

(2009) 05 DEL CK 0473
In the Delhi High Court
Case No : CS (OS) No. 1038 of 2009

Shree Krishna Vanaspati Industries (P) Ltd.	APPELLANT
Vs	
Virgoz Oils and Fats Pte Ltd. and Another	RESPONDENT

Date of Decision : 29-05-2009

Acts Referred:

Arbitration and Conciliation Act, 1996 — Section 16, 16(2), 16(4), 16(6), 2(2)
Civil Procedure Code, 1908 (CPC) — Order 7 Rule 11

Citation : (2009) 05 DEL CK 0473

Hon'ble Judges : Rajiv Sahai Endlaw, J

Bench : Single Bench

Advocate : Chetan Sharma, Sanjay Abbot and Chanchal, for the Appellant;
None, for the Respondent

Final Decision : Dismissed

Judgement

Rajiv Sahai Endlaw, J.—The suit came up yesterday first for admission. Doubts were expressed by this Court as to the maintainability thereof. The suit was as such adjourned to today. The senior Counsel for the plaintiff as well as the Counsel for the plaintiff in another CS(OS) No. 1101/2009 listed today for the first time and involving inter alia the same questions as in the present suit, have been heard. However separate order is pronounced with respect to CS(OS) No. 1101/2009.

2. The plaintiff in this suit claims, to be engaged in the business of manufacture, distribution and marketing of Vanaspati; Palm Oil is one of the main raw materials in manufacture of Vanaspati; the plaintiff has been importing Palm Oil from Malaysia and other Palm Oil producing countries; the plaintiff has been buying Palm Oil either directly from Malaysia or through traders and brokers; the plaintiff in or about July, 2008 contacted and made enquiries from two Indian brokers (who have not been impleaded as parties to the suit) of the price and availability of Palm Oil; the said brokers offered the rates and also informed the required goods being readily available with the defendant No. 1 a Singapore

based Company. It is the case of the plaintiff that though it had only made enquiries but it was surprised to receive three several Sales Contracts of which two were dated 24th July, 2008 and one 7th August, 2008 from the defendant No. 1. The plaintiff pleads that immediately on receipt of the Sale Contracts aforesaid it made enquiries from the brokers and informed the brokers that the plaintiff was then not in a position to establish Letter of Credit and was thus not in a position to enter into any contract as forwarded by the defendant No. 1. It is the case of the plaintiff that upon the plaintiff so informing the brokers, and the plaintiff having thus not accepted the contracts, no concluded contract came into being between the plaintiff and the defendant No. 1. At this stage, it may be stated that the written contracts stated to have been received by the plaintiff from the defendant No. 1 and filed before this Court are in the nature of confirmation of a transaction already concluded and contain a notation:

The validity of this contract will be unaffected by the non-return of the counter confirmation duly signed by your goodselves.

3. The said contracts are signed on behalf of the defendant No. 1 and according to the plaintiff have not been signed by the plaintiff at the place marked and not returned to the defendant. The said sales contracts proceed on the premise of an agreement having already been entered into between the parties and envisage the plaintiff opening the Letter of Credit in pursuance thereto. The said sales contracts inter also provide:

All other terms and conditions to be in accordance with FOSFA 81 currently in force. Arbitration, if any, shall take place in Malaysia in accordance with the PORAM Rules of arbitration and appeal in force at the date of contract. This contract shall be governed by Malaysian Law.

4. It is the case of the plaintiff that notwithstanding the aforesaid, the plaintiff received a letter dated 20th September, 2008 from the defendant No. 1 informing the plaintiff that as the plaintiff had defaulted in performing the obligations under the three sales contracts aforesaid, i.e. of failing to establish a letter of credit, the defendant No. 1 would be initiating arbitration proceedings against the plaintiff for recovery of the purported loss suffered by the defendant No. 1 owing to the fluctuation in the price of the goods to which the sales contracts pertained.

