

(2004) 03 CAL CK 0037

In the Calcutta High Court

Case No : G.A. No. 4133 of 2003 and C.S. No. 73 of 2002

Kwality Builders and Developers Ltd.

APPELLANT

Vs

A.B.S. Spinning Orissa Limited and Another

RESPONDENT

Date of Decision : 23-03-2004

Acts Referred:

Arbitration and Conciliation Act, 1996 — Section 5, 8
Sick Industrial Companies (Special Provisions) Act, 1985 — Section 11, 20, 22, 5

Citation : 108 CWN 721

Hon'ble Judges : Ashim Kumar Banerjee, J

Bench : Single Bench

Advocate : Joy Saha, Jishnu Choudhury and M.M. Chanda, for the Appellant; Avrajit Mitra, for the Respondent

Final Decision : Dismissed

Judgement

Ashim Kumar Banerjee, J.—The defendant no. 1 is a spinning mill situated at Bhubaneswar. It was passing through acute financial stringency. The defendant no. 1 entered into an agreement with the plaintiff for conversion of cotton into yarn. It was agreed by and between the parties that the plaintiff would lend and advance from time to time diverse sums of money to the defendant no. 1 which would be adjusted against conversion charges. By virtue of the agreement the plaintiff supplied cotton as well as paid diverse sums of money to the defendant no. 1 and in turn the defendant no. 1 was to convert the said cotton into cotton yarn and supply to the plaintiff. By virtue of such arrangement a sum of Rs. 1.81.05.974.33 became due and payable by the defendant no. 1 to the plaintiff as on the date of filing of the suit. According to the plaintiff the defendant no. 2 guaranteed repayments of the sums lent and advanced by the plaintiff as well as the value of the cotton as the defendant no. 1 committed breach of contract. The plaintiff filed a suit as against the defendant no. 1 and 2 for recovery of the said sum of Rs. 1.81.05.974.33 together with interest @ 24% per annum.

The said agreement stipulated an arbitration clause. Clause 18 being relevant

herein is quoted below:

18(i) that the parties shall mutually co-operate for implementation of this agreement smoothly and successfully and settle all the disputes amicably. However, if any issue/matter remains unresolved, the parties shall refer the matter to the arbitrator as may be mutually agreed by the parties and the decision of such arbitrator shall be binding on both the parties.

(ii) That, the arbitration proceeding shall be conducted as per the provisions of Arbitration and Conciliation Act. 1996. Irrespective of the place of signing, this agreement shall "be construed to be executed at Bhubaneswar and all disputes arising out of the agreement shall be subject to the jurisdiction of the courts of Bhubaneswar under the control of the High Court of Orissa."

2. It further reveals from the records that the defendant no. 1 was declared a sick company under the provisions of Sick Industrial Companies (Special Provision) Act. 1985 (hereinafter referred to as the "said Act. 1985). After a prolonged deliberation the said company being the defendant no. 1 was recommended for winding up u/s 20 of the said Act. 1985. Such recommendation is now pending before the Orissa High Court for passing formal order of winding up.

3. The defendant no. 1 made the instant application inter alia u/s 8 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as the "said Act, 1996) praying for the following reliefs:

"(a) C.S. No. 73 of 2002 be dismissed and/or permanently stayed and/or the plaint thereof be rejected;

(b) The plaintiff be directed to refer the disputes being the subject matter of the suit to Arbitration;

(c) Stay of all further proceedings in the suit being CS. No. 73 of 2002."

4. Mr. Joy Sana, appearing in support of the application, contended that since the agreement stipulated an arbitration clause this court in view of Section 5 of the said Act. 1985 is not competent to try and determine the suit as also is bound to refer the disputes to arbitration u/s 8 thereof.

5. Mr. Abhrajit Mitra, learned counsel appearing for the plaintiff, while opposing the application contended that the instant suit is a composite suit as against the defendant no. 1 and 2. Defendant no. 2 admittedly was not a party to the arbitration agreement. Hence, the disputes involved with the suit cannot be referred to arbitration. Mr. Mitra also contended that the issue that defendant no. 2 guaranteed repayment of the sums under the said transaction cannot be gone into by the arbitrator without the express consent of the defendant no. 2 and as such the part of the disputes being the disputes between the plaintiff and the defendant no. 1 cannot be referred to arbitration.

6. In support of the respective contentions the parties cited following decisions :

- i) AIR 1949 Cal 179 (Johurmull Parasram & Ors. vs. Louis Dreyfus & Co. Ltd.):
- ii) 2002 (1) Arb LR 122 (Bom) (Garden Finance Ltd. vs. Prakash Industries Ltd. & Anr.)
- iii) Sukanya Holdings Pvt. Ltd. Vs. Jayesh H. Pandya and Another, .

7. Section 5 of the said Act, 1996 inter alia provides that no judicial authority shall intervene in any subject matter governed by Part I of the said Act of 1996.

8. Section 8 provides for reference of the disputes to arbitration by the judicial authority in case action is brought in a matter before the said authority covering an arrangement agreement.

