

(2013) 11 MAD CK 0265

In the Madras High Court

Case No : C.R.P. (PD). No. 2543 of 2013 and M.P. No. 1 of 2013

M/s. H.J. Hansen Recycling Industry Ltd.

APPELLANT

Vs

M/s. Shree Ganesh Steel Rolling Mills Pvt. Ltd. and Others

RESPONDENT

Date of Decision : 29-11-2013

Acts Referred:

Citation : (2014) 1 LW 811

Hon'ble Judges : S. Tamilvanan, J

Bench : Single Bench

Final Decision : Allowed

Judgement

S. Tamilvanan, J.—This Civil Revision has been preferred under Article 227 of the Constitution of India, challenging the order, dated 20.02.2013 made in O.S. No. 3905 of 2011 on the file of the V Assistant Judge, City Civil Court, Chennai. The petitioner herein is the first defendant in the suit and the suit was filed by the first respondent/plaintiff, against the petitioner and the other respondents herein, seeking Judgment and Decree (a) declaring that the reference for arbitration by the second defendant at the behest of the first defendant vide Ref. No. 17224/JHN, appointing the third defendant as arbitrator is illegal, unlawful, ab initio, null and void and not binding on the plaintiff (b) for consequential declaration that the third defendant is not empowered to proceed with the claim petition filed by the first defendant as it is illegal, ab initio, null and void.

2. In the aforesaid suit, I.A. No. 7604 of 2011 was filed by the first respondent/plaintiff under Order 39 Rule 1 and 2 CPC, seeking interim injunction restraining the respondents/defendants therein, their men, servants, agents from in any manner proceeding with the arbitration proceeding initiated at the behest of the first respondent in pursuance of the reference made by the second respondent, appointing the third respondent as arbitrator, vide Ref. No. 17224/JHN.

3. It is seen from the certified copy of the docket order, that on 20.02.2013, the petition was closed by the Court below, since the suit was dismissed, however, at

about 4.30 p.m., on the same day, another docket order came to be passed by the Court below, which reads thus:

Dismissal order in suit is set aside, hence, restored. For fresh notice to R2 to R7 and counter by 25.02.2013.

4. It is seen that the Interlocutory Application in I.A. No. 14191 of 2011 was filed in the earlier I.A. No. 7604 of 2011 in the suit u/s 8 of Arbitration and Conciliation Act, 1996 by the petitioner herein, seeking an order to refer the dispute pertaining to the suit in O.S. No. 3905 of 2011 pending before the Court below for Arbitration, in terms of Section 8 read with Section 5 of Arbitration and Conciliation Act, 1996 and by order, dated 20.02.2013, the said Application was dismissed. However, at about 4.30 p.m., another docket order was passed by the Court below as follows:

Dismissal order in suit is set aside. Hence restored for Enquiry by 25.02.2013.

The aforesaid order, dated 20.02.2013 made in the suit in O.S. No. 3905 of 2011 is under challenge in this revision.

5. Mr. R. Krishnamoorthy, learned Senior counsel appearing for the petitioner herein submitted that the impugned order passed by the Court below is contrary to law and procedure, which has to be construed as error apparent on the face of record, hence, liable to be set aside. There was no notice issued to the petitioner herein before passing the subsequent order on 20.02.2013, which is against principles of natural justice and also contrary to Order 9 Rule 9(2) of the Code of Civil Procedure. Learned Senior counsel further contended that the Court below has erred in restoring the suit in O.S. No. 3905 of 2011, on the memo filed by the first respondent herein, even without any petition being filed under Order 9 Rule 9 of the CPC and without issuing notice and providing opportunity to the petitioner/D1 and other defendants in the suit. According to the learned Senior counsel for the petitioner, the suit itself is not maintainable, as it is statutorily barred, in view of the arbitration clause, as per the agreement between the parties.

6. The relief sought for in the suit is for declaring that the reference for arbitration by the second defendant at the behest of the first defendant vide Ref. No. 17224/JHN, appointing the third defendant as arbitrator as illegal, unlawful, ab initio, null and void and not binding on the plaintiff and consequential declaration that the third defendant is not empowered to proceed with the claim petition filed by the first defendant as it is illegal, ab initio, null and void.

7. It is not in dispute that final Award was passed by the third respondent, sole Arbitrator on 03.08.2011, a xerox copy of the final award is also available in the typed set of papers. As per the order, dated 30.08.2012 passed in C.R.P. (PD). No. 2767 of 2011 by this Court (R.S. Ramanathan, J.), the said Revision petition was dismissed as infructuous, on the ground that arbitrator was appointed by the first defendant, the petitioner herein, who has passed the award on 03.08.2011.