5. Thereafter the correspondence ensued in which the plaintiff denied any contract and the defendant No. 1 and the brokers reiterated that contract had been entered into by one Mr. Manoj Agarwal on behalf of the plaintiff. The correspondence shows that the plaintiff does not dispute Mr. Manoj Agarwal to be one of the owners of the plaintiff company but has contended that the said Mr. Manoj Agarwal was not concerned with international purchase and was not authorized to make the purchase via the brokers and the said fact was to the knowledge of the brokers. The present suit has been filed by the plaintiff Company through its Manager (Commercial). No affidavit of Mr. Manoj Agarwal

has been filed. The correspondence also is by officials/directors/owners of the plaintiff other than Mr. Manoj Agarwal. According to the brokers the contracts had been entered into by them on behalf of the plaintiff acting through Mr. Manoj Agarwal, with the defendant No. 1 validly. The plaintiff has in the plaint contended the said brokers to be of the defendant No. 1 and not of the plaintiff.

6. It appears that the defendant No. 1 lodged a claim with PORAM (Palm Oil Refiners Association of Malaysia) who have been impleaded as the defendant No. 2 in the suit and who in accordance with their Rules of arbitration requested the plaintiff to nominate its arbitrator.

7. The plaintiff again replied that it had not entered into any agreement and had not signed any arbitration agreement and thus there can be no question of reference of any dispute to arbitration. The plaintiff has also pleaded of one En. Mohamed Abd Majed being appointed as the arbitrator by the defendant No. 1 and alleged the same being part of a racket. It is argued that the same En. Mohamed Abd Majed has been appointed arbitrator in similar transactions qua other importers of Palm Oil in India also. It is alleged that the defendants are in collusions with certain brokers in India and are similarly making claims against several parties in India.

8. The arbitration proceedings having been informed to have been commenced, the plaintiff has instituted the present suit for the following reliefs:

(a) Declaration that the initiation of the Arbitration Proceedings by the defendant No. 2 as per the PORAM Rules in Malaysia is malafide, illegal null and void ab-initio;

(b) Declaration that the Arbitral Tribunal constituted by the defendant No. 2 pursuant to the Notice dated January 7, 2009 is not competent and lacks Jurisdiction;

(c) Declaration that the purported sales contracts being SG/08/0561/107B01 dated 24th July, 2008, SG/08/0560/07B04 also dated 24th July, 2008 and SG/08/0623/08B01 dated 7th August, 2008 are nonest and void-ab-initio;

(d) Mandatory/Perpetual Injection restraining the defendants, its agents, servants and assigns from proceeding with the Arbitration or from taking any steps and or causing any steps to be taken in the Arbitration initiated by the Defendant No. 1;

(e) Pass such further or other order (s) as this Hon"ble Court may deem fit and proper in the facts and circumstances of the present case.

The plaintiff along with the suit has also applied for interim relief restraining the defendants from taking any further steps in the arbitration.

9. As aforesaid, yesterday doubts were expressed as to the maintainability of the suit. It was informed to the senior Counsel for the plaintiff that I have recently in *Roshan Lal Gupta v. Sh. Parasram Holdings Pvt. Ltd.* 157 (2009) DLT 712, in

relation to a domestic arbitration held that a suit for declaration that an agreement containing an arbitration Clause relied upon by the other party was fabricated, forged and thus void and for perpetual injunction restraining the other party as well as the arbitrator named in the agreement (in that case "Stock Exchange) from taking any arbitration proceedings did not lie. While holding so, reliance was inter alia placed upon the judgment of the Apex Court in K.V. Aerner Cementation India Ltd. v. Bajranglal Agarwal 2001 (6) Supreme 265, and which for easy reference is set out herein below:

1. These special leave applications are directed against an order of a learned Single Judge of Bombay High Court refusing to interfere with an order of the Civil Court vacating an interim order of injunction granted by it earlier. The suit in question had been filed for a declaration that there does not exist any arbitration Clause and as such the arbitral proceedings are without jurisdiction. The learned Single Judge of Bombay High Court came to hold that in view of Section 5 of the Arbitration and Conciliation Act, 1996 read with Section 16 thereof since the arbitral Tribunal has the power and jurisdiction to make rule on its own jurisdiction, the Civil Court would not pass any injunction against an arbitral proceeding.

