

(2012) 02 GUJ CK 0039

In the Gujarat High Court

Case No : Special Civil Application No. 11605 of 2011

Rupal Textile and Partners of Partnership Firm Madhubhai G. APPELLANT
and Another

Vs

Partners of Partnership Firm M/s. Rupal Textile Mahendra H. RESPONDENT
and Another

Date of Decision : 08-02-2012

Acts Referred:

Arbitration Act, 1940 — Section 34

Arbitration and Conciliation Act, 1996 — Section 8, 8(2)

Citation : (2012) 2 GLH 86

Hon'ble Judges : S.G. Gokani, J

Bench : Single Bench

Advocate : M.G. Nagarkar, Petitioners 1 - 2, for the Appellant; Dhirendra Mehta, Respondents 1 - 2 and Mr. Shaivang D. Mehta Respondents 1-2, for the Respondent

Judgement

Ms. Sonia Gokani, J.—The present petition is preferred by the original defendant challenging the order of the learned Principal Senior Civil Judge, Surat passed in Special Civil Suit No. 3 of 2011 against the petitioners-defendants in a suit for declaration and permanent injunction preferred by the respondents herein to restrain the petitioner from transferring the properties belonging to the partnership firm and for such other reliefs. Petitioners-defendants made an application at exhibit 15 before the Court on 20th January, 2011, inter alia contending that the suit is barred by Section 8 of the Arbitration and Conciliation Act, 1996(hereinafter referred to as "the Act"), for there being specific condition in the partnership deed for referring the disputes concerning the affairs and matters of partnership firm to the Arbitrator to be appointed by the partners of the firm and for such appointment, Court was not to be approached. In this circumstance, petitioner herein (original defendant) requested the Court to stay the said suit of the plaintiffs-respondents based on the partnership agreement for getting its share along with interest and to issue the direction to resolve the

dispute through the Arbitrator. It is say of the petitioner that plaintiffs themselves have produced the copy of the partnership agreement along with the suit and relied upon the same for basing its claim. However, the petitioners (original defendants) did not produce the copy along with such application (exhibit 15) u/S. 8 of the said Act.

2. Learned senior Civil Judge after a detailed hearing on both the sides on the ground that the application was not accompanied by the partnership deed, which is otherwise mandatory under the provision of Section 8 of the Act, dismissed the said application of the petitioner. The impugned order is challenged in this petition raising various grounds as enumerated in the petition.

3. Learned Advocate Shri M. G. Nagarkar appearing for the petitioners assailed the order impugned by firstly distinguishing the decision of the Apex Court passed in case of Atul Singh & Ors. v. Sunil Kumar & Ors. reported in AIR 2008 SC 1016 as the same is made the basis for insisting on the partnership deed along with the application u/S. 8 of the Act. He urged that the facts in this case of Atul Sing is completely different where the very document referring the clause of Arbitration was disputed whereas in the instant case, respondents-original plaintiffs themselves have based their suit and depended on such partnership deed which was already forming the part of very record of the Court. He substantiated his submissions by citing the decision of Madras High Court rendered in case of Cash & Gain Finance & Investment Ltd. v. Manjula Udaya Shankar reported in (2009) 1 ALR 576. It is emphasized that in the said judgment Atul Sing's case (supra) had been referred to and distinguished by the Madras High Court.

3.1 Learned Advocate also relied on the judgement of Kerala High Court in case of Natarajan v. General Manager, Southern Railway reported in 2006(4) Arb. LR 149(Kerala), where the Kerala High Court has discussed the purpose of production of arbitration agreement or copy thereof along with application and emphasized that what is required to keep in mind is the purpose of such production. It also interpreted the word "accompanied" as used in Section. 8(2) of the Act.

3.2 Based on this judgement, it is urged that the order of the Trial Court in interpreting Section 8(2) is completely erroneous and further urged to set-aside the order impugned.

