
(1997) 08 CAL CK 0025

In the Calcutta High Court

Case No : G.A. No. 1665 of 1997 and C. Suit No. 968 of 1997

Magma Leasing Limited

APPELLANT

Vs

NEPC Micon Limited and Another

RESPONDENT

Date of Decision : 12-08-1997

Acts Referred:

Arbitration and Conciliation Act, 1996 — Section 11, 21, 8, 8(1)

Citation : AIR 1998 Cal 94

Hon'ble Judges : Sujit Kumar Sinha, J

Bench : Single Bench

Advocate : P.K. Roy, Barrister-at-Law and J. Saha, for the Appellant; Ranjan Deb, Barrister-at-Law and Arijit Banerjee, Barrister-at-Law, for the Respondent

Final Decision : Dismissed

Judgement

Sujit Kumar Sinha, J.—This is an application by the first defendant u/s 8 of the Arbitration and Conciliation Act, 1996 ("the said Act" for short) for stay of this suit and for reference to arbitration.

2. The cause of action of the plaintiff as laid in its plaint which is an annexure to the present application is stated briefly hereinafter:--

The plaintiff is a financial institution. As and by way of financial accommodation the plaintiff purchased from the first defendant its five several wind turbine generators that the said defendant had set up in village Nallurpelayam in the district of Coimbatore, Tamil Nadu ("the said generators" for short) and let the same to the said defendant on and subject to the terms and conditions contained in five several hire-purchase agreements in writing all dated 14th June, 1995 ("the said agreements" for short). The said agreements were each executed by the said defendant but not by the second defendant. Each of the said agreements is identical in terms and contains an arbitration clause to which I shall refer presently. Copies of the said agreements which are annexures to the plaint are also annexures to the present application.

3. In terms of the said agreements the first defendant executed demand promissory notes in favour of the plaintiff and the second defendant executed letters of guarantee. Simultaneously, with the execution of the aforesaid documents the first defendant also made over to the plaintiff fifty five several post-dated cheques for Rupees 11,45,883/- each covering the amounts of the agreed quarterly instalments payable under each of the said agreements. The said defendant also made over to the plaintiff eleven several postdated cheques in payment of the additional hire-charges in consequence of increase in the rate of interest aggregating Rs. 96,565/- for each quarter from 1st October, 1995 and ending 1st April, 1998.

4. It is the case of the plaintiff that the cheques issued by the first defendant in respect of the fourth, fifth, sixth and seventh instalments aggregating Rs. 2,32,07,355/- were dishonoured by non-payment and that by several letters addressed on its behalf referred to in its plaint, the plaintiff gave notice of the dishonour of the said cheques and called upon the defendants to pay the said amounts. Thereafter criminal proceedings, were initiated by the plaintiff and during their pendency the defendants made payment of the fifth instalment that had fallen due under the said agreements and thereupon the said criminal proceedings were withdrawn by the plaintiff. Other criminal proceedings in respect of the other dishonoured cheques are still pending.

5. It is the further case of the plaintiff that by reason of the aforesaid default each of the said agreements stands determined and that the plaintiff has become entitled to demand payment of all the instalments under the said agreements with interest thereon. By reason of the premises the plaintiff has become entitled to be paid by the defendants the sum of Rs. 5,00,52,810/-. The plaintiff also claims to be entitled to take possession and remove the said generators. It is stated that the first defendant by its letter dated 26th October, 1996 purported to terminate each of the said agreements on the grounds stated therein. The plaintiff denies having received the bank draft for Rs. 10 lacs alleged to have been sent under cover of letter dated 3rd October, 1996 by the said defendant, and referred to in its said letter dated 26th October, 1996. The plaintiff has also not accepted the conditional offer made by the said defendant by its said letter for delivery of the said generators to the plaintiff. The plaintiff also claims that the purported termination of the said agreements by the said defendant by its said letter is invalid, void and of no effect. It is on the aforesaid basis that the plaintiff has claimed in its suit a decree for Rs. 5,00,52,810/- together with interest as well as for possession and delivery of each of the said generators and for their sale as well as perpetual injunction restraining the defendants from obstructing or interfering with the taking of possession and removal of the said generators by the plaintiff from site.

