
(2004) 09 AP CK 0097

In the Andhra Pradesh High Court

Case No : Civil Miscellaneous Appeal No's. 3533, 3633 and 3700 of 2003

Krebs Bio-Chemicals Ltd.

APPELLANT

Vs

Gayatri Sugar Complex Ltd. and Another

RESPONDENT

Date of Decision : 03-09-2004

Acts Referred:

Arbitration and Conciliation Act, 1996 — Section 8, 8(1), 8(2), 9
Civil Procedure Code, 1908 (CPC) — Order 39 Rule 1, Order 39 Rule 2

Citation : (2004) 6 ALD 430 : (2005) 123 CompCas 100 : (2005) 3 CompLJ 269

Hon'ble Judges : P.S. Narayana, J; Bilal Nazki, J

Bench : Division Bench

Advocate : J. Ramachandra Rao and V. Hari Haran, in CMAs. 3533 and 3700, for the Appellant; K.S. Murthy and S.V. Bhatt, for the Respondent

Final Decision : Dismissed

Judgement

Sri Bilal Nazki, J.

C.M.A.No. 3633 OF 2003

1. This is a Civil Miscellaneous Appeal filed by the plaintiff in O.S.No.24 of 2003 against an order passed by the trial Court in I.A.No.261 of 2003.

2. The appellant filed a suit against the respondents with the following prayer:

"That the permanent injunction may be granted in favour of the plaintiff restraining the defendants and their employees, agents, members, men, and officers from causing obstruction of any sort to the plaintiff and their employees in removing the schedule mentioned property from factory premises of the first defendant situated at Prabhagiripatnam, Podalakur Mandal, Nellore District."

3. It appears that a status quo order had been passed when the respondents/defendants moved an application in I.A.No.261 of 2003. In this application, they prayed that the matter be referred to an arbitrator in view of the fact that the parties had an agreement, which provided for arbitration and the trial Court

passed an order, accepting the plea of the respondents/defendants. The trial Court, while allowing the petition, stated:

"In the result, the petition is allowed and the parties are referred to named Arbitrator, the District Collector and Magistrate of Nellore as per Clause 2 (General) in the operational agreement, dt. 26.12.2002 entered into between the petitioner and the 1st respondent (plaintiff) in O.S.No.24 of 2003."

4. Against this order, this appeal has been filed. The matter was finally heard therefore this appeal is decided at this stage with the consent of the parties. Plaintiff laid the suit in the following factual back-ground as stated by it in the plaint.

5. Plaintiff is a Public Limited Company and defendant No.1 is a Private Limited Company, having its factory at Prabhagiripatnam, Podalakur Mandal, Nellore District. The defendant No.1 is the owner of the sugar factory. As he was not in a position to run the factory during the year 2002-03, he requested the plaintiff to run the factory during the crushing season of the said year on the understanding that the profits derived by running the factory should be shared by plaintiff and defendant No.1 in equal shares. The plaintiff and defendant No.1 entered into operational agreement on 26.12.2002. In the plaint, it was stated by the plaintiff that the contents of the agreement be read as part of the plaint. As per the terms of agreement, the plaintiff operated the factory during the crushing season 2002-2003. Plaintiff also paid Rs.1.12 Crores to the 1st defendant, to be used by him to clear the dues to the cane growers for the preceding year. The agreement provides that the plaintiff will have all rights to sell and deal with the products produced during the operational period of the agreement. It was further provided that the plaintiff would have right for the unsold stocks produced during the period of the agreement and to keep them in the godown of the defendant No.1 even after the expiry of the agreement and till the end of September, 2003. At present there were 24,986 bags of sugar, each weighing 100 Kilograms, belonging to the plaintiff. Sugar bags were in the godown in the factory of the defendant No.1. There is also 5899.465 Metric tonnes of molasses in the storage tank of the 1st defendant in their factory. Plaintiff claimed that he was absolutely and exclusively entitled to the schedule property and the 1st defendant had no right in the property. The plaintiffs wanted to remove the schedule mentioned property from the factory premises on 15.8.2003, but the staff of the 1st defendant, with the assistance and support of members of defendant No.2, prevented the employees of plaintiff from removing the same. In this back-ground, the suit was filed.

6. In the application moved by the other side, it was stated that there was an agreement, which contains an arbitration clause, therefore the matter be referred to arbitration.