3.3 Yet another judgement sought to be relied upon by learned Advocate is the case of NIIT Ltd. v. Manoharan reported in 2006 (1) Arb. LR 69 (Kerala) where the plaintiff had produced the arbitration agreement before the Court and relied upon the said agreement. In such circumstances, Court held that the requirement of Section 8(2) was essentially fulfilled by such production and it is not material as to who produces such agreement.

4. Per contra, learned Advocate Shri Dharendra Mehta has contended that Section 8 of the Arbitration Act is amply clear and the same is also further amplified and

clarified by the Supreme Court in case of Atul Sing (Supra). Court below has relied upon such interpretation as was made by the Apex Court and rejected the application of the present petitioner and therefore there is no error in the said order which calls for any interference by this Court.

5. On having heard both the sides and also on having examined the materials on record as well as on due consideration of the judgments pressed into service, the order passed by learned Principal Senior Civil Judge, Surat passed in Special Civil Suit No. 3 of 2011 below exh. 15 requires interference for the reasons mentioned hereinafter.

6. In the instant case at the outset, it is apt to refer to the case of Atul Singh (Supra) where the Apex Court interpreted Section 8 of the Act and insisted on accompaniment of original arbitration agreement or duly certified copy along with such application which was made the base by the Court while rejecting the application. Apex Court observed as under :-

10. Sub-Section(2) of Section 8 of the 1996 Act says that 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. As already stated in the earlier part of the judgement, defendant No. 3 had moved an application on 25.11.2004 u/s 34 of the Arbitration Act, 1940 for staying the proceedings of the title suit and for referring the matter to arbitration. He filed a supplementary petition to the aforesaid application on 16.12.2004. Herein also reference was made to Section 34 of the Arbitration Act, 1940. Thereafter, he filed an application on 28.2.2005 praying that as the Arbitration Act, 1940 had been repealed and the suit is of 1998, to avoid any confusion, his earlier petitions may be treated to have been filed u/s 8 of the Arbitration Act, 1996. None of these petitions were accompanied by the original arbitration agreement dated 17.2.1992 or a duly certified copy thereof. In fact, there is no requirement of filing the original arbitration agreement or a duly certified copy thereof u/s 34 of Arbitration Act, 1940 and as such there was no occasion for defendant No. 3 to file the aforesaid document. The third petition filed on 28.2.2005 contained the following prayer :-

It is, therefore, prayed that your honour may graciously be pleased to treat the petitions dated 25.11.2004, 16.12.2004 and the present petition as supplement and part of each other for deciding the prayer with regard to stay of the proceedings of the aforesaid suit and/or refer to arbitration in view of the arbitration agreement covering the subject matter of this suit.

There is no whisper in petition dated 28.2.2005 that the original arbitration agreement or a duly certified copy thereof is being filed along with the application. Therefore, there was a clear noncompliance of sub Section 2 of Section 8 of 1996 Act which is a mandatory provision and the dispute could not have been referred to arbitration. Learned Counsel for the respondent has submitted that a copy of the partnership deed was on the record of the case.

However, in order to satisfy the requirement of sub-Section 2 of Section 8 of the Act, defendant No. 3 should have filed the original arbitration agreement or duly certified copy thereof along with the petition filed by him on 28.2.2005, which he did not do. Therefore, no order for referring the dispute to arbitration could have been passed in the suit.

6.1 It would be worth while to mention at this stage that Trial Court in the matter before the Apex Court had dismissed the petition preferred u/S 8 of the Act mainly on the ground the predecessor-in-interest of the plaintiffs was not a party to the partnership deed and the main relief sought for in the suit was that the partnership deed was illegal and void and that question could only be decided by the Civil Court and such dispute could not have been referred to the Arbitrator.

The said order was challenged in the Civil Revision which was allowed by the High Court where High Court simply said that the Court below committed an error in passing the impugned order. There was no reference to the arbitration in the order passed by the High Court.