The aforesaid revision was preferred against the order, dated 25.07.2011 passed in unnumbered I.A. Sr. No. 35361 of 2011 in I.A. No. 7604 of 2011 in O.S. No. 3905 of 2011 on the file of the V Assistant Judge, City Civil Court, Chennai.

8. It is an admitted fact that the aforesaid C.R.P. (PD). No. 2767 of 2011 relates to the very same suit, wherein the order passed in the Interlocutory Application was challenged. Considering the fact that award was passed by the sole arbitrator on 03.08.2011, this Court dismissed the revision as infructuous.

9. Mr. R. Krishnamoorthy, learned Senior counsel appearing for the petitioner submitted that the same analogy is applicable in the present revision and in view of the award passed by Arbitrator, the relief sought for in the suit became infructuous and hence, the suit has to be dismissed on that ground. However, after dismissing the suit, the Court below, even without issuing notice, has erroneously set aside the order.

10. Per contra, Mr. P.N. Prakash, learned counsel appearing for the respondents submitted that the scope of the suit is limited and according to him, the relief sought for would not come under any statutory bar.

11. Learned counsel appearing for the respondents relied on the decision, Ramji Gupta and Another Vs. Gopi Krishan Agrawal (D) and Others, , rendered by the Hon'ble Supreme Court, wherein it has been ruled that (i) An application under Order IX Rule 13 CPC cannot be filed by a person, who was not initially a party to the proceedings; (ii) Inherent powers u/s 151 CPC could be exercised by the Court to redress only such a grievance, for which no remedy is provided for under the Code of Civil Procedure; (iii) In the event that an order has been obtained from the Court by playing fraud upon it, it is always open to the Court to recall the said order on the application of the person aggrieved, and such power can also be exercised by the appellate court; (iv) Where the fraud has been committed upon a party, the court cannot investigate such a factual issue, and in such an eventuality, a party has the right to get the said judgment or order set aside, by filing an independent suit; (v) A person aggrieved may maintain an application before the Land Acquisition Collector for reference u/s 18 or 30 of the Act, 1894, but cannot make an application for impalement or apportionment before the Reference Court. The aforesaid decision is no way applicable to the facts and circumstances of the Revision on hand.

12. Mr. R. Krishnamoorthy, learned Senior counsel appearing for the petitioner drew the attention of this Court to the decision in Hindustan Petroleum Corpn. Ltd. Vs. Pinkcity Midway Petroleums, , wherein the Supreme Court has held as follows:

16. It is clear from the language of the Section, as interpreted by the Constitution Bench Judgment in Konkan Railway (supra), that if there is any objection as to the applicability of the arbitration clause to the facts of the case, the same will have to be raised before the concerned Arbitral Tribunal. Therefore, in our opinion, in this case the Courts below ought not to have proceeded to

examine the applicability of the arbitration clause to the facts of the case in hand but ought to have left that issue to be determined by the Arbitral Tribunal, as contemplated in Clause 40 of the Dealership Agreement and required under Sections 8 and 16 of the Act.

13. In the aforesaid decision, the Hon''ble Apex Court has also relied on an earlier decision rendered by the Supreme Court in *P. Anand Gajapathi Raju and Others Vs. P.V.G. Raju (Died) and Others*, wherein it was held that the language of Section 8 is pre-emptory in nature. Therefore, in cases where there is an arbitration clause in the agreement, it is obligatory for the Court to refer the parties to arbitration in terms of their arbitration agreement and nothing remains to be decided in the original action after such an application is made except to refer the dispute to an arbitrator. Therefore, it was made clear that if, as contended by a party in an agreement between the parties before the Civil Court, there is a clause for arbitration, it is mandatory for the Civil Court to refer the dispute to an arbitrator. In the aforesaid case, the existence of an arbitral clause in the agreement had been accepted by both the parties as also by the Courts below but the applicability thereof was disputed by the respondent and the said dispute was accepted by the Courts below. On the facts and circumstances, the Hon''ble Supreme Court, held that as the existence of the arbitration clause was admitted, in view of the mandatory language of Section 8 of the Act, the Courts below ought to have referred the dispute to arbitration.

14. In *Hindustan Petroleum's case* (referred to above), the Hon''ble Supreme Court has further held as follows:

24... We have come to the conclusion that the Civil Court had no jurisdiction to entertain a suit after an application u/s 8 of the Act is made for arbitration. Therefore, we are of the opinion that the trial Court failed to exercise its jurisdiction vested in it u/s 115 of the C.P.C., when it rejected the application of the appellant filed under Sections 8 and 5 of the Act. In such a situation, refusal to refer the dispute to arbitration would amount to failure to justice as also causing irreparable injury to the appellant. For the said reason, we are of the opinion that the High Court has erred in coming to the conclusion that the appellant was not entitled to the relief u/s 115 C.P.C.

