
(2000) 11 DEL CK 0073

In the Delhi High Court

Case No : I.A. 5115/98 and 10358 and 11745/99 and S. No. 1162/98

MMTC Ltd.

APPELLANT

Vs

Shyam Singh Chaudhary and Others

RESPONDENT

Date of Decision : 21-11-2000

Acts Referred:

Arbitration and Conciliation Act, 1996 — Section 34, 8

Citation : (2000) 11 DEL CK 0073

Hon'ble Judges : Vikramajit Sen, J

Bench : Single Bench

Advocate : Rajiv Nayyar and Ajay Kumar Dutta, for the Appellant; Anurag Kr. Aggarwal, for the Respondent

Judgement

Vikramajit Sen, J.

I.A. 11745/98.

1. This order will dispose of the Defendant's application u/s 8 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as "the Act"), read with Section 151 of the Code of Civil Procedure. The plaintiff has already initiated arbitration for the recovery of its dues from the Company (Defendant No. 4). It has filed the present suit for recovery against the Guarantors as well as the Company (Defendant No. 4), predicated it on a Guarantee Bond.

2. It is contended by learned counsel for the Defendants that, on 15.9.1995, two agreements were executed between the parties. The first is the "Associateship Agreement", the significant contents of which are that the Applicants/Defendants had to submit personal bonds of the Promoter Directors in respect of the loan to be taken from the plaintiff (Clause 2) and that they had consented to Arbitration (Clause 19). The second document executed on the same date was the Bond of Guarantee, the salient covenants of which are that in the event of a default in payment of the principal, interest and other monies due to the plaintiff, the Guarantors will pay the whole of such amount (Clause 1); and that all legal

proceedings arising out of or under the said Guarantee shall be subject to the jurisdiction of the High Court of Delhi (Clause 18). The Guarantee also contains a recital to the effect that the Deed was intended to supplement the Loan Agreement (presumably the "Associateship Agreement" as no objection has been raised on this score). Both Agreements have been signed by the Promoter Directors (Defendants 1 to 3) of the Company (Defendant No. 4).

3. The contention of learned counsel for the Applicants/Defendants is that the suit is not maintainable in view of the existence of the Arbitration Clause, invoked previously. In terms thereof the parties have been referred to the Sole Arbitration of Mr. Justice P.K. Bahri (Retd.) by Orders dated 29.10.1998 passed in AA 244/97. It has been clarified by the learned counsel for the parties that only Defendant No. 4 and the plaintiff are adversaries in those proceedings. On my specific query to learned counsel for the Defendants/Applicants as to whether Defendants 1 to 3 are also necessary parties and ought to join in the Arbitration Proceedings it has been so contended by him. This is independently clear from the fact that it has been prayed in the application that if any disputes still remain, the parties be referred to the pending arbitrations. Learned counsel for the Applicants/Defendants has relied on M/s. Chand Chits and Finance (P) Ltd. Vs. M/s. Super Advertisers and others, .

4. The contention of the learned counsel for the plaintiff is that two separate Agreements had been executed between the parties. The plaintiff was fully entitled to file the present suit by proceeding under the Deed of Guarantee and that this was further clarified by the terms contained in Clause 18. It was vehemently argued that the First Agreement, which contains the Arbitration Clause, is between the plaintiff and Defendant No. 4 only and, Therefore, there is no Arbitration Clause between the plaintiff and Defendants 1 to 3. It is further argued that the present application is not maintainable in view of the clear provisions of Section 8 of the Act.

5. I am unable to agree with the contentions put forward by learned counsel for the plaintiff. It would be reading far too much into Clause 18 to construe it as indicating anything more than that the parties had agreed only to the jurisdiction of the High Court of Delhi. The clause only confines territoriality to Delhi, and no more. The Clause does not even faintly indicate that the compact between the parties was that the Arbitration Clause would not apply in respect of the enforcement of any rights emanating from or predicated upon the Bond of Guarantee. The fact that there is a recital that the Bond of Guarantee was intended to be a supplement to the other Agreement must be allowed to have its natural application viz. that both the Deeds were intrinsically and integrally intertwined. This view is supported by Clause 2 of the First Agreement which enjoins the Defendants to provide security by way of personal bonds of the Promoter Directors in respect of the loan to be taken from the plaintiff. A perusal of the Bond of Guarantee clarifies that Defendants 1 to 3, as Directors of Defendant No. 4 Company, had executed the Bond of Guarantee. It is a well

established principle of law, admitting of no exceptions, that the simultaneous continuance of two independent legal proceedings on the same subject matter must be assiduously avoided. Not only does this expose the parties to multiplicity of proceedings but, even more importantly, it creates the possibility of a piquant situation where there may be diametrically conflicting decisions on the same matter by two jural entities of competent jurisdiction. As has already been mentioned, the disputes inter se the plaintiff and Defendant, No. 4, who is the principal debtor, is already pending adjudication before Mr. Justice P.K. Bahri (Retd.). I am informed that the plaintiff has preferred a claim of approximately Rs. 2 crores (which is also the claim filed before this Court), and Defendant No. 4 has filed a Counter Claim of approximately Rs. 3 crores. Furthermore, it has been clarified by the Hon"ble Supreme Court that it is not mandatory for the creditor to attempt recoveries firstly against the principal debtor and only thereafter from the guarantors. The creditor is free to proceed against both these parties simultaneously, and is in fact mandated so to do. A selection between the debtors is to be eschewed. Courts have, however, on equitable grounds only, sought to grant relief to the guarantors where it is evident that the creditor is proceeding against the guarantors in a manner which shows collusion, connivance or preferential treatment towards the principal debtor.

