

(1996) 10 MAD CK 0078

In the Madras High Court

Case No : O.S.A. No. 202 of 1996 and C.M.P. No. 11606 of 1996

M/s. Rakesh Enterprises and others

APPELLANT

Vs

M/s. Addisons, Paints and Chemicals Ltd.

RESPONDENT

Date of Decision : 17-10-1996

Acts Referred:

Arbitration Act, 1940 — Section 34

Citation : (1996) 10 MAD CK 0078

Hon'ble Judges : Sathasivam, J;Abdul Hadi, J

Bench : Division Bench

Advocate : G.S. Sivakumar, for the Appellant; Sriram, for the Respondent

Final Decision : Allowed

Judgement

Abdul Hadi, J.—The defendants in O.S. No. 777 of 1993 have preferred this O.S.A. against the dismissal of their O.A. No. 889 of 1993 in the said suit under Sec.34 of the Arbitration Act for stay of trial of the said suit on the ground that the dispute relating to the subject matter of the suit should be only referred to Arbitration pursuant to the agreement dated 11.10.1990 between the parties. Admittedly the 1st defendant firm is a consignment sales agent of the plaintiff respondent under the abovesaid agreement between them, and the said agency was terminated, originally by the plaintiff by its notice dated 29.1.1993 addressed to the 1st defendant. However the plaintiff sent subsequent notice of termination dated 9.2.1993, on the footing that the earlier notice did not give 60 days notice for termination as contemplated in clause 13 of the agreement between them. The material portion of the said notice dated 9.2.1993 is as follows: "Taking into consideration Clause-13 of the CSA Agreement dated 11.10.1990, we hereby rescind our termination letter referred above (letter dated 29.1.1993) we hereby give you 60 days of notice of termination of the agency, commencing from 15.2.1993, You are hereby required to surrender all the unsold stocks of finished goods, empty containers, empty cartons, invoices and other printed materials bearing the name of the company, to our authorised

representative on 15.4.1993, on such surrender and taking stock and on arrival of value of the stocks, we hereby agree to settle your accounts with the company.... Lastly, we have taken inventory of the stocks available as on 20.1.1993 and you have also signed and acknowledged the physical inventory check sheets and you shall be liable to render proper accounts for the said stocks at the time of surrender of stocks...."

To the abovesaid notice dated 9.2.1993, the 1st defendant firm replied on 3.4.1993. The material portions of the said reply are as follows:-

"The letter under reply has been issued to us without any basis and no grounds have been stated or given as to why you have decided to terminate our agency agreement.... The termination is therefore, tainted with mala fides and your action is arbitrary. Moreover, the action in terminating the agency has not been taken lawfully or by authorised person. We, therefore, inform you that so called termination of agency...is not binding on our rights."

2. Then the abovesaid suit has been filed on or about 28.5.1993, claiming a sum of Rs. 7,47,176.28 with interest. The relevant allegations in the plaint for seeking the said sum are as follows:-

"As per the terms, the defendants are bound to return the goods on 15.4.1993. Despite repeated letters, the defendants are not allowing the plaintiff to secure the stocks and it is therefore necessary for the plaintiff to approach this Hon'ble Court for recovery of the sum of Rs. 7,47,176.28 and also for the return of the available goods. The amount due, namely, Rs. 7, 47, 176.28 is inclusive of the value of the stocks. The plaintiff is arriving at the amount due as per the Statement Account and reserves their right to alter the same, if necessary on physical verification of stocks. It is to be seen that the provisions of Arbitration Clause in the agreement may not be applicable to return of stocks. (The abovesaid statement of account is given at the end of the plaint)

3. Clause 14 of the abovesaid agreement between the parties runs as follows: -

"If any dispute or difference arise on any of the provisions contained in this agreement such dispute or difference shall be referred to an arbitration in accordance with the provision of the Indian Arbitration Act, 1940".