2. Mr. Dave, the learned Senior Counsel appearing for the petitioner contends that the jurisdiction of the civil Court need not be inferentially held to be ousted unless any statute on the face of it excludes the same and judged from that angle when a party assails the existence of an arbitration agreement, which would confer jurisdiction on an arbitral Tribunal, the Court committed error in not granting an order of injunction. There cannot be any dispute that in the absence of any arbitration Clause in the agreement, no dispute could be referred for arbitration to an arbitral Tribunal. But, bearing in mind the very object with which the Arbitration and Conciliation Act, 1996 has been enacted and the provisions thereof contained in Section 16 conferring the power on the arbitral Tribunal to rule on its own jurisdiction including ruling on any objection with respect to existence or validity of the arbitration agreement, we have no doubt in our mind that the Civil Court cannot have jurisdiction to go into that question. A bare reading of Section 16 makes it explicitly clear that the arbitral Tribunal has the power to "rule on its own jurisdiction even when any objection with respect to existence or validity of the arbitration agreement is raised and a conjoint reading of Sub-section (2), (4) and (6) of Section 16 would make it clear that such a decision would be amenable to be assailed within the ambit of Section 34 of the Act. In this view of the matter, we see no infirmity with the impugned order so as to be interfered with by this Court. The petitioner who is a party to the arbitral proceedings may raise the question of jurisdiction of the Arbitrator as well as the objection on the ground of non-existence of any arbitration agreement in the so-called dispute in question and such an objection being raised, the Arbitrator would do well in disposing of the same as a preliminary issue so that it may not be necessary to go into the entire gamut of arbitration proceedings.

10. I had thus enquired from the senior Counsel for the plaintiff as to why the aforesaid law in relation to domestic arbitration, will not apply to international commercial arbitration as well.

11. The senior Counsel for the plaintiff has today made the following contentions:

A. Firstly it is contended that the Apex Court in *K.V. Aerner (supra)* has inter alia relied upon Section 5 and Section 16 of the Arbitration and Conciliation Act, 1996 and both of which are contained in part I of the said Act and which as per Section 2(2) thereof applies only when the place of arbitration is in India. It is contended that in the present case as per the agreement alleged by the defendants the place of arbitration is not in India but in Malaysia.

B. Secondly it is contended that Section 45 in part II of the Act relating to Enforcement of Certain Foreign Awards is in diversion from the para materia Section 8 in part I relating to domestic awards. u/s 45, the judicial authority seized of a matter, which is the subject matter of an agreement for arbitration is on the request of either party required to refer the parties to arbitration "unless it finds that the said agreement is null and void, inoperative or incapable of being performed."

C. Reliance is also placed on para 18 of *S.B.P. and Co. Vs. Patel Engineering Ltd. and Another*, to contend that the court loses the jurisdiction only when the other party applies for reference to arbitration owing to existence of an arbitration agreement; else the suit is maintainable.

D. The Counsel for the plaintiff in CS(OS) No. 1101/2009 has in support of the aforesaid proposition also referred to *Roshan Lal Gupta (supra)* and *Ministry of Sound International Ltd. Vs. Indus Renaissance Partners Entertainment Pvt. Ltd.*, also holding that the suit even if subject matter thereof is subject matter of arbitration agreement is not barred at the threshold.

E. The senior Counsel for the plaintiff also relies on order dated 17th April, 2009 in CS(OS) No. 682/2009 *Union of India v. Cairn Energy India Pty. Limited* whereby a Single Judge of this Court had registered the plaint and restrained the defendants therein from taking any further steps to prosecute any arbitration proceedings and restrained the defendant No. 3 in that case from Constituting an arbitral tribunal.