6. Mr. Rajiv Nayyar, learned senior counsel for the plaintiff has relied on the decision rendered in State Bank of India Vs. Messrs. Indexport Registered and others, , to buttress his argument that the plaintiff is entitled in law to continue arbitration proceedings against one Defendant and a suit for recovery of the same amount against other Defendants. It is at once evident that this authority contemplates execution proceedings. It is in this context that the Apex Court observed that the Defendant cannot be forced to first exhaust the remedy by way of the execution of the mortgage decree alone and then proceed against the guarantor. There must be unity or commonality in the proceedings against all the Defendants.

7. This principle, however, does not permit or authorise the filing of separate legal actions against or after arbitral proceedings have been initiated against the principal debtor only, the filing of a civil suit for recovery of the same amounts from the principal debtor and the guarantors. The attempt to file a separate recovery suit against them appears undoubtedly to be sequel to the fact that Defendant No. 4/prin-cipal debtor has been registered as a sick industrial company by BIFR. Understandably, apprehending a possibility of not being able to make recoveries against Defendant No. 4, the plaintiff has filed the present suit for recovery against the Guarantors, namely, Defendants 1 to 3 also.

8. The position of the plaintiff appears to be even worse confounded by the decision of the Hon"ble Supreme Court in M/S Patheja Bros. Forgings and Stamping and Another Vs. I.C.I.C.I. Ltd. and Others, , wherein it has been held that Section 22 of the Sick Industrial Companies (Special Provisions) Act, 1985 (hereinafter referred to as "SICA") prohibits a suit for enforcement of the

guarantees in respect of loans granted to such company, unless the consent as required by Section 22 of SICA is first obtained. Apart from other considerations which have prevailed on me to hold that the suit is not maintainable, the observations contained in this case make the position of the plaintiff wholly indefensible. Learned counsel for the plaintiff had argued that it is not clear whether registration has been accorded to Defendant No. 4 u/s 22(1) of SICA. Learned counsel for the Applicants/Defendants has relied on a decision of the Supreme Court in M/s. Rishabh Agro Industries Ltd. Vs. P.N.B. Capital Services Ltd., , in which the plaintiff has been noticed as having been so registered. A perusal of the Written Arguments filed on behalf of plaintiff further clarifies that this contention has lost all force because of the reversal of the decision of the Division Bench of the High Court of Punjab & Haryana by the aforementioned decision of the Hon"ble Supreme Court.

9. In order to answer the remaining question, that is, whether the Applicants have the right to invoke Section 8 of the Act, it would be necessary to appreciate the differences in the provisions of the Act and the Section 34 of the Arbitration Act, 1940. Section 8 of the Arbitration and Conciliation Act, 1996 and Section 34 of the Arbitration Act, 1940 read as follows:

"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."

"34. Power to stay legal proceedings where there is an arbitration agreement.--

Where any party to an arbitration agreement or any person claiming under him commences any legal proceedings against any other party to the agreement or any person claiming under him in respect of any matter agreed to be referred, any party to such legal proceedings may at any time before filing a written statement or taking any other steps in the proceedings, apply to the judicial authority before which the proceedings are pending to stay the proceedings; and if satisfied that there is no sufficient reason why the matter should not be referred in accordance with the arbitration agreement and that the applicant was, at the time when the proceedings were commenced, and still remains, ready and willing to do all things necessary to the proper conduct of the arbitration, such authority may make an order staying the proceedings."

10. A perusal of these provisions will immediately highlight, inter alia, the

following disparities and changes, (i) u/s 34 discretion to refer the parties to arbitration was saved to the Court; now it is mandatory. Although Courts have sometimes interpreted the auxiliary verbs "may" to be mandatory in the syntax of a particular enactment, and "shall" only to be mildly directional, where there has been a deliberate departure from "may" to "shall", I would consider it to be mandatory, (ii) The earlier enactment merely called for a stay of proceedings, whereas the later provisions prescribes that the parties should be referred to arbitration, if not rendering the suit not maintainable, atleast thereby bringing the proceedings before the judicial authority to its culmination, (iii) The 1940 Act contemplated an invocation by as well as against a party to an arbitration agreement or any person claiming under him. The 1996 Act by referring to the legal action in a matter which is the subject of any arbitration agreement, shifts the focus from the parties to the "matter" to the "matter" itself. The ambit of Section 8 is clearly much wider than of Section 34. This appears to me to be a natural jurisprudential progression from the period when arbitration as a mode of the disposal of disputes was at its nascent stages, to the present time, when arbitration is well established as an effective alternate system, conceptually quicker and cheaper than the jural establishment. There is a conscious shift from the Courts to the Arbitral Tribunals. These are not the only differences between the two Acts. I do not feel the necessity to adumbrate others since they may not be relevant to the facts and issues of the present case.