4. The material portions of the affidavit in support of the abovesaid Application No. 889 of 1993 are as follows:-

"The....plaintiff has filed in a above suit for the recovery of a sum of Rs. 7,47,176.28 alleged to be due by the applicants. The applicant has not narrated..... the unilateral charges sought to be effected by the Respondent, the protest lodged by the Applicants.... The Agent (applicant) cannot be held liable for the credits extended to various customers unless and otherwise a del credere commission is granted... The Respondent has suppressed all their material particulars and has set out the terms and conditions imposed by him unilaterally and has claimed amounts not due to him. The applicants have not accepted the

debit notice raised by the respondents. The applicants have disputed the claim made by the Respondent. If a true account is taken, the applicant will not owe any money to the Respondent. On the contrary the respondent owes monies to the applicant... Besides the accounting, the respondent has terminated the agency without any notice and is liable in damages for such termination these issues are to be determined."

5. According to the counter affidavit to the said application, the contention of the plaintiff respondent is that the point now disputed by the defendant is not a matter agreed to be referred to arbitration, that the defendants have not opted for arbitration when the agreement was terminated, that the question of termination of agency agreement is not in dispute in the suit and that the suit is for recovery of the amount, which the defendants are bound to pay to the plaintiff as per accounts, over which, there is no dispute. The plaintiff also denies the other allegations in the affidavit in support of the application.

6. The reasoning of the learned trial judge in the impugned order is as follows:-

"According to me, the said dispute has nothing to do with any of the provisions contained in the agreement which is agreed to be referred in this case....plaintiffs says that notice was issued to them and on expiry of term, the defendants are bound to return the goods and also the amounts as per the accounts. The defendants only dispute the correctness of the accounting and also the validity of the termination notice. It has nothing to do with the provisions contained in the agreement. According to me, there is no dispute or difference in regard to any of provisions contained in the agreement... Since the dispute in this case does not cover clause 14, the application for stay under Sec.34 of the Arbitration Act is misconceived...."

7. Learned counsel for the appellants submits that when clause 14 is read with clause 13(d) of the abovesaid agreement dated 11.10.1990 between the parties, it is clear that the suit claim is referable to arbitration. He also submits that even though the abovesaid agreement is alleged to have come to an end in view of the abovesaid notice dated 9.2.1993, the arbitration clause under the agreement survives. In this connection he relies on M/s. Indian Drugs and Pharmaceuticals Ltd. Vs. M/s. Indo Swiss Synthetics Gem Manufacturing Co. Ltd. and others, which relies on Union of India v Kishorilal Gupta & Bros (AIR 1959 SC. 1362). He also points out that even in the plaint, the respondent plaintiff does not say why the suit claim was not referred to arbitration. Therefore, according to him, the learned Judge erred in dismissing the application.

8. On the other hand, learned counsel for the respondent, apart from reiterating the reasoning of the learned trial judge also submits that strictly speaking there is no dispute at all since the defendants have actually admitted the suit claim. He also relies on The Printers (Mysore) Private Ltd. Vs. Pothan Joseph, .

9. We have considered the rival submissions. We have already extracted clause 14 of the abovesaid agreement. As per the said clause 14, if any dispute or