7. In these circumstances, the only question is whether the trial Court was right in allowing the application of respondents, referring the matter to the arbitrator.

8. The agreement is styled as "Operational Agreement" and was executed on 27.12.2002. Few clauses are noted hereunder:

Clause 4 reads:

"Party A shall allow Party B to keep all the stocks left unsold in the godowns of the party A till the end of September 2003 at the risk and cost of Party B."

Clause 7 reads;

"Party B agrees to pay Rs.1.12 Crores as advance on or before 30th December, 2002 and Party A agrees to use the said advance to clear the dues to Cane growers only."

Clause 9 reads;

"Party A has to negotiate with their employees to continue to work and be subordinate to Party B till the completion of the operational agreement and not to raise any claims from Party B towards their dues/pending matters upto 30th December, 2002 with Party A."

Clause 1 of General clauses reads;

"Both the parties agree to share equally the profit/loss arising out of this operations and the profits for the period shall have to be calculated after deducting Rs.120 lacs towards off seasonal expenditure and other operational expenditure excluding interest and depreciation incurred during the period of this operational agreement."

Clause 2 of General clauses says;

"In the case of any disputes in implementing this agreement the parties are willing to approach the District Collector and Magistrate of Nellore for settlement."

9. The argument of the learned Counsel for appellant is that clause (2) in General Clauses in the agreement is only an enabling clause, but not a mandatory clause. He submits that in case parties are willing to approach the District Collector, they may do so in terms of this clause in the agreement, but if one of them approaches the Court, that means he is not willing for arbitration and therefore this clause would not oust the jurisdiction of the trial Court to try the Civil Suit, whereas the respondents' argument is that as there is an arbitration clause, the Court has no jurisdiction to entertain the suit and the dispute has to be referred to a named arbitrator.

10. On facts, there is no dispute between the parties, therefore the clause of arbitration in the agreement has to be interpreted in the light of the law. Before coming to the various judgments cited by the parties, it will be necessary to have a look of the relevant provisions of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as "the Act").

Section 5 lays down;

"5. Extent of judicial intervention:-- 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 lays down;

"7. Arbitration agreement:-- (1) In this part, "arbitration agreement" means an agreement 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.

(2) An arbitration agreement may be in the form of an arbitration clause in a contract or in the form of a separate agreement.

(3) An arbitration agreement shall be in writing.

(4) An arbitration agreement is in writing if it is contained in-

(a) a document signed by the parties ;

(b) an exchange of letters, telex, telegrams or other means of telecommunication which provide a record of the agreement ; or

(c) an exchange of statements of claim and defence in which the existence of the agreement is alleged by one party and not denied by the other.

(5)The reference in a contract to a document containing an arbitration clause constitutes an arbitration agreement if the contract is in writing and the reference is such as to make that arbitration clause part of the contract.

Section 8 says;

"8. Power to refer parties to arbitration where there is an arbitration agreement :--

(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.

(2) The application referred to in sub-section (1) shall not be entertained unless it is accompanied by the original arbitration agreement or a duly certified copy thereof.

(3) Notwithstanding that an application has been made under sub-section (1) and that the issue is pending before the judicial authority, an arbitration may be commenced or continued and an arbitral award made.

Section 9 reads;

"9. Interim measures etc. by Court:-- A party may, before or during arbitral proceedings or at any time after the making of the arbitral award but before it is

enforced in accordance with Section 36, apply to a Court :--

(i) for the appointment of a guardian for a minor or a person of unsound mind for the purposes of arbitral proceedings ; or

(ii)for an interim measure of protection in respect of any of the following matters, namely :--

(a) the preservation, interim custody or sale of any goods which are the subject-matter of the arbitration agreement ;

(b) securing the amount in dispute in the arbitration ;

(c) the detention, preservation or inspection of any property or thing which is the subject-matter or the dispute in arbitration, or as to which any question may arise therein and authorizing for any of the aforesaid purposes any person to enter upon any land or building in the possession of any party, or authorizing any samples to be taken or any observation to be made, or experiment to be tried, which may be necessary or expedient for the purpose of obtaining full information or evidence ;

(d) interim injunction or the appointment of a receiver ;

(e) such other interim measure of protection as may appear to the Court to be just and convenient,

and the Court shall have the same power for making orders as it has for the purpose of, and in relation to, any proceedings before it.