11. It is not in dispute that the Arbitration Clause exists between the plaintiff and Defendant No. 4. This being the position the present suit is manifestly not maintainable because the Company, which is Defendant No. 4, has signed the Agreement containing the Arbitration Clause and is engaged in the ongoing arbitration. As against this Defendant, it cannot be subjected to different proceedings in respect of the same cause of action and/or relief. Even if this fact is ignored, I am satisfied that an Arbitration Clause exists even between the plaintiff and Defendants 1 to 3 who are Directors of Defendant No. 4 and have simultaneously signed both the Agreements. The fact that they had signed the Bond of Guarantee as Directors of Defendant No. 4, and not in any other capacity, cannot also be lost sight of. In this respect I am supported by the opinion expressed by P.N. Nag, J. in *M/s. Chand Chits* case (*supra*). From a reading of the decision it appears that the principal debtor in that case had not signed the Agreement of Guarantee. Even in those circumstances the principal debtor was held to have been bound by the terms of the Guarantee which contained the Arbitration Clause. Learned counsel for the plaintiff had submitted that in the present case there was a bipartite agreement. Even if this is so it would not make the slightest difference. The present case is on a much firmer footing since there is no refusal or absence of the signatures of Defendants 1 to 3 on the first agreement containing the Arbitration Clause. The two contracts are intrinsically intertwined with each other. Accordingly, it is my view that an Arbitration Clause exists between all the parties. Even otherwise, since the matter in dispute is the same, the Clause can be relied upon even by persons

who are not privy to it. This appears to be the intendment of Section 8.

12. The matter before the Court is the plaintiffs claim for recovery of an amount of money from the Defendants. The money was advanced to the Company (Defendant No. 4) and as contemplated by the Agreements, covered by Collateral in the nature of Personal Bonds. Even if it be assumed that Defendants 1 to 3, the Guarantors, are not a party to the Arbitration Agreement, Defendant No. 4, the principal borrower, certainly is. The matter, in contradistinction to the parties, is the subject of an Arbitration Agreement. As I perceive it, the Legislature could have employed the words "in a matter in which the parties have entered into an arbitration agreement" in place of the words "in a matter which is the subject of an arbitration agreement". The whole dispute is what is contemplated by the Section, and not the narrower concept of the parties to the disputes. Learned counsel has not shown any decision which interprets this Section to the confines of the parties to the litigation. A holistic interpretation, calculated to carry out complete adjudication, should be preferred to compartmentalization and splinterization of disputes. The contention that Section 8 is not applicable is Therefore rejected.

13. In this analysis, the application is allowed. The parties are referred to the pending Arbitration before Mr. Justice P.K. Bahri (Retd.). The plaintiff may seek the impleadment of Defendants 1 to 3 in these proceedings and they shall not be heard to object to such impleadment.

I A. 5115/98

This is an application under Order XXXIX Rules 1 and 2 read with Section 151 of the Code of Civil Procedure. I have already held that the present suit is not maintainable because of the existence of an Arbitration clause on the matter in dispute. An application u/s 8 of the Arbitration and Conciliation Act, 1996 has been allowed. On 3.6.1998 the Defendants had been restrained from selling, alienating, disposing of and transferring or parting with the possession of the properties in the name of Defendants as mentioned in paragraphs 4(a) to 4(d) of the application, either by themselves or through their agents, attorneys, servants etc. Defendants 1 to 3 are not parties in the pending arbitration of the claims of the plaintiff as well as Defendant No. 4, before Mr. Justice P.K. Bahri (Retd). The interim orders shall remain in force for a period of three months. In this period the plaintiff may seek this protection from the learned Arbitrator.

With the above observations the application is disposed of. I.A. 10358/99.

This is an application under Order xxxvIII Rule 1 read with Order XXXIX Rules 1 and 2 read with Section 151 of the Code of Civil Procedure. The Defendants have already been restrained from dealing with their properties. I am not satisfied that sufficient cause has been shown as would justify the issuance of Warrants of Arrest against Defendant No. 1 and/or directing the seizure of his passport. The plaintiffs already have the security of immovable properties in respect of which restraint orders have already been passed. The application is without merit and is

dismissed. The plaintiff, however, may approach the learned Arbitrator in case fresh circumstances transpire as would justify this relief in the future.

Suit No. 1162/98.

The parties have been referred to Arbitration. The suit is rendered infructuous and is dismissed as such. There shall be no order as to costs.