

(2015) 08 CAL CK 0023
In the Calcutta High Court
Case No : CO 2669 of 2013

Luxmi Township Limited

APPELLANT

Vs

Asif Iqbal Hussain and Others

RESPONDENT

Date of Decision : 11-08-2015

Acts Referred:

Arbitration Act, 1940 — Section 34
Arbitration and Conciliation Act, 1996 — Section 45, 8, 8 (1), 8(1)
Civil Procedure Code, 1908 (CPC) — Order 39 Rule 1, Order 39 Rule 2, 151
Constitution of India, 1950 — Article 227

Citation : (2015) 08 CAL CK 0023

Hon'ble Judges : Arijit Banerjee, J

Bench : Single Bench

Advocate : Bhaskar Sen and Rishav Banerjee, for the Appellant; Probal Kumar Mukherjee, Anindya Basu and N. Pal, Advocates for the Respondent

Final Decision : Allowed

Judgement

Arijit Banerjee, J—In this revisional application the petitioner challenges a judgment and order dated 28th May, 2013 passed by the Ld. Civil Judge (Senior Division) at Siliguri in TS No. 39 of 2012 (Dr. Asif Iqbal Hossain v. Luxmi Township Limited & Ors.) whereby the Ld. Judge dismissed the application of the petitioner/defendant No. 1 under Section 8 of the Arbitration and Conciliation Act, 1996 thereby refusing to refer the disputes in the suit to arbitration. The material facts of the case are as follows.

2. The petitioner company was granted a lease of 99 years in respect of a land measuring 395 acres approximately for the purpose of setting up a township. Out of the said area, a portion measuring about 10.59 acres was meant for constructing a residential complex. The petitioner company obtained sanction from the Siliguri Jalpaiguri Development Authority being the opposite party No. 3 for construction of the residential complex. Thereafter applications were invited from intending purchasers of residential units/flats by issuing brochures.

3. The opposite party No. 1 purchased a flat in the said residential complex and was put in possession of the flat in January, 2012. The brochures issued by the petitioner as well as the possession letter contained/referred to certain "general terms and conditions".

4. Subsequent to delivery of possession, a registered deed of assignment was executed by the petitioner in favour of the opposite party No. 1. The sanctioned plan of the residential complex showed the place in front of the flat of the opposite party No. 1 as lawn/open ground space.

5. In March 2012 the opposite party No. 1 along with the predecessor-in-interest of the opposite party Nos. 2(i) to 2(iv) filed a suit before the Ld. Civil Judge (Senior Division) at Siliguri being Title Suit No. 39 of 2012 alleging that the aforesaid lawn/open ground space was being demolished by the petitioner for the purpose of making construction thereon in violation of the sanctioned plan. In the suit the plaintiffs claimed declaration of their right in respect of the common facilities and amenities within the Residency and injunction restraining the defendants from constructing any structure on the area demarcated as "front lawn" in the building plan. The plaintiffs impleaded the petitioner and the opposite party Nos. 3 and 4 as defendants in the said suit.

6. In the said suit the plaintiffs filed an application under Order 39 Rules 1 and 2 of the CPC read with Section 151 thereof praying for a temporary injunction restraining the defendants from constructing any structure on the area demarcated as "front lawn" in the sanctioned plan of the Residency.

7. On 6th March, 2012 the Ld. Judge passed an order of temporary injunction as prayed for by the plaintiffs.

8. The petitioner filed an objection to the injunction application of the plaintiffs. By an order dated 17th July, 2012, the Ld. Judge vacated the earlier order of injunction dated 6th March, 2012.

9. On 17th April 2013, the petitioner filed an application under Section 8 of the Arbitration and Conciliation Act, 1996, praying for a direction to refer the parties in TS No. 39 of 2012 to arbitration in terms of an arbitration clause contained in the general terms and conditions of the Residency. It was stated in the said application that the right, title and interest of the plaintiffs in respect of the flats in the Residency and/or the common areas and facilities are governed and controlled by the general terms and conditions of the Residency and Clause 19 thereof provided for resolution of disputes between the parties through arbitration in accordance with the provisions of the Arbitration and Conciliation Act, 1996.

10. The plaintiffs filed their objection to the said Section 8 application and contended, inter alia, that by filing its objection to the interlocutory application for injunction, the petitioner/defendant No. 1 had submitted their first statement on the substance of disputes and therefore were precluded from maintaining an

application under Section 8 of the said Act.

11. The Ld. Court below accepted the submission of the plaintiffs and on that ground alone rejected the application of the petitioner/defendant No. 1 by his judgment and order dated 28th May, 2013. Being aggrieved by the same, the petitioner is before this court by way of the present revisional application.