9. The scope of Section 5 and Section 8 came up for consideration before the Apex Court in the case of Sukanya Holdings Pvt. Ltd. (Supra). The Apex Court held that for interpretation of Section 8, Section 5 would have no bearing as it contemplates the subject matter governed by part 1 of the said Act. The Apex Court also held that there is no provision in the said Act, 1996 except section 8 for referring the disputes being the subject matter of a pending suit to arbitration. Hence. Mr. Sana's contention with regard to Section 5 in view of the decision of the Apex Court in the case of Sukanya Holdings Pvt. Ltd. (Supra) cannot be accepted.

10. The Apex Court in the said case of Sukanya Holdings Pvt. Ltd. (Supra) also held that bifurcation of a subject matter in a pending suit and thereby referring a part to arbitration and keeping the other part for decision by the Civil Court is not permissible as there would be likelihood of conflicting decision by two different forums. Paragraph 16 and 17 of the said judgment being relevant herein are quoted below:

"16. The next question which requires consideration is even if there is no provision for partly referring the dispute to arbitration, whether such a course is possible u/s 8 of the Act ? 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. This would be laying down a totally new procedure not contemplated under the Act. If bifurcation of the subject matter of a suit was contemplated, the legislature would have used appropriate language to permit such a course. Since there is no such indication in the language, it follows that bifurcation of the subject matter of an action brought before a judicial authority is not allowed.

17. Secondly, such bifurcation of suit in two parts, one to be decided by the arbitral tribunal and other to be decided by the civil Court would inevitably delay the proceedings. The whole purpose of speedy disposal of dispute and decreasing the cost of litigation would be frustrated by such procedure. It would also increase the cost of litigation and harassment to the parties and on occasions there is possibility of conflicting judgments and orders by two different forums."

11. The Calcutta decision relied upon by the parties relates to the old arbitration law.

12. The Single Bench decision of the Bombay High Court relates to the interpretation of the arbitration agreement as well as interpretation of Section 22 of the said Act. 1985.

13. In view of the latest Supreme Court decision in the case of Sukanya Holdings Pvt. Ltd. I do not wish to deal with other two cases referred to above.

14. In the plaint it was categorically pleaded that the defendant no. 2 guaranteed repayment of the transaction. Mr. Sana contended that the disputes between the plaintiff and the defendant no. 1 may be referred to arbitration by keeping the disputes between the plaintiff and defendant no. 2 pending before this court. The submission of Mr. Saha. in my view, is without any logic. On a plain reading of the plaint as a whole it would appear that the plaintiff and the defendant no. 1 entered into a transaction by virtue of the agreement which stipulated an arbitration clause. At the same time it was pleaded that the defendant no. 2 guaranteed such repayment. In case the arbitrator decides that there had been no sum due and payable and at the same time this court decides the liability of the defendant no. 2 there must be a conflict of decisions.

15. The present matter has another complication. The arbitration clause stipulates appointment of arbitrator by mutual agreement. Neither there was any named arbitrator nor the appointing authority was named. Mr. Abhrajit Mitra, learned counsel appearing for the plaintiff on a query made by this court on instruction contended that they were ready and willing to go before the arbitrator to be mutually agreed between the parties. Mr. Mitra on instruction further agreed to have the arbitration conducted at Bhubaneswar as stipulated In the agreement with the corresponding assurance that all expenses (except arbitrator's full remuneration) for holding the arbitration at Bhubaneswar would be paid by his client. Mr. Joy Saha took time to react to the suggestion given by Mr. Mitra. On the adjourned date Mr. Saha contended that since the company is already contemplating winding up by the Orissa High Court the officials of the defendant company were not in a position to take a decision in this regard.

16. The aforesaid "fact would show that the defendant no. 1 although applied for referring the disputes to arbitration was in fact not ready for arbitration.

17. Mr. Saha contended in this regard that the disputes were to be amicably settled between the parties and if it was not possible in such event reference to arbitration would have to be made. Since the plaintiff did not approach the defendant company for mutual settlement the suit was premature.

18. I am unable to accept the contention of Mr. Saha on this score. Assuming I am with the defendant no. 1. I would have to pass order in terms of prayer (b) referring the matter to arbitration. Orders are passed by the court of law for implementation and order whose implementation is doubtful in view of the facts

narrated above the court is not bound to pass such order. If I am to direct reference of the disputes to arbitration the arbitration would have to be conducted by an arbitral or to be mutually agreed by the parties. It was not possible in the instant case at this juncture.

19. Mr. Saha further contended that if I pass the order in terms of prayer (b) in such event the plaintiff would have to approach the appropriate High Court u/s 11 for appointment of an Arbitrator. This would unnecessarily give rise to multiplicity of litigation. I am unable to appreciate the submission of the defendant no. 1. Since they are asking for reference to arbitration why the plaintiff would have to approach u/s 11 before the appropriate court is a question whose answer is not known to me.

20. Hence, on both scores i.e. on the issue of bifurcation of the cause of action as well as readiness and willingness of the applicant in referring the disputes to arbitration I am not at all satisfied which could prompt me to pass an order as prayed for herein.

21. In the result, the application fails and is hereby dismissed. There would, however, be no order as to costs.

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