(2014) 10 MAD CK 0247

In the Madras High Court

Case No : O.S.A. No. 244 of 2014 and M.P. No. 1 of 2014

MMTC Ltd. APPELLANT

Vs

Shiv Sahai and Sons RESPONDENT

Date of Decision : 28-10-2014

Acts Referred:

Arbitration and Conciliation Act, 1996 — Section 7, 8

Citation : (2015) 2 ARBLR 54 : (2014) 5 LW 722

Hon'ble Judges : Sanjay Kishan Kaul, C.J;M. Sathyanarayanan, J

Bench : Division Bench

Judgement

Sanjay Kishan Kaul, C.J.—The appellant filed the suit on the original side of this Court against the present two respondents and one V.Gurumurthy seeking recovery of a sum of Rs.170,69,37,775/-, which includes principal and interest, calculated at 18% p.a., along with future interest.

2. The basis for the plaint is the transaction inter se the appellant and the respondents under the arrangement for import of Bullion administered by the Department of Commerce. The appellant imports Bullion from its various foreign suppliers on consignment basis and sells them to local customers at various places, under different schemes. These schemes are : a) Outright purchase scheme; b) Buyers'' Credit Scheme; and c) Usance Letter of Credit and Stand By Letter of Credit Scheme.

3. Learned Senior Counsel for the appellant submits that the transactions in question are solely under the Buyers'' Credit Scheme, though the learned senior counsel for the respondents seeks to state that they also include Outright Purchase Scheme.

4. A perusal of the plaint shows that in para 8, there is a categorical averment that a request was made by the first respondent/ first defendant for commencement of purchase of Bullion under Buyers'' Credit Scheme and on that basis, goods were sold on the understanding that all expenses and losses in

respect of transactions will be on the account of the first respondent. These transactions took place from the period 01.04.2007 to 31.12.2012. The plaint also alleges that the third defendant (not a party in this appeal), an employee of the appellant, was looking after the books of accounts during the period 01.04.2007 to 30.11.2010.

5. The appellant further alleges that the first respondent, on 18.06.2008, accepted that there was an increase in their liability towards payment for the bullions purchased and gave an undertaking to cover the foreign exchange fluctuations for the current transaction, but, despite the assurance, started delaying the foreign exchange cover, with the expectation that the Dollar rate would move to their advantage. This is stated to have caused loss, which was borne by the appellant on account of foreign exchange fluctuations.

6. The allegation against the third defendant is that as G.M. (F&A), he confirmed that the debit balances in the account of the first defendant have been cleared by passing correct / relevant entries in the accounting software system maintained by the appellant and thus, recommended that the pending request be cleared for bullion transaction. This business of the first defendant was taken over by the second defendant in September / October, 2008.

7. Pursuant to reconciliations, a sum of Rs.33.49 crores was ultimately issued as refunds to the first two defendants / respondents, the details of which have been set out in the plaint and these amounts were so remitted without deducting amounts payable to the appellant on account of foreign exchange loss when no cover was taken, debit of interest payable on the loan against fixed deposits, etc. Thus, the third defendant is sought to be blamed for the same, who, incidentally retired on 30.11.2010.

8. Some discrepancies in transactions are stated to have been detected by the Special Audit, post an internal audit. This Special Audit report was submitted by the Chartered Accountants. It is in view thereof that the appellant alleges fraud having been practised on the appellant.

9. It would be relevant to note that in para 29 of the plaint, this fraud is alleged to have been practised especially in regard to overstated fixed deposits in Union Bank of India. On a subsequent query, the Union Bank of India informed the appellant that the statement issued by the Officer showing deposits held by the appellant as on 31.03.2009, was overstated by Rs.40.37 crores. Surprisingly, Union Bank of India sought to wash its hands off by saying that it is the third defendant who approached the branch and pressed for confirmation on urgent basis and the branch-head had made a random verification of deposits in the core banking system and gave confirmation of list prepared by the appellant ! The further allegation is that the third defendant sought to prevent detection / discovery of amounts due from the first respondent by the fraudulent certificate obtained from the Union Bank of India.

10. The aforesaid transactions have given rise to investigations by the C.B.I. and

learned Senior Counsel for the appellant, on instructions, states that even charge sheet has now been filed, post completion of investigation.