12. Appearing on behalf of the petitioner Mr. Bhaskar Sen, Ld. Senior Advocate contended that the judgment and order of the Ld. Court below suffers from a flagrant error of law apparent on the face of it. He submitted that the objection filed by the petitioner to the injunction application of the plaintiffs before the court below could not be construed to be a statement on the substance of the disputes. By filing an objection to an interlocutory application, a party does not lose its right to seek reference to arbitration in accordance with Section 8 of the Arbitration and Conciliation Act, 1996. In this connection Mr. Sen relied on a decision of the Hon'ble Supreme Court in the case of *Rashtriya Ispat Nigam Limited and Another Vs. Verma Transport Company*, AIR 2006 SC 2800 : (2006) 3 ARBLR 210 : (2006) 7 JT 404 : (2006) 7 SCALE 565 : (2006) 7 SCC 275 : (2006) 4 SCR 332 Supp : (2006) 2 UJ 1118 : (2006) AIRSCW 3966 : (2006) 8 Supreme 196 wherein the Hon'ble Supreme Court held that filing a reply to the injunction application could not have been a ground to refuse to entertain the plea taken by the appellants that the suit should be referred to arbitral tribunal. The Supreme Court further observed that the expression "first statement on the substance of the dispute" contained in Section 8(1) of the 1996 Act must be contra-distinguished with the expression "written statement". It implies submission of the party to the jurisdiction of the judicial authority. What is, therefore, needed is a finding on the part of the judicial authority that the party has waived his right to invoke the arbitration clause. If an application is filed before actually filing the first statement on the substance of the disputes, the party cannot be said to have waived his right or acquiesced himself to the jurisdiction of the court.

13. Mr. Sen also relied on a decision of the Hon'ble Supreme Court in the Case of *Food Corporation of India and Another Vs. Yadav Engineer and Contractor*, AIR 1982 SC 1302 : (1982) 2 SCC 499 . That was a case where the Supreme Court was dealing with Section 34 of the Arbitration Act, 1940. The Supreme Court observed that before a party to the arbitration agreement is entitled to enforce such agreement by stay of the suit it must disclose its unequivocal intention to abide by the agreement and, therefore, Section 34 obliges such a party to ask for stay of the proceedings before such a party takes any steps which may unequivocally indicate the intention to waive the benefit of the arbitration agreement. Abandonment of a right to seek resolution of dispute as provided in the arbitration agreement must be clearly manifested by the step taken by such party. Appearing in and contesting interlocutory applications cannot be said to be displaying an unambiguous intention to acquiesce in the suit and waive benefit of the arbitration agreement. Any other view would be harsh and iniquitous and

contrary to the underlying intendment of the Act.

14. The next decision relied on by Mr. Sen in this connection is that in the case of *Booz Allen and Hamilton Inc. Vs. SBI Home Finance Ltd. and Others*, AIR 2011 SC 2507 : (2011) 2 ARBLR 155 : (2011) 5 JT 198 : (2011) 5 SCALE 147 : (2011) 5 SCC 532 : (2011) 2 UJ 1472 : (2011) AIRSCW 3089 wherein the Hon"ble Supreme Court reiterated that filing of a reply by a defendant to an application for temporary injunction/attachment before judgment/appointment of receiver, cannot be considered as submission of a statement on the substance of the dispute as that is done to avoid an interim order being made against him.

15. Relying on the aforesaid decisions Ld. Senior Counsel submitted that the Lower Court's judgment and order impugned in this application ought to be quashed.

16. Appearing for the plaintiff No. 1/opposite party No. 1 Mr. Probal Mukherjee, Ld. Senior Counsel submitted that the arbitration clause relied upon by the petitioner has no manner of application in respect of the cause of action of the suit. He submitted that the dispute which is the subject matter of the suit arises out of violation of the building plan sanctioned by the Siliguri Jalpaiguri Development Authority and as such the said authority has been impleaded as defendant No. 3 in the suit. However, the defendant No. 3 is not a party to the alleged arbitration agreement and as such the disputes forming the subject matter of the suit cannot be referred to arbitration. Any attempt to invoke or give effect to any arbitration clause in the facts and circumstances of the case would result in bifurcation of the suit which is not permissible in law. In this connection, Mr. Mukherjee relied on a decision of the Hon"ble Supreme Court in the case of *Sukanya Holdings Pvt. Ltd. Vs. Jayesh H. Pandya and Another*, AIR 2003 SC 2252 : (2003) 2 ARBLR 43 : (2003) 3 CompLJ 68 : (2003) 2 CTC 431 : (2003) 4 JT 58 : (2003) 4 SCALE 7 : (2003) 5 SCC 531 : (2003) 44 SCL 146 : (2003) 3 SCR 558 : (2003) 2 UJ 986 : (2003) AIRSCW 2209 : (2003) 3 Supreme 324 wherein at paragraphs 15, 16 and 17 of the judgment the Hon"ble Supreme Court observed as follows:

"15. The relevant language used in S. 8 is - "in a matter which is the subject matter of an arbitration agreement." Court is required to refer the parties to arbitration. Therefore, the suit should be in respect of "a matter" which the parties have agreed to refer and which comes within the ambit of arbitration agreement. Where, however, a suit is commenced - "as to a matter" which lies outside the arbitration agreement and is also between some of the parties who are not parties to the arbitration agreement, there is no question of application of S. 8. The words "a matter" indicates entire subject matter of the suit should be subject to arbitration agreement.