In addition to these provisions, definition of "Court" is given in Section 2(e) of the Act, which lays down;

"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."

11. Section 7 lays down the definition of the "Arbitration Agreement" and the requirements of the arbitration agreement. Section 8 refers to the power of the Judicial authority before whom an action is sought in a matter which is subject of an arbitration agreement. The bare perusal of this Section would show that if a party applies not later than when submitting his first statement on the substance of the dispute for reference to arbitration, the Judicial authority has to refer the matter to the arbitration. Therefore, in our view, if a suit is filed before the Judicial authority and the contesting party, not later than when submitting his first statement on the substance of the dispute, applies for arbitration, the Judicial authority has to refer the matter to arbitration if there is an agreement for arbitration. There cannot be a dispute with this preposition, but the learned

Counsel for appellant submits that u/s 9 of the Act, a Civil Court is empowered before or during arbitral proceedings or at any time after making of the award, but before it is enforced, to make orders which are interim measures for protection and are just and convenient. The Section has already been reproduced hereinabove and it gives the list of powers that the Court can exercise while exercising the power u/s 9 of the Act. He has referred to a judgment of Hon''ble Supreme Court, in Sukanya Holdings Pvt. Ltd., Vs. Jayesh H. Pandya and another 1963(2) An.W.R. 474. In our view, this judgment is not applicable to the present case because what Court held was;

"This would, therefore, mean that 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) & (2) of Section 8 of the Act."

12. Alternately, these observations would mean that as contemplated under sub-sections (1) & (2) of Section 8 of the Act, the Civil Court's jurisdiction would be ousted and in this case, Court was also dealing with a situation where there were some parties who were parties to the arbitration agreement and there were some parties who were not parties to arbitration agreement. In these circumstances, the Supreme Court held;

"In our view, it would be difficult to give an interpretation to Section 8 under which bifurcation of the cause of action that is to say the subject matter of the suit or in some cases bifurcation of the suit between parties who are parties to the arbitration agreement and others is possible."

13. Counsel for appellant has also referred to another judgment of Supreme Court in Wellington Associates Ltd. Vs. Kirit Mehta, AIR 1978 Kerala 209 which is a judgment of learned Single Judge of the Supreme Court. In our view, this judgment cannot be relied upon in view of the judgment of two Judges of Supreme Court, reported in Hindustan Petroleum Corporation Ltd., Vs. Pinkcity Midway Petroleums 1960 ALT 985, 1967 (1) ALT 3 (NRC) (D.B). Judgment pronounced by the learned Single Judge in an arbitration petition is dated 04.04.2000, whereas the judgment pronounced by a Division Bench of the Supreme Court in Hindustan Petroleum case (3 supra) was pronounced on July 23rd, 2003. Besides, this is an order of a designate of Chief Justice u/s 11 of the Arbitration Act. The Constitution Bench of the Supreme Court in the case of Konkan Railway Corporation Ltd. and Another Vs. Rani Construction Pvt. Ltd., held;

"We hold that the order of the Chief Justice or his designate u/s 11 nominating an arbitrator is not an adjudicatory order and the Chief Justice or his designate is not a Tribunal. Such an order cannot properly be made the subject of a petition for special leave to appeal under Art. 136. The decision of the three Judge Bench in Konkan Railway Corporation Ltd. And others v. Mehul Construction Co., is affirmed."

14. He has also referred to a Division Bench judgment of this Court reported in L. Tulsi Ram and Others Vs. Maiku Lal and Others, . In this case, the Division Bench made the following observations;

"We are unable to accept the contention that in view of clause 15 of the partnership deed providing for settlement of the disputes by a sole Arbitrator, the Civil Court has no jurisdiction to entertain the suit and pass interim orders. We give below the reasons for our conclusions."