6. It would be convenient at this stage to set out the Arbitration Clause contained in each of the said agreements which is identical in terms ("the said arbitration agreement" for short):--

"If any difference, dispute or question shall arise between the parties as to the interpretation, meaning or effect of this Agreement or as to the rights of liabilities of the parties arising hereunder or as to any other matter or things relating to this Agreement or arising out of or in connection herewith either during the continuance of this Agreement or after any termination or purported termination hereof, the same shall be referred to sole arbitration of any person appointed by Messrs. Mukherjee and Biswas, 10, Old Post Office Street, Calcutta-700001 for arbitration and the decision of the arbitrator whether on questions of law or of fact, shall be final and binding on the parties. The venue of arbitration shall be Calcutta. Time for making a reference to arbitration is within six months of the arising of a dispute regarding any matter arising out of this contract. Provided, however, that if the Company apprehends that the Hirer may alienate or charge or dispose of the Hired Article or may cause to the Hired Article, the Company is at liberty to seek redress in a court of law, straightaway, without resort to arbitration proceedings in the first instance."

7. The said arbitration agreement is relied upon by the first defendant in making the present application. It is stated in the petition of the said defendant (in paragraph 12) as follows :--

"In any event your petitioner has a bona fide claim against the plaintiff in relation to the aforesaid five Arbitration Agreements to enforce which your petitioner has filed the suit No. 333 of 1996 (NEPC MICON Ltd. v. Magma Leasing Ltd.) in this Hon"ble Court in which your petitioner has claimed, inter alia, a decree for Rupees 3,21,00,000/-."

8. It appears from the affidavit-in-opposition filed on behalf of the plaintiff that on 26th March, 1997, the petitioner filed Civil Suit No. 156 of 1997 in the High Court of Judicature at Madras inter alia for a declaration that the plaintiff is not entitled to claim any amounts under its post-dated cheques and for perpetual injunction and other reliefs. On the interlocutory application filed in its suit the learned interlocutory Judge of that Court has passed an ad interim order of injunction restraining the plaintiff from presenting the said post-dated cheques until further orders. Copies of the plaint and of the ex parte ad interim orders are annexures to the said affidavit-in-opposition. It further appears from the said affidavit-in-opposition of the plaintiff that the first defendant has sold the said generators to the third party.

9. It is thus clear that the first defendant has by instituting its aforesaid suits in respect of the said agreements in this Court as well as in the Madras High Court given a complete go-bye to the said arbitration agreement. It follows therefore that the said defendant is precluded from invoking the said arbitration agreement and from maintaining the present application. It is often slated that a party can blow hot and hotter but he is not entitled to blow hot and cold as the first defendant is now seeking to do.

10. It is necessary at this stage to examine the provisions of Section 8 of the

said Act under which the present application of the first defendant is laid. The provisions of the said section in so far as they are material are set out hereunder :--

"(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) xxxxxxxx "

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

11. The "party" referred to in Section 8(1) to my mind is a party who is entitled to maintain the application thereunder. The party to the arbitration agreement who has himself instituted a suit is clearly not the "party" envisaged. The first defendant although a party to the said arbitration, agreement has elected to institute the aforesaid suits in enforcement of its rights and as such it cannot be said to be a "party" within the meaning of that Sub-section. It was submitted by the learned Counsel on behalf of the said defendant that the said defendant was not aware of its right to enforce the said arbitration agreement when it instituted the aforesaid suits in this Court and in the Madras High Court. I am not impressed by the said submission. By reason of its conduct in instituting the aforesaid suits the first defendant is estopped from maintaining the present application.

12. The phrase "not later than when submitting his first statement on the substance of the dispute" does not appear to me to refer to the aforesaid suits instituted by the first defendant as was contended by the learned Counsel on behalf of the plaintiff. The submission of the substance of the dispute by the party seeking to invoke the arbitration agreement takes place when such party requests for the dispute to be referred to arbitration in terms of Section 21 of the said Act or when u/s 11 of the said Act, he applies for the appointment of an arbitrator. The said construction of the said phrase appears to me to be consistent with the phrase "an arbitration may be commenced or continued" occurring in Section 8(3). If one were to accept the said submission of the learned Counsel then one would have to read into that phrase words to the effect that the submission of the substance of the dispute is made to any other judicial authority which is not permissible.

13. Some support was sought to be derived by the learned Counsel for the first defendant from the provisions of the Foreign Awards (Recognition and Enforcement) Act, 1961 and in particular Section 3 thereof and various cases were cited under that Act. Section 3 of that Act is not in pari materia with the said Section 8 of the said Act and as such it is not necessary to notice any of the said cases.

14. In a codifying statute the proper method of interpreting such a statute is as laid down by Lord Herschell in the case of "Bank of England v. Vegliano Bros" (1891) AC 107 at pp. 144-5 :--

"I think the proper course is in the first instance to examine the language of the statute and to ask what is its natural meaning, uninfluenced by any considerations derived from the previous state of the law, and not to start with inquiring how the law previously stood, and then, assuming that it was probably intended to leave it unaltered, to see if the words of the enactment will bear an interpretation in conformity with this view.