F. Reliance is also placed on the order dated 27th January, 2009 of a Single Judge of the Calcutta High Court in CS No. 11/2009 *SESA International Ltd. v. Macsteel International FZCO* whereby also ex parte injunction informed to be in restraint of arbitration pursuant to international commercial arbitration was, issued.

G. The Counsel for the plaintiff in CS(OS) No. 1101/2009 also relied upon *Bharti Televentures Ltd. Vs. DSS Enterprises Private Ltd. and Others*, , whereby another Single Judge of this Court had restrained arbitration by ICC, International Court of Arbitration during the pendency of the suit.

H. The Counsel for the plaintiff in CS(OS) No. 1101/2009 also referred to *Shin-Etsu Chemical Co. Ltd. v. Aksh Optifibre Ltd.* 2005 (6) Scale 561 where the Apex Court by majority of 2:1 held that when a suit is filed for a declaration and injunction for cancellation of document and declaration that long term sale and purchase agreement including arbitration Clause was void on the ground that terms of agreement are unconscionable, unfair and unreasonable and an application u/s 45 of the Arbitration Act is moved therein, the findings therein are only prima facie and not final.

12. The contention of the senior Counsel for the plaintiff of this Court being required to take a different view in relation to International Commercial Arbitration than that taken by the Apex Court in *K.V. Aerner (supra)* for the reason of Sections 5 and 16 being applicable only to Part I relating to domestic arbitration and not to an International Commercial Arbitration in Part II of the Arbitration Act is not found to be correct or in accordance with the law. The Apex Court in *Bhatia International v. Bulk Trading S.A.* 2002 (4) SCC 105 has held that the provisions of part I of the Arbitration Act apply to all arbitrations and to all proceedings relating thereto; where such arbitration is held in India the provisions of part I would compulsorily apply and parties are free to deviate only to the extent permitted by the derogable provisions of part I; in cases of international commercial arbitrations held out of India, the provisions of Part I would apply unless the parties by agreement, express or implied, exclude all or any of its provisions and in that case the laws or rules chosen by the parties would prevail; any provision in Part I, which is contrary to or excluded by that law or rules will not apply. Section 9 was thus held applicable to International Commercial Arbitrations.

13. The Apex Court again in *Venture Global Engineering Vs. Satyam Computer Services Ltd. and Another*, not only followed *Bhatia International (supra)* and further held that the provisions of Section 34 of the Act to be also applicable to International Commercial Arbitrations but otherwise also, in my view, the said judgment squarely applies to the facts of the present case. In that case a suit was filed before the Civil Court Secunderabad seeking a declaration to set aside the Award, and permanent injunction on the transfer of shares under Award. An application under Order 7 Rule 11 of the CPC was filed for rejection of the plaint. The trial court allowed the said application and rejected the plaint. The challenge thereto before the High Court did not succeed. The High Court held that the Award cannot be challenged even if it is against the public policy and in contravention of statutory provisions. Against the said order the appeal was preferred to the Apex Court. The Apex Court did not interfere with the rejection of the plaint and proceeded on the premise that though the suit was not maintainable but the same could be converted into objections to the Award u/s 34 of the Act. The Apex Court thus upheld the non-maintainability of a suit and provided for the remedies under the Arbitration Act only.

14. In view of the aforesaid settled position of law, I am not persuaded to hold

otherwise on the basis of the ex parte orders of this Court and Calcutta High Court cited above or the judgment in Bharti Televentures (supra).

15. As far as the reliance on the observations in SBP & Co. (supra) is concerned, the same is in relation to an application u/s 8 of the Arbitration Act. In fact Section 8 of the Arbitration Act as now interpreted is not different from Section 45. Though the language as in Section 45 and as quoted above does not form part of Section 8 but the courts have nevertheless held that the court can refer the parties to arbitration only upon being satisfied of the existence of the arbitration agreement and not mechanically.