Then the Court referred to Section 9 of the Act and then drew its conclusions as under;

"The above provision clearly indicates that even before or during arbitral proceedings, a party is entitled to apply to a Court for an interim measure of protection in respect of the preservation, interim custody or sale of any goods which are the subject-matter of the arbitration agreement, for securing the amount in dispute in the arbitration, for the detention, preservation or inspection of any property or thing which is the subject-matter of the dispute in arbitration." "If either of the parties to any contract with an arbitration clause does not refer or take steps to refer the disputes to arbitration, the law does not bar either of them to have a recourse to a Civil Court and seek appropriate remedies. If the Legislature wanted to bar the jurisdiction of Civil Court in cases arising out of a contract with an arbitration clause, it would not have inserted a specific provision like Section 9 in the above Act empowering the Civil Court to grant certain interim orders. If a party to the arbitration agreement wants the matter to be decided by arbitration, then, as laid down in Section 8(1) of the Act, he can request the Civil Court by filing appropriate application u/s 8 of the above Act to refer the parties to arbitration."

15. This judgment shows that an application u/s 8(1) of the Act, moved by the defendants, was still pending before the Court and in those circumstances, the Court passed the order, which it had passed.

16. On the strength of this judgment of the Division Bench, it is contended that even after referring to the arbitrator, the trial Court could have passed orders in terms of Section 9 of the Act, as an application under Order 39 Rule 1 and 2 of the CPC (hereinafter referred to as "the Code") was pending before it, which had been filed along with the suit. In our view, that is not at all possible because of the scheme of the Act. As we have noted hereinabove, the definition of the "Court" specifically says, it does not include any Civil Court of a grade inferior to such Principal Civil Court, or any Court of Small Causes. The Legislature purposefully used the phrase "Judicial authority" in Section 8 and used word "Court" in Section 9. So, proceedings u/s 9 of the Act are independent proceedings and only entertainable by a Court, whereas a suit can be filed before any Judicial authority, which can comprise of a Civil Court of any grade. Therefore an application under Order 39 of the Code, filed along with the suit, can in no circumstances, be treated as an application u/s 9 of the Act. An

application under Order 39 Rule 1 and 2 of the Code has no independent existence and it cannot live beyond the suit. If the suit is disposed of either way and an application is pending under Order 39 Rule 1 and 2 of the Code, no orders can be passed in that application.

17. In our view, Section 9 of the Act though empowers a Court to order interim measures for protection, yet, it is an independent proceeding. Section 9 of the Act would not operate when an application is filed along with a regular suit. What Section 9 envisages is that both parties should agree to the arbitration. There should be no dispute to the arbitration and to the fact that the matter has to be decided by the arbitrator. Power of Court u/s 9 of the Act does not depend on filing of a suit like Order 39 in the Code. Under Order 39 of the Code, the basic requirement is that where in any suit it is proved by affidavit or otherwise that any property in dispute in a suit is in danger of being wasted, damaged or alienated by any party to the suit, or wrongfully sold in execution of a decree or that the defendant threatens, or intends to remove or dispose of his property with a view to defraud his creditors, or that the defendant threatens to dispossess the plaintiff or otherwise cause injury or loss to the plaintiff, the Court may pass certain orders. So, the basic requirement under Order 39 of the Code is that a suit must be pending. No orders can be passed under Order 39 in a bare application, without a suit being pending before the Court. This has not to be confused with the power of Court u/s 9 of the Act. Section 9 of the Act envisages an independent proceeding and the language is such that it only suggests that the parties to the dispute must have no quarrel with regard to applicability of arbitration to the subject matter of dispute. There was no such independent application pending before the trial Court. A regular suit was filed and that regular suit is barred u/s 8 of the Act and there cannot be any dispute on that question because of the authoritative judgment of the Hon'ble Supreme Court of India, in *Hindustan Petroleum case* (3 supra). Though the case was in different factual context, but the law laid down by the Supreme Court will apply squarely to the present case. There was an agreement between the parties, which contained an arbitration clause as well. Under the agreement, one of the parties had to supply its products to other party. One party found that there were some lapses committed by the other party, therefore it stopped the supply of products. The other party felt aggrieved of the stoppage of supply and filed a suit. Along with the suit, it filed an application under Order 39 Rule 1 and 2 of the Code. The Court stayed the suspension of supplies. The defendants filed an application u/s 8 of the Act along with the copy of the agreement. They contended that the action they had taken was in consonance in terms of the agreement and any dispute arising out of their action, only the matter could have been referred to arbitration in terms of the arbitration clause. The Judge dismissed the application on the ground that the dispute between the parties was not covered by the arbitration agreement. Revision filed before the High Court was also dismissed and the matter reached to the Supreme Court. Supreme Court, on facts, found that the dispute between the parties was arising out of the agreement and hence

covered by the arbitration agreement. To that extent, this judgment may not be helpful for us to resolve the present controversy, but on scope of Section 8 of the Act, the law was laid down in the following terms;

"Section 8 of the Act in clear terms mandates that a judicial authority before which an action is brought in a matter which is the subject of an arbitration agreement to refer such parties to arbitration, the language of this section is unambiguous."