difference arises" on any of the provisions contained in this Agreement" such dispute or difference shall be referred to arbitration. Mainly the interpretation that has to be put on the words " on any of the provisions contained in this agreement " appearing in the abovesaid clause 14 has to be considered in dealing with the correctness of the decision arrived at by the learned trial judge. In dealing with the said question, we shall first summarise the material portions of the said agreement as follows:- the 1st appellant is a consignment sales agent of the respondent. The 1st appellant shall always maintain a certain level of stocks of the goods of the respondent and shall be responsible for the safe and proper custody of the said goods. The said agent shall submit to the respondent fortnightly sales account statement and stock statement. The said agent has already deposited a sum Rs. 2.45 Lakhs (with the respondent) and the stock position as well as outstanding will be reviewed every quarter and the security shall have to be deposited by the agent to the extent of 25% of the value of the stock and 25% of the outstanding of non-deposit dealers. Upon termination of the agency, the said agent shall hand over all stocks etc., belonging to the respondent. The said agent shall canvass orders for the respondent's products and distribute them to parties, from whom, payment shall be received only in the form of account payee crossed cheque/D.Ds. in favour of the respondent. The respondent shall fix the maximum price for their products and the agent shall not distribute the products at prices exceeding the maximum prices mentioned by the respondent; the agent shall pay the respondent the invoice amount on the 60th day from the invoice date or earlier. The agent would meet the expenses for the maintenance of depot and also office, etc., and the respondent will not contribute any money on this account. Exceeding the commission of 5% on the sale proceeds remitted to the respondent. The said commission will become payable only after full realisation of the money from the party, parties, which turn has been remitted by the agent to the respondent within the stipulated period.

10. While the abovesaid summary relates to clauses 1 to 12 of the abovesaid agreement, in clause 13 (a) of the agreement, it is stated as follows:-

"If either party desires to terminate the agreement, it shall do so on giving to the other, notice in writing, giving sixty days of its intention to terminate this agreement."

Clause 13 (d) runs as follows:-

"On termination of this agreement for whatsoever reasons and by whichever party, the Consignment Sales Agent shall hold all goods unsold stocks, invoices and other printed materials bearing the name of the Company as also all sale realisations and accounts receivable as trustee for and on behalf of the Company and hand over the same to the company on demand, notwithstanding that there may be any disputes and differences between the parties which may be capable of being referred to arbitration...."

11. In the light of the above referred to provisions of the agreement, we are of the view that the use of the words "on any of the provisions contained in this agreement" referred to in the above referred to clause 14 of the agreement could only be held to denote that if any dispute arises on the Subject matter referred to in any of the provisions of the said agreement, that shall be referred to arbitration. In other words clause 14 cannot be interpreted narrowly to denote only a dispute arising on the Interpretation or construction of any of the abovesaid provisions in the agreement. If that interpretation dispute alone has to be referred to arbitration, the parties would have specifically and expressly stated so in the abovesaid clause 14. We are of the view that the learned trial judge has construed clause 14 in the abovesaid narrow manner and wrongly concluded that the dispute in this case is not covered by the said clause 14. As already extracted, the relevant observation of the learned trial judge is as follows:-

"The defendants only dispute the correctness of the accounting and also the validity of the termination notice. It has nothing to do with the provisions contained in the agreement."

We are unable to agree with this narrow construction put on the abovesaid clause 14 by the learned trial judge. In the broader view we have taken the above referred to dispute raised by the defendants is covered by the abovesaid clause 114. This conclusion is also fortified by what is stated in the above referred to clause 13 (d), wherein inter alia it is stated that on the above termination of the abovesaid agency agreement, the agent shall hold the unsold stocks, etc. and also the sale realisation, etc., as trustee for the respondent and hand over same to the respondent on demand "notwithstanding that there may be any disputes and differences between the parties which may be capable of being referred to arbitration."

(Emphasis Supplied.)

11-A. We may also add that the Supreme Court in *The Union of India (UOI) Vs. D.N. Revri and Co. and Others*, has cautioned that in interpreting a contract containing an arbitration clause narrow technical approach is not proper and has held that a contract being a commercial document, must be interpreted in a manner to give efficacy to the contract rather than to invalidate it (vide also *Jammu and Kashmir State Forest Corporation Vs. Abdul Karim Wani and Others*, where one of the learned judges, observed that endeavor should always be made in constructing a clause in the relevant agreement to ascertain the intention of parties which has to be found out by reading the terms broadly, clearly and without being circumscribed.