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 under Section 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."

17. Mr. Mukherjee also submitted that it would appear from the tenor of the written objection filed by the defendant No. 1 in response to the injunction application of the plaintiffs before the court below that the same was a statement on merits made by the defendant No. 1. No right was reserved in the said written objection to apply under Section 8 of the Arbitration and Conciliation Act and the same was not filed without prejudice to the right of the defendant No. 1 to invoke the alleged arbitration clause. Hence, the Ld. Trial Court rightly rejected the application of the defendant No. 1 under Section 8 of the Arbitration and Conciliation Act, 1996.

18. Mr. Mukherjee further submitted that in any event Clause No. 19 of the "General Terms and Conditions" which is the purported arbitration clause is applicable only to disputes or differences relating to or arising out of or in connection with the provisional allotment (emphasis added). The disputes forming the subject matter of the suit are neither related to nor arise out of or in connection with the provisional allotment. Subsequent to the provisional allotment, a registered deed of assignment was executed by and between the parties. Such deed of assignment does not contain or refer to any arbitration clause. As such no arbitration agreement exists between the parties and the question of reference of the disputes in the suit to arbitration does not arise.

19. Relying on the aforesaid submissions Mr. Mukherjee prayed for dismissal of the present revisional application.

20. In reply Mr. Sen Ld. Senior Counsel submitted that the point that the suit is beyond the scope of the arbitration agreement inasmuch as the defendant No. 3 in the suit is not a party to the arbitration agreement, was not urged before the Court below. He submitted that in any event, a close scrutiny of the plaint will reveal that the defendant No. 3 is neither a necessary nor a proper party to the suit. The defendant No. 3 has been impleaded as a party mischievously only to by-pass the arbitration agreement. If the contention of the plaintiff is accepted,

any arbitration clause would be avoided by an interested party by adding a third party to the suit who is not a party to the arbitration clause. Such manipulation is not permissible. A perusal of the plaint will show that no relief has been claimed against the defendant No. 3. The suit is purely in respect of a dispute between the plaintiffs and the defendant No. 1. He submitted that simply because one of the parties to the suit is not a party to the arbitration agreement does not result in the arbitration agreement being rendered infructuous. In this connection, he relied on a decision of this court in the case of Biswanath Rungta Vs. Oriental Industrial Engineering Co. Pvt. Ltd. and Others, AIR 1975 Cal 222 . In the said case a suit was instituted by the company and two of its directors against another director complaining of financial irregularity on the part of that director. The Allahabad Bank was made a part defendant in the suit on the basis of the allegation that the defendant director had opened an account in the Allahabad Bank with moneys belonging to the plaintiff company and was operating such account. The defendant director applied under Section 34 of the Arbitration Act, 1940 for stay of the suit on the basis of an arbitration clause in the Articles of Association of the company which provided for resolution of disputes by and between the company and its directors through the process of arbitration. The plaintiffs resisted such application on the basis that the defendant Allahabad Bank was not a party to the arbitration agreement. It was held that the Bank was not concerned with the dispute in the suit and was not a necessary party in the suit. By impleading the Bank it could not be said that disputes have arisen which were substantial in nature involving a third party who is not a party to the arbitration agreement. Presence of Allahabad Bank thus did not debar the right of the defendant for stay of the suit under Section 34 of the Arbitration Act, 1940.

21. Mr. Sen also relied on a decision of this court in the case of Rajeev Maheshwari and Others Vs. Indu Kocher and Others, (2011) 3 CHN 680 wherein this court held that if a person who is not a party to an arbitration agreement is impleaded in an action, the judicial authority should scrutinize the basis of the claim against such person on an application under Section 8 of the 1996 Act. If the cause of action of the suitor against such party who is not a party to the arbitration agreement flows from the right of the suitor against a party to the arbitration agreement, the reference sought should not be denied. This follows from the scheme of the 1996 Act and the underlying thought behind it of giving primacy to the arbitration agreement.