In such circumstances, when this dispute was at large before the Apex Court, it noticed that the defendants had moved twice earlier such an application and there was also reference made (under Section 34) in the 3rd application moved by defendants. However, when in none of these applications, there was a whisper with regard to the original arbitration agreement or duly certified copy thereof and in such circumstances, the Apex Court held that the application did not satisfy the requirements of subclause (2) of Section 8 and there was necessity for defendant to file the original agreement or duly certified copy thereof.

6.2 This Court is in agreement with the submission by learned Advocate Mr. Nagarkar that the said decision has been rendered in completely different set of facts than those exist in the present case.

7. In the instant case as has been correctly pointed out from the beginning original plaintiffs (respondents herein) had produced the copy of partnership deed which contained arbitration clause for appointing the Arbitrators by the partners of the firm. And thus, the copy of such deed continued to be the part of the record for having been initially produced with the plaint and both the parties had relied upon such partnership agreement for their rival claims which was already on record. Thus, the original plaintiff (present respondent) has filed the suit based on such partnership agreement which has not been challenged by the either side and on the basis thereof, when respondent had made an application below exh. 15 in such premise, if such a partnership deed or certified copy thereof had not accompanied the application, it would be too technical an approach on the part of the Court to hold it against the petitioners herein and that would marr the very object and spirit of such Revision and the Act.

8. In identical set of facts, Madras High Court dealt with the issue in case of Cash & Gain Finance & Investment Ltd. (Supra) as under :-

19. The objection regarding the non-filing of the original or the certified copy of the arbitration agreement itself does not appear to be tenable and the reliance on the decision of the Supreme Court reported in Atul Singh and Others Vs. Sunil Kumar Singh and Others, is not helpful. The Supreme Court has dealt with the case where the arbitration agreement itself was denied and they found that no document had even been filed along with the suit. On the other hand, in the present case, the partnership deed which contains the arbitration agreement is relied on by the plaintiff herself and it is that document which is the basis for the suit."

9. As can be noted from the record itself document which is made the very basis of the suit had not accompanied the application, to dismiss such application merely on that count even where such a deed expressly provided the clause of arbitration is not an acceptable approach.

10. Decision of this Court rendered in case of Corned Pharmaceuticals Ltd. v. Blue Star Limited reported in 2011(3) GLH 548 deals with this very issue where of course the decision of Apex Court given in case of Atul Sing (Supra) has not been referred to. However while interpreting Section 8 of the Act, Court held that tendering of agreement containing the arbitration clause would not be inevitable as interpreted by the Trial Court, while preferring the application the original agreement though was not produced by the applicant, but, the same was relied upon by the plaintiff along with the plaint and there was no dispute with regard to the existence of the arbitration clause in such a document.

10.1 In the case of Corned Pharmaceuticals Ltd. (Supra), Plaintiff had along with the plaint submitted the copy of tender agreement containing arbitration clause and when the existence of arbitration clause was not in dispute, it was held that once the document containing the arbitration agreement was already part of record and when same was not disputed by the either side, considering the facts that the arbitration is a binding, voluntary alternative resolution process, this kind of technical approach would not be called for.

10.2 Kerala High Court in NIIT Lid's case also emphasized on the object of making such provision by holding on this line in these words:-

10. The second ground on which the Court below rejected the application is that the petitioner did not produce the "original" or "certified copy" of the arbitration agreement. It is not disputed that the arbitration agreement was produced before Court by the plaintiff himself. The plaintiff relied on the agreement dated 27.2.1995 and on two other subsequent agreements. The originals of the three agreements were produced by the plaintiff along with the plaint. The requirement of Section 8(2) for the production of the original arbitration agreement or duly certified copy thereof is only to ensure that there is an arbitration: clause and to ascertain whether the arbitrator is named and other allied matters. The requirement would be satisfied if the agreement is before Court. It is not relevant whether the plaintiff produced it or the defendant produced it Whoever produced

the document, the fact remains that the document is before Court. When the original document is before Court, the Court below was not justified in dismissing the application on the ground that the defendant who made the application for reference did not produce the original or certified copy of the agreement. Such a stand would be too technical and it would tend to defeat the very purpose of the Act. In *ITC Classic Finance Ltd. Vs. Grapco Mining and Co. Ltd.* and another, xerox copies of the agreements were produced before Court. The agreements were relied upon by the plaintiff as well as the defendants. It was also not in dispute that the copies were true copies of their originals. The Calcutta High Court held that production of xerox copies of the agreement containing the arbitration clause would constitute sufficient compliance of the requirement of Section 8(2) of the Act.