12. We may also point out that the contention of learned counsel for the respondent that there is no dispute at all since the defendants have actually admitted the suit claim, cannot be accepted. As against the allegations made in the plaint, the appellants have in their affidavit in support of OA. No. 889 of 1993

have disputed many of those material allegations. Further as already pointed out as against the demand made in the observed termination notice dated 9.2.1993, requiring the appellants to surrender all the unsold stocks etc., to the plaintiff, and as against the statement in the said notice that on such surrender, the plaintiff, the 1st appellant-firm, account in its above referred to repay dated 3.4.1993, has stated that the abovesaid notice dated 9.2.1993 had been issued without any basis and the termination is tainted with mala fides and arbitrariness and the said termination is not binding on the rights of the appellant. In the light of the above features, it cannot be said that there is no dispute between the parties, with reference to the claim made in the suit. We may also point out that very soon after 3.4.1993, i.e., on or about 28.5.1993, the suit has been filed.

13. AIR 1968 Calcutta 330 (supra) has no application to the present facts. There, the Calcutta High Court held on facts before it that a particular subject matter before it could not be said to arise out of or concerning or connecting or in consequence of or relating to the suit contract therein, which could be referable, to arbitration pursuant to the arbitration agreement therein.

14. AIR 1983 Calcutta 376 supra) has also no application to the present facts, particularly in the light of the construction we have put on the abovesaid clause 14. In the said Calcutta case, the Court, on reading the arbitration clause in the agreement therein and in the light of the features of the said case, held that agreement between the parties provided only, for reference of dispute regarding interpretation of various conditions of the agreement. No doubt in The Printers (Mysore) Private Ltd. Vs. Pothan Joseph, relied on by learned counsel for the respondent, it has been held that power to grant stay under Sec.34 of the Arbitration Act is discretionary. However, the following observations of the Supreme Court in the said Judgment should be pointed out:-

"It is however, clear that the discretion vested in the Court must be properly and judicially exercised. Ordinarily where a dispute between the parties has by agreement between them to be referred to the decision of a domestic tribunal the Court would direct the parties to go before the tribunal of their choice and stay the legal proceedings instituted before it by one of them."

That apart, the following observation of the Supreme Court in the same decision is also significant:-

"According to him, any difference of opinion in regard to the application of the contract must in the contest mean the working out of the contract or giving effect to its terms. In our opinion, this contention is well founded. The word "interpretation or application of the contract" are frequently used in arbitration agreements and they generally cover disputes between the parties in regard to the construction of the relevant terms of the contract as well as their effect, and unless the context compels a contrary construction, a dispute in regard to the working of the contract would generally fall within the clause in question."

15. We may also add that even though the abovesaid agreement between the

parties herein has come to an end pursuant to the above referred to notice dated 9.2.1993, the arbitration clause therein survives. This view of ours is supported by the relevant observations in M/s. Indian Drugs and Pharmaceuticals Ltd. Vs. M/s. Indo Swiss Synthetics Gem Manufacturing Co. Ltd. and others, which relied on The Union of India Vs. Kishorilal Gupta and Bros., .

16. We may also point out that the respondent has also not said anything in the plaint as to why the suit claim was not referred to arbitration, except stating at the end of paragraph 6 of the plaint thus:-

"It is to be seen that the provisions of Arbitration Clause in the agreement may not be applicable to return of stocks."

(Emphasis Supplied)

Even with reference to this passage at the end of paragraph 6, we must state that the plaint is not assertive and only uses the word "may" and further it only says that the provisions of the arbitration clause may not be applicable to "return of stocks". In other words, it does not say that the said clause is not applicable with reference to return of sale realisation, etc. At any rate, in the broad view we have taken, as already stated, the contention in the abovesaid last sentence in paragraph 6 of the plaint cannot stand.

The net result is the Original Side Appeal is allowed, the impugned order is set aside and O.A. No. 889 of 1993 shall stand allowed as prayed for. There will be no order as to costs throughout. Consequently, C.M.P. 11606 of 1996 is dismissed.