15. In *Minerals and Metals Trading Corporation of India Ltd. Vs. Ocean Knigh Maritime Company Ltd. and Others*, the Hon''ble Supreme Court has found that the arbitration petition filed therein was clearly time-barred and hence, based on the arbitration agreement, the party therein was not entitled to raise any plea and accordingly, the impugned order passed by the High Court was set aside by the Hon''ble Supreme Court.

16. In the instant case, it is not the plea of the respondents that the arbitration agreement relating to the Revision is barred by limitation. In fact, the arbitrator has passed the final Award on 03.08.2011 itself, which cannot be challenged before the Civil Court, by way of filing a suit.

17. It has been categorically ruled by the Hon''ble Apex Court that when there is arbitration clause, any party to the agreement should seek remedy, by way of arbitration and that the Civil Court has no jurisdiction to entertain any suit, after the application u/s 8 of the Act is made for arbitration, in view of the arbitration clause of the agreement.

18. In the case on hand, in spite of the fact that there is arbitration clause in the agreement, the respondents herein filed the suit in O.S. No. 3905 of 2011, which was pending on the file of the V Assistant Judge, City Civil Court, Chennai. It is an admitted fact that final Award itself was passed by the third respondent, sole arbitrator on 03.08.2011. A xerox copy of the final Award is also available in the typed set of papers and further, this Court by its order, dated 30.08.2012 passed in C.R.P. (PD). No. 2767 of 2011, dismissed the aforesaid earlier revision as infructuous, on the ground that arbitrator was appointed, as per the arbitration clause of the agreement by the first defendant, who is the petitioner herein. Having considered the same, the Court below had rightly dismissed the suit. However, subsequently, without notice to the petitioner herein, who was the first defendant in the suit, passed impugned order. It is crystal clear that the relief sought for in the suit was against the arbitration clause of the agreement between the parties. In view of Section 8 of the Arbitration Act, the suit filed by the first respondent/plaintiff before the City Civil Court, Chennai was not maintainable.

19. It is also clear that the Court below became functus officio, after dismissing suit, after hearing both sides and which could not be construed as an ex parte order of dismissal and further, without notice to the petitioner/first defendant, the impugned order could not have been passed by the Court below, which is totally erroneous and that order has been passed without jurisdiction and against law. As it is an admitted fact that there was an arbitration clause between the petitioner/first defendant and the first respondent/plaintiff, as per Section 8 of the Arbitration Act, it is seen that the suit itself was not maintainable. On such circumstances, the Court below could have referred the matter for arbitration, as per the decision rendered by the Hon''ble Apex Court reported in Hindustan Petroleum Corpn. Ltd. Vs. Pinkcity Midway Petroleums, .

20. It is an admitted fact that final Award was passed by the third respondent, sole arbitrator on 03.08.2011, hence, the suit filed by the first respondent, M/s. Shree Ganesh Steel Rolling Mills (P) Ltd., itself became infructuous. Even the earlier C.R.P. (PD). No. 2767 of 2011, filed before this Court was dismissed as infructuous. On the aforesaid facts and circumstances, having dismissed the suit on 20.02.2013, after hearing both sides, the Court below cannot pass the subsequent order, without giving notice to the revision petitioner/D1, under Order 9 Rule 9(2) of the Code of Civil procedure, hence, the impugned subsequent order is totally erroneous and unsustainable in law. Such an order has to be construed only an abuse of process of law and court, in view of the final Award passed by the sole arbitrator and the order passed by the Court

earlier. Instead of challenging the award, the first respondent could not have filed a petition to set aside the order of dismissal, under Order 9 Rule 9 CPC and the Court below erroneously, without issuing notice to the respondent therein, allowed the petition under Order 9 Rule 9 CPC, which is against law, since the Court below became functus officio to restore the suit again. As there is arbitration clause, as per Section 8 of the Arbitration Act, filing a suit itself was not maintainable and after the dismissal of the suit, passing an order to restore the suit again would be an abuse of process of law.

21. On the aforesaid circumstances, this Court is of the view, that it is a fit case to invoke Article 227 of the Constitution of India, to prevent abuse of process of law and accordingly, the Civil Revision Petition has to be allowed and the impugned order passed by the Court below is liable to be set aside, to meet the ends of justice. In the result, this Civil Revision Petition is allowed and the impugned subsequent order, dated 20.02.2013 passed in O.S. No. 3905 of 2011 by the Court below, restoring the suit against law is set aside. Consequently, connected miscellaneous petition is closed. No order as to costs.