of subsequent and later agreement is different, there would be no bar to such incorporation unless the incorporation of arbitration clause appears insensible or unintelligible. In paragraph 14, the Hon''ble Apex Court notices that term about arbitration was not a term of supply of goods. The relevant clause relied upon to point out incorporation read "all other terms and conditions for supply not specifically shown and covered by the contract shall be as per previous contract signed between the parties for earlier supplies of HPS". The previous contract contained arbitration clause and incorporation clause specifically mentioned only terms and conditions of supply of previous contract. The Hon''ble Apex Court notices that there is no proposition of law that when -a contract is entered into for supply of goods, the arbitration clause must form part of such contract. It is therefore apparent that ruling does not lay down any blanket proposition as urged by respondent No. 1.

18. Shri Kshirsagar, learned Counsel has also pointed out the judgment of the Hon''ble Apex Court in the case of M. Dayanand Reddy Vs. A.P. Industrial Infrastructure Corporation Limited and others, , particularly paragraph 8 to point out how arbitration clause is distinct from other clauses in the agreement. The Hon''ble Apex Court has held that arbitration clause is quite distinct from the other clauses of the contract. Other clauses of agreement impose obligations on parties and arbitration clause does not impose on any of the parties any such obligation. The arbitration agreement in no way classifies the rights of parties under the Contract but it relates wholly to the mode of determining the rights. There can not be any debate about this proposition. But when debt is being taken over it is difficult to accept that such buyer is not interested in various modes of its recovery preserved in loan agreement and any such mode of speedy recovery including through arbitration therefore needs to be viewed differently i.e. as affecting rights of the parties. He has also pointed out judgment of the learned Single Judge of Punjab High Court in the case of S. Mehtab Singh S. Jot Singh and Another Vs. National Fire and General Insurance Co. Ltd. and Another, , wherein it has been held that a purchaser of a motor vehicle from a person who is party to the contract of motor insurance containing the arbitration clause, cannot be deemed to be a party to the arbitration clause and he could not, therefore, seek to enforce the arbitration agreement u/s 20 of Arbitration Act, 1940 against the insurance company. The judgment does not mention the

relevant term in the agreement and as such, I find it difficult to appreciate it.

19. In (N.G.I. Co. India Ltd. v. A.S.A. Kampagni) reported at 1963 Mh.L.J. 768, the Division Bench of this Court found that though the contract between the parties prescribes that dispute should be decided in Denmark, as claim involved was very small, its enforcement at a place of suing (Denmark) was not appropriate. The Division Bench, therefore, permitted the suit to continued before Bombay Court. In Hindustan Petroleum Corporation Limited Vs. Batliboi Environmental Engineers Ltd., formerly known as Hydraulic and General Engineers Ltd. and Shri K. Narayanan, Sole Arbitrator, , is the other ruling of Division Bench of this Court which holds that Award against the terms of contract between the parties is perverse. It has been held that Arbitrator is creation of the contract between the parties and he gets jurisdiction under the terms of contract and as such he is expected to interpret and apply provisions of the contract and pass an award accordingly. In (Sandeep Kumar v. Master Ritesh) reported at 2006 DGLS 759 : 2006(13) S.C.C. 567, the Hon''ble Apex Court has held that when all the parties to the suit were not parties to the arbitration agreement, the question of invoking the arbitration clause as against such non party defendants will not arise. All these judgments are not very relevant here as respondent No. 1 i.e. plaintiff is not disputing the existence of arbitration clause in original agreement between him and respondent Nos. 2 & 3. Only attack is upon validity of its assignment to present appellant. Even validity of transfer of loan recovery has not been questioned.

20. From all these judgments, it is apparent that the question whether arbitration clause has been assigned or not, needs to be decided in the facts and circumstances of each case and there is no law which prohibits such assignment.

21. In Patanjali and Another Vs. Rawalpindi Theatres (P) Ltd., , relied upon by Shri Khapre, learned Counsel, the Division Bench of Delhi High Court in paragraph 8 has found that if the subject-matter of the arbitration agreement is capable of assignment, then the assignee would step into the shoes of his assignor and be both bound by it and entitled to enforce it. The Division Bench has held that for that purpose, one has to look into the law relating to assignment of contractual rights and obligations. In paragraph 9, British Judgments taking similar view are also quoted. Shri Khapre, learned Counsel has also relied upon the judgment of Gujarat High Court in the case of (Gujarat Water Supply and Severage Board v. S.H. Shivanani) reported at AIR 1991 Guj. 170, wherein while considering transfer of accountable claims, right to sue for damages has been held to be transferable.

22. The preamble of agreement dated 11.12.2001 itself permits respondent No. 2/3 to assign the agreement and the benefit of agreement is also available to its successor. Clause 25 therein is the arbitration agreement and its existence or validity is not in dispute. The contention of respondent No. 1 is that said clause has not been and can not be assigned to present appellant. The agreement dated 11.12.2001 is between a finance provider i.e. owner and a hirer. Therefore, the

provision for arbitration as contained in Clause 25 is an important right and remedy reserved for itself by M/s. Tata Finance Limited. These rights of debt recovery available to respondents No. 2 & 3 are then purchased by present appellant as per Deed of Assignment dated 19.5.2006. The appellant has been expressly mentioned as assignee in this document and the agreements with parties like respondent No. 3 and its other customers/clients are collectively mentioned as financial instruments. The assignor has transferred to assignee all debts together with security interest (if any) under those documents. In Clause 2 of the agreement right, title and interest benefit in and to the Debts and incidental rights thereto, together with security interest, have been transferred to assignee in consideration of assignee paying assignor valuable consideration. The assignee has been declared to be full and absolute legal owner and only person legally entitled to receive the repayment with sole right of collecting and enforcing payment of all debts in whatever manner in its absolute discretion. The assignee thus has acquired all rights and benefit under the financial instruments. Clause 5 of this agreement on which Shri Kshirsagar, learned Counsel has placed reliance is only describing the relationship between assignor and assignee and it affirms that it is not a partnership, association, joint venture or other common enterprise. The arrangement is, therefore, described as one privately negotiated arm's length sale of the Debts on a principal-to-principal basis. This does not in any way show that the right to take recourse to arbitration, available to assignor which forms essential and integral part of agreement between respondent No. 2 and respondent No. 1 has not been transferred or assigned to present appellant. Clause 6.4 of this agreement also shows that respondents No. 2 & 3 have disclosed to appellant No. 1 that they are fully and absolutely free to assign debts and no prior permission or consent from respondent No. 1 was essential for that purpose. All these clauses, therefore, clearly show that entire agreement with rights and obligations flowing therefrom entered into by present respondent No. 1 in favour of respondent No. 2 has been assigned to and transferred by it to the present appellant including the arbitration clause therein. None of the arguments of respondent No. 1 mentioned above are, therefore, valid and it has to be held that there is an arbitration agreement and clause in existence between him and present appellant.

23. In view of these findings, it is apparent that Regular Civil Suit No. 781 of 2007 as filed by respondent No. 1 before 8th Joint Civil Judge, Junior Division, Nagpur, is not maintainable. The judgment dated 9.4.2008 delivered by the District Judge-5, Nagpur in Regular Civil Appeal No. 584 of 2007 is unsustainable. The same is accordingly quashed and set aside.

24. The order of trial Court rejecting the plaint and holding that suit is not maintainable before Civil Court is hereby restored. Respondent No. 1- plaintiff is free to initiate arbitration proceedings as per arbitration agreement between parties in accordance with law.

25. Appeal against order is thus allowed. Rule is made absolute accordingly.

However, in the circumstances of the case, there shall be no order as to costs.