18. Then the Supreme Court referred to a case in P. Anand Gajapathi Raju and Others Vs. P.V.G. Raju (Died) and Others, wherein it was held that the language of Section 8 is peremptory in nature. The Court noted,

"Therefore, in cases where there is an arbitration clause in the agreement, it is obligatory for the court to refer the parties to arbitration in terms of their arbitration agreement and nothing remains to be decided in the original action after such an application is made except to refer the dispute to an arbitrator. Therefore, it is clear that if, as contended by a party in an agreement between the parties before the civil Court, there is a clause for arbitration, it is mandatory for the civil court to refer the dispute to an arbitrator."

19. Then in Para 15, the Supreme Court raised question for answer and it reads;

"15. The question then would arise: what would be the role of the civil court when an argument is raised that such an arbitration clause does not apply to the facts of the case in hand ? Learned counsel for the appellant contends that it is a matter which should be raised before the arbitrator who is competent to adjudicate upon the same and the civil court should not embark upon an inquiry in regard to the applicability of the arbitration clause to the facts of the case. While learned counsel appearing for the respondent contends that since the applicability of the arbitration clause to the facts of the case goes to the very root of the jurisdiction of the reference to arbitration, this question will have to be decided by the civil court before referring the matter to arbitration even in cases where there is admittedly an arbitration clause. The answer to this argument, in our opinion, is found in Section 16 of the Act itself. It has empowered the Arbitral Tribunal to rule on its own jurisdiction including rule on any objection with respect to the existence or validity of the arbitration agreement. That apart, a Constitution Bench of this Court in Konkan Railway Corporation Ltd. and Another Vs. Rani Construction Pvt. Ltd., with reference to the power of the arbitrator u/s 16 has laid down thus: (SCC p.405, para 21)

"21. It might also be that in a given case the Chief Justice or his designate may have nominated an arbitrator although the period of thirty days had not expired. If so, the Arbitral Tribunal would have been improperly constituted and be without jurisdiction. It would then be open to the aggrieved party to require the Arbitral Tribunal to rule on its jurisdiction. Section 16 provides for this. It states that the Arbitral Tribunal may rule on its own jurisdiction. That the Arbitral Tribunal may rule "on any objections with respect to the existence or validity of

the arbitration agreement" shows that the Arbitral Tribunal's authority u/s 16 is not confined to the width of its jurisdiction, as was submitted by learned counsel for the appellants, but goes to the very root of its jurisdiction. There would, therefore, be no impediment in contending before the Arbitral Tribunal that it had been wrongly constituted by reason of the fact that the Chief Justice or his designate had nominated an arbitrator although the period of thirty days had not expired and that, therefore, it had no jurisdiction."

20. In Para 16, the Supreme Court held;

"16. It is clear from the language of the section, as interpreted by the Constitution Bench judgment in *Konkan Rly.*, that if there is any objection as to the applicability of the arbitration clause to the facts of the case, the same will have to be raised before the Arbitral Tribunal concerned. Therefore, in our opinion, in this case the courts below ought not to have proceeded to examine the applicability of the arbitration clause to the facts of the case in hand but ought to have left that issue to be determined by the Arbitral Tribunal as contemplated in clause 40 of the Dealership Agreement and as required under Sections 8 and 16 of the Act."

21. Therefore, we have no doubt in view of the law laid down in clear terms by the Supreme Court that once requirements of Section 8 of the Act are complied with, the Judicial authority has no option but to refer the matter to the arbitration.

22. For these reasons, we do not find any merit in this appeal and hence it is dismissed.

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23. In view of the orders passed in C.M.A.No.3633 of 2003, both these C.M.As. are also dismissed.

24. In the result, all the appeals are dismissed. No costs.

25. However, if the appellant is so advised, he may move an application u/s 9 of the Arbitration & Conciliation Act, 1996 before the Court of competent jurisdiction.