22. Mr. Sen finally submitted that while dealing with Section 45 of the Arbitration and Conciliation Act, 1996, the Supreme Court has observed that in exceptional circumstances even a non-party to an arbitration agreement can be referred to arbitration, which shows the tendency of the court to uphold arbitration agreements. In this connection, Mr. Sen relied on a decision of the Supreme Court in the case of Chloro Controls (I) P. Ltd. Vs. Severn Trent Water Purification Inc. and Others, (2013) 1 ABR 563 : (2012) 4 ARBLR 1 : (2012) 111 CLA 1 : (2013) 1 CompLJ 19 : (2013) 1 CTC 418 : (2012) 10 JT 241 : (2012) 10 JT 187 :

(2012) 4 RCR(Civil) 638 : (2012) 9 SCALE 595 : (2013) 1 SCC 641 1 wherein the Hon'ble Supreme Court observed that even a non-signatory or a third party can be subjected to arbitration without his consent though it may only be in exceptional circumstances. Even parties who are not signatories to any arbitration agreement can pray for or be referred to arbitration provided they satisfy certain prerequisites e.g. when various agreements constitute a composite transaction, the court can refer disputes between signatory and non-signatory parties to arbitration.

23. I have considered the rival contentions of the parties.

24. The Ld. Court below dismissed the application under Section 8 of the Arbitration and Conciliation Act, 1996 filed by the defendant No. 1 solely on the ground that the defendant No. 1 had filed a written objection to the injunction application filed by the plaintiffs under Order 39 Rules 1 and 2 of the Code of Civil Procedure. According to the Ld. Judge by filing such written objection the defendant No. 1 had filed its first statement on the substance of the disputes and was thus precluded from maintaining an application under Section 8 of the 1996 Act. In my view, the Ld. Judge erred in doing so and this is an error which appears on the face of the record. It is now well settled that filing a written objection to contest an interlocutory application in the suit does not per se amount to filing the first statement on the substance of the disputes. If any other view is taken, a defendant who has been dragged to court by a plaintiff in breach of an arbitration agreement and is faced with an interlocutory application for injunction or appointment of receiver or the like, would be precluded from contesting such interlocutory application for the fear of losing his right to apply to the court for reference of the disputes to arbitration. This would clearly be unjust and unfair to a defendant. It often happens that a party approaches a court of law in breach of an arbitration agreement and obtains an ex parte order of injunction or appointment of receiver which has devastating effect on the business or other proprietary rights of the defendant. In such cases the defendant should be free to apply for vacating or modification of the order and to file necessary pleadings in aid thereof. By doing so, the defendant cannot be said to have given up his right to enforce the arbitration agreement.

25. Opposing a prayer for interim injunction does not attract the restriction contained in Section 8 (1) of the 1996 Act. Disclosure of a defence for the purpose of opposing a prayer for interlocutory injunction would not necessarily mean that the defendant has filed his first statement on the substance of the disputes. Waiver of a right on the part of the defendant to enforce the arbitration agreement must be gathered from the facts and circumstances in each case. Thus it cannot be said that merely by filing the written objection to the injunction application of the plaintiffs, the defendant No. 1 forfeited its right to apply under Section 8 of the 1996 Act for reference of the disputes to arbitration. Before rejecting a Section 8 application on such a ground, the judicial authority who is in seisin of a lis must come to a finding that by filing his pleading before that

authority the defendant has clearly and unambiguously waived his right to seek arbitration. There is no such finding in the order impugned in the present application. The Ld. Judge proceeded on the basis that filing of a written objection to an interlocutory application per se denudes the defendant of his right to apply under Section 8 of the 1996 Act. This is a flagrant error of law as would appear from the judicial authorities discussed above. Such error of law apparent on the face of the record, if not corrected shall cause miscarriage of justice to the petitioner. In my opinion, it would subserve the ends of justice if this court in exercise of its supervisory jurisdiction under Article 227 of the Constitution of India corrects such error of law and sends back the matter to the Ld. Court below for fresh consideration in the light of the discussion made herein.

26. Accordingly, this application succeeds. The order under challenge is set aside. The matter is remanded back to the Ld. Court below for consideration afresh. The Ld. Court below shall hear the application under Section 8 of the Arbitration and Conciliation Act, 1996 afresh and decide the same by a reasoned order in accordance with law and in the light of the discussion made in this order.

27. I make it clear that I have not entered into the merits of the other points urged by the parties before me including the point as to whether or not the Section 8 application should fail because of some of the defendants in the suit not being parties to the arbitration agreement as also the point of existence or otherwise of a valid arbitration agreement between the parties. The Ld. Court below will be at liberty to consider these points freely and decide the same in accordance with law. The entire exercise will be completed by the Ld. Court below within three months from the date of communication of this order.

28. This revisional application is accordingly disposed of.