16. Though in Shin-Etsu Chemical (supra), a suit as in the present case and/or as in K.V. Aerner (supra) had been filed but the same cannot be said to be a judgment on the maintainability of such a suit. The Apex Court in that case only proceeded to adjudicate the nature of the Order u/s 45 of the Act. It is well settled that a judgment of the Court has to be read in the context of question which arose for consideration in the case in which the judgment was delivered. The detailed discussion in this regard in para 4 of Bharti Televentures (supra), need not to be repeated herein.

17. The senior Counsel for the plaintiff has vehemently contended that an arbitration agreement is required to be in writing and in the present case there is no writing and even if the plea of the brokers and the defendants, of a transaction/contract having been concluded by Mr. Manoj Agarwal of the plaintiff is to be believed, there is admittedly no written arbitration agreement. It is contended that the suit ought to be entertained in these circumstances. However, in my view, the same would not make any difference. What emerges is that the brokers had placed an agreement on the defendant No. 1. The plaintiff contends that the brokers are of the defendant No. 1. The existence of such brokers in the trade is not disputed. Whether said brokers are the agents of the plaintiff or of the defendant No. 1 and whether there is any agreement in writing by the said brokers with the defendant No. 1 so as to bring an arbitration Clause into operation cannot be permitted to be adjudicated in this suit. The spirit of change in the arbitration law, even independently of Bhatia International was to minimize the intervention of the Court in arbitration proceedings and to expedite the same. If the suits as the present one are to be entertained, it would give tool in the hands of the party who is interested in delaying the arbitration (as one party is generally found to be) to in every case of arbitration first institute a suit for determination of validity thereof.

18. Though Bhatia International aforesaid has held the provisions of Part I of the Arbitration Act to be applicable to International Commercial Arbitrations also and which would include Section 16 as well, I had repeatedly asked from the senior Counsel for the plaintiff as to whether the Arbitration Forum relied upon by defendants did not permit the plaintiff to take the pleas as taken in the plaint in this suit. The plaintiff in para 20 of the plaint has also stated that the defendant No. 2 also asked the plaintiff to take all such pleas before the arbitral tribunal.

The senior Counsel for the plaintiff candidly states that though it was open to the plaintiff to take all the said pleas but the inconvenience, costs and harassment to the plaintiff would be tremendous. I am afraid that cannot change the law as aforesaid. The parties are not strangers to each other, both being in the trade and both having transacted in the past also. The plaintiff in para 21 of the plaint claims to have not taken any steps for the past relationship with the defendant No. 1. In these circumstances, the factual controversy ought to be gone into by the arbitral tribunal only. If the plaintiff succeeds in establishing before the arbitral tribunal that there is no agreement, the plaintiff can certainly claim costs of arbitration.

19. There is yet another consideration which prevails upon me to hold the suit to be not maintainable. The reliefs of declaration and injunction claimed in the suit fall within the domain of Specific Relief Act and are discretionary reliefs and circumscribed by the provisions of the Specific Relief Act, to be available only when there is no alternative efficacious remedy available. The remedy of taking the plea as by way of the present suit, before the arbitral tribunal itself is found to be alternative efficacious remedy.

20. The defendant No. 2 is a Chamber of Commerce as Delhi Hindustani Mercantile Association. All persons dealing with such chambers/associations and trading therein are aware that all their transactions would be governed by the arbitration of such associations/bodies. The plaintiff admittedly in the trade of buying of Palm Oil, is presumed to know that all transactions are subject matter of arbitration of the defendant No. 2. The plaintiff now cannot be permitted to thwart/frustrate the arbitration by institution of the present suit.

21. Though the reliefs in prayer paragraph (c) of declaration with respect to the agreements as distinct from the relief of declaration qua the arbitration agreement strictly would not be covered by the law discussed above but in my view no purpose would be served in confining the suit to the said relief and issuing notice to the defendant No. 1 only qua the same inasmuch as the defendant No. 1 having already initiated arbitration proceedings and the same having been pleaded by the plaintiff himself, the alternative remedy for seeking the said relief is also found to be the arbitral tribunal only.

22. The suit as filed is thus found to be not maintainable and is dismissed.