If a statute, intended to embody in a code a particular branch of the law, is to be treated in this fashion, it appears to me that its utility will be almost entirely destroyed, and the very object with which it was enacted will be frustrated. The purpose of such a statute surely was that on any point specifically dealt with by it, the law should be ascertained by interpreting the language used instead of, as before, by roaming over a vast number of authorities in order to discover what the law was, extracting it by a minute critical examination of the prior decisions."

The aforesaid observations of Lord Herschell apply with equal force to the said Act, which is a consolidating and amending Act.

15. There is another reason why the present application should fail.

16. The said arbitration agreement expressly provides that recourse thereto can only be had if reference is made "within six months of the arising of a dispute". This suit was instituted for recovery of amounts due and payable by the defendants on account of the 4th, 6th and 7th instalments under the said agreements for which post-dated cheques had been issued by the first defendant and which have all been dishonoured by non-payment. Such dishonour took place long prior to 29th April, 1997 when the present application was made. If any dispute with regard to the said cheques is said to have arisen the same is clearly beyond the six months period envisaged by the said arbitration agreement. It was however submitted by the learned Counsel appearing on behalf of the first defendant that the present application has been made within six months after the conditional offer made by the said defendant for return of the said generators had been rejected by the plaintiff. At best the said conditional offer can be said to be an attempt on the part of the first defendant to resolve the disputes between it and the plaintiff and the same cannot by any stretch of imagination be considered as a dispute within the meaning of the said arbitration agreement. Further the said arbitration agreement by its term does not apply to a situation such as the present where there is an apprehension on the part of the plaintiff that the first defendant "may alienate or charge or dispose of the hired article (the said generator)..." In such a situation the plaintiff which is referred to as the "company" in the said arbitration agreement is entitled to institute appropriate proceeding such as this suit "without resort to arbitration proceedings in the first instance."

17. It was further submitted by the learned Counsel for the plaintiff that there is no dispute between it and the first defendant. The learned Counsel appears to me to be on firmer ground having regard to the averments made in the suit instituted by the first defendant in the Madras High Court.

18. It was also submitted by the learned Counsel for the plaintiff that the said arbitration agreement is not signed by the second defendant who is the guarantor. However, the liabilities of the principal debtor and guarantor are joint and several and it would have been open to the first defendant to invoke the said arbitration agreement if it was otherwise entitled to do so.

19. There was another ground urged by the learned Counsel for the plaintiff which is that fraud has been alleged by the plaintiff against the first and second defendants. However, the said allegation which has been made by the plaintiff in its affidavit-in-opposition does not find place in its plaint filed in this suit. Therefore, the said ground of fraud in my opinion cannot be urged by the plaintiff as a defence to the present application. It is not necessary therefore to consider the cases cited by the learned Counsel for the first defendant in this regard. In this context it may be of interest to refer to the observations of the learned Master of Rolls Sir George Jessel in the case of "Russell v. Russell": Law Reports (1880) 14 Ch D 471 at pp. 476-7 :--

"I now come to the first ground, where personal fraud is in issue. Though I quite agree it is within the discretion of the Court to say, where one of the two partners desires it, that a dispute shall not be aforesaid to arbitration, yet I must consider for a moment which of the two partners does desire to exclude arbitration. Does the party charging the fraud desire it, or the party charged with the fraud desire it? Where the party charged with the fraud desires it, I can perfectly understand the Court saying, "I will not refer your character against your will to a private arbitrator". It seems to me in that case it is almost a matter of course to refuse the reference, but I by no means think the same consideration follows when the publicity is desired by the person charging the fraud. His character is not at stake, and the other side may say, "The very object that I have in desiring the arbitration is that the matter shall not become public. It is very easy for you to trump up a charge of fraud against me, and damage my character, by an investigation in public." There is a very old and familiar proverb about throwing plenty of mud, which applies very much to these charges made by members of the same family, or members of the same partnership, against one another in public. It must be an injury, as a rule, to the person charged with fraud to have it published, and I must say that I am by no means satisfied that the mere desire of the person charging the fraud is sufficient reason for the Court refusing to send the case to arbitration."

The aforesaid observations of the learned Master of Rolls has been followed and applied by our Courts including the Supreme Court.

20. At the conclusion of hearing the learned Counsel filed their respective Notes

of Argument and Supplementary Notes of Argument and they have been directed to be kept on records.

21. For the foregoing reasons, this application must fail and the same is accordingly dismissed.

22. There will however be no order as to costs.