11. In the suit proceedings, the third defendant sought to bring his written statement on record albeit belatedly and suffice to note his defence in substance, whereby it was alleged that the transaction was not and could not have been handled solely by the third defendant. The relevant portion of the application seeking condonation of delay in filing the written statement is extracted as under:

" I further submit that the plaintiff MMTC is one of the nominated agents for importion bullion and supply to registered customers on demand by addressing a letter to G.M. (Marketing Division) for supply of certain quantity of bullion and there after MMTC will direct the customer to pay the value of Bullion based on notional exchange rate along with commission of MMTC. The customer will transfer 110% of the value and handed over the cheque to General Manager (Commodity) in turn will hand over to Accounts along with a covering letter for each transaction. The General Manager (Accounts) confirm the receipt of the amount and inform G.M. (Commodity) who in turn inform the Recognized forwarding agency who will deliver the goods after taking acknowledgement. Thus from the established procedure there cannot be any deviation of taking any individual decisions by D-3 and D-3 is only Deputy General Manager (F & A) and one of the officers of MMTC. At the first instance the customer will place the intent only to marketing section and the marketing section in turn inform how much amount to be collected. Only on the basis of advice from the marketing section about the payment and thereafter the marketing section inform the delivery of goods."

12. Insofar as the first two respondents are concerned, they moved an application under Section 8 of the Arbitration and Conciliation Act, 1996, alleging arbitration agreement inter se the parties in the Memorandum signed by the parties. The Memorandum of Understanding dated 02.04.2008 contains clause 11 as under:

"11.Any dispute or difference whatsoever arising between the ''Seller'' and ''Customer'' out of or relating to the construction, meaning, scope, operation or effect of this sale purchase agreement or the validity or the breach thereof shall be settled through arbitration in accordance with Rules of Arbitration of the Indian Council of Arbitration and the Award made in pursuance thereof shall be binding on the parties. The venue of arbitration shall be Chennai."

13. In view of the aforesaid clause, it was pleaded that the dispute between the parties is one of accounting and the appellant should not be permitted to wriggle out of the mode of resolution of disputes by arbitration.

14. The stand of the first two defendants / respondents herein found favour with the learned Single Judge as per the impugned judgment and decree dated 30.06.2014, which is sought to be assailed in the present appeal.

15. We have heard learned Senior Counsel for the appellant at length.

16. There is really no dispute about the existence of arbitration clause. If one may say, there is a dual plea raised by the appellant: a) that in view of the allegations of fraud, which are really serious in nature and the chargesheet having been filed, this is an appropriate case where trial should take place before the Civil Court; and b) the third defendant becomes necessary to the proceedings, who is not a party to the arbitration clause and the allegations of fraud are not only against the third defendant, but also against the first two defendants / respondents.

17. In order to appreciate the aforesaid pleas, we also consider it appropriate to refer to some of the inter se correspondence exchanged between the counsels for the appellant on one hand and the first two defendants / respondents on the other hand. The first communication dated 17.01.2013 is by the Advocates for the appellant proposing an ad hoc arbitration before a Single Arbitrator not being acceptable to them as proposed by the first two respondents and stating that the Memorandum of Understanding dated 02.04.2008 would govern the same and thus, the matter be referred to arbitration under ICA Rules with three Arbitrators with the seat of arbitration being at Chennai. This proposal was, in fact, accepted by the Advocates for the first two defendants / respondents vide their communications dated 29.01.2013 and 31.01.2013, subject to certain clarifications. Thereafter, on 04.02.2013, the Advocates for the appellant sought certain clarifications and conveyed their consent to the arbitration under ICA Rules with three-member Arbitral Tribunal with the seat at Chennai. The Indian Council for Arbitration also issued communications to the appellant, including letter dated 05.02.2013 asking for share of costs and expenses, which had already been deposited by the first two defendants / respondents. The first two defendants / respondents vide their Advocates'' letter dated 06.02.2013 reiterated the agreement to refer all disputes and differences arising between the parties including transaction relating to bullion business to arbitration.