11. In the instant case also as mentioned hereinabove, so as to avoid any kind of technical breach that the petitioner who is the original defendant, at a later date did produce the copy of such agreement. The interpretation made by the Kerala High Court in case of *Natarajan v. General Manager (Supra)* also could come to the rescue of the petitioner that the word "accompanied" used u/s 8(2) need not be given too rigid a meaning.

11.1 In these circumstances as mentioned hereinabove, it would be relevant to reproduce at this stage finding of Kerala High Court which has aptly interpreted words "accompanied" emerging in the provision:-

8. But according to me it would be myopic to read into Section 8(2) any invariable mandate that the arbitration agreement or a copy thereof must be produced along with such request. The purpose of such production has got to be borne in mind. It is only to help the Court to decide whether as a matter of fact there is such an arbitration agreement or not. The plea for reference u/s 8 cannot be made by a party without any bona fide intent or with the sole intention of protracting the proceedings. That is why it is very specifically stipulated that the arbitration agreement in original or copy must accompany the application for reference u/s 8. Considering the object and purpose the word "accompanied" in Section 8(2) according to me, need not be read and understood to mean that the arbitration agreement or copy thereof must be annexed to the application. If it is already there before Court or if it is not disputed or if it is produced in the event of a dispute when such dispute is raised, it can still be said that the agreement had accompanied the petition. The word "accompanied" used in Section 8(2) must be reasonably and realistically understood. In language one can accompany another in a march even if one does not walk with the other. He can walk ahead or walk behind and can still be said to accompany the other. No artificial or inelastic or rigid meaning need be assigned. The expression "accompanied" used by the statute is inherently elastic.

12. Thus, on cumulative reading of entire gamut of facts and legal position, it would be necessary to reiterate that the partnership document containing the clause of Arbitration of course was not accompanying the application of the

petitioner defendants moved u/S. 8 of the Arbitration Act. However, this deed was the basis of the suit preferred by the respondent-plaintiff seeking injunction and other rights concerning the affairs and matters of partnership and the same was not disputed by either side. Defendants-petitioners herein produced the same at a later date and interpreting that move as a breach to the mandate of Sec. 8 of the said Act. Court of Sr. Civil Judge dismissed the said application.

13. Section 8 of the Act requires reference of parties to arbitration by judicial Authority before which an action is brought in respect of matter which is subject matter of Arbitration Agreement. Not only this rejection was an incorrect reading of Atul Sing's case (supra) but, upholding that interpretation also would defeat the very object of the said provision of the Arbitration Act. The purpose of insisting an accompaniment of document containing arbitration clause with the application u/S. 8 of the Act is surely not for being technical but for determining existence/non-existence of arbitration agreement before directing reference to Arbitrator. It is obligatory on the judicial Authority to refer the parties to arbitration on being subjectively satisfied about arbitration agreement and when such agreement is already forming the part of the record and same pertains to the subject of arbitration agreement, insistence of the Trial Court of production of the said agreement from defendants and that too along with the application of reference is simply a very pedantic approach.

14. Again, when such an agreement is produced subsequently before the Court, that simply cannot take away the right of the party of reference by adopting this kind of approach keeping in view the object and spirit of the provision. In light of the discussion above, this petition is allowed setting aside and quashing the order of learned Principal Senior Civil Judge, Surat passed below exhibit 15 in Special Civil Suit No. 3 of 2011 of 28th June, 2011 made by the petitioners - original defendants by referring the parties to the arbitration in accordance with the arbitration clause containing in the partnership deed for adjudicating the matter which is the subject matter of arbitration agreement. This petition stands disposed of accordingly with no order as to cost.