18. It is for the first time on 18.02.2013 that the Advocates for the appellant took a complete ''U'' turn and stated that the arbitration under ICA Rules is without their client''s consent and without any arbitration agreement, as provided for under Section 7 of the Arbitration and Conciliation Act !

19. We find it quite surprising, if not shocking, that a public sector enterprise should do such ''U'' turn and that too, on a simple issue as to the forum before which the disputes ought to be settled. This is the background in which the suit has come to be filed.

20. Insofar as the two pleas raised by the learned Senior Counsel for the appellant is concerned, the findings of the learned Single Judge are that the allegations of fraud are really against the third defendant and not the first two defendants / respondents. In this behalf, certain averments in the plaint have been referred to in the grounds of appeal to contend that there are allegations of

fraud even against the first two defendants / respondents.

21. On a perusal of the plaint, we find no infirmity in the findings of the learned Single Judge. A plaint is not to be read like a statute. The plaint has to be read as a whole. The allegation is really against their employee and in accounting dispute inter se the parties, and by impleading the third defendant, the appellant cannot be permitted to defeat the arbitration clause. At request of learned Senior Counsel for the appellant, we do clarify that naturally what has been observed by the learned Single Judge is for purposes of deciding the application under Section 8 of the said Act and would not, in any case, affect the merits of controversy before the Arbitral Tribunal.

22. Insofar as the aspect of arbitration not being an appropriate remedy on account of allegation of fraud and the criminal case being filed is concerned, learned Senior Counsel for the appellant fairly states that there is a subsequent development in the hiatus period between the judgment being reserved and it being pronounced - the judgment of the learned Single Judge of the Hon''ble Supreme Court in Swiss Timing Limited Vs. Organising Committee, Commonwealth Games 2010, . It has been held that it is mandatory for the Courts to refer disputes to arbitration if the agreement between the parties provides for a reference to arbitration, and the registering of a criminal case in relation to agreement concerned on grounds of fraud, corruption and collusion against certain members of both parties is not an absolute bar to refer disputes to arbitration. It goes on to state that even stalling of arbitration proceedings till the disposal of criminal proceedings was not warranted and further more, the Arbitrator can decide the allegations of fraud in obtaining of the contract.

23. The plea of the learned Senior Counsel for the appellant is that while taking note of its earlier judgment in N. Radhakrishnan Vs. Maestro Engineers and Others, , the views expressed therein could not have been said to be obiter dicta. He, in fact, submits that the consequences of a plea of fraud was initially examined in the judgment of the Supreme Court in Abdul Kadir Shamsuddin Bubere Vs. Madhav Prabhakar Oak, . He submits that this judgment has not been referred to in Swiss Timing Ltd. case, supra. He, however, concedes that Adbul Kadir Shamsudding Bubere''s case, supra, has been referred to in N.Radhakrishnan''s case, supra, which, in turn, has been referred to in the judgment of Swiss Timings Ltd. case, supra. Learned Senior Counsel does concede that the judgment in Swiss Timings Ltd. case, supra, stand in his way and thus, seeks to persuade us to take a contrary view based on the earlier judgments in Abdul Kadir Shamsuddin Bubere''s case, supra and N.Radhakrishnan''s case, supra.

24. We are afraid that such a course would not be permissible in the judicial discipline of hierarchy of Courts. It is not as if that the subsequent judgment in Swiss Timings Ltd. case, supra, did not consider the earlier judgments or they were not brought to the notice. It has analysed the earlier judgments albeit of larger benches and come to a conclusion over the legal position, as even

emanating from those judgments. Thus, it is not for us to comment on the correctness or otherwise of the judgment in Swiss Timings Ltd. case, supra, which would govern the issue sought to be urged before us by the learned Senior Counsel for the appellant.

25. We are, thus, of the view that mere allegation of fraud against the third respondent, with some splatterings of allegations against the first two defendants / respondents, would not result in the case being made unfit for adjudication before the agreed mode of Arbitral Tribunal. In fact, even the appellant understood it in the same way, till suddenly the ''U'' turn arose, as noticed by us aforesaid.

26. In view of the aforesaid, the appeal is meritless and is accordingly, dismissed, leaving the parties to bear their own costs.

Consequently, M.P.No. 1 of 2014 also stands dismissed.

