

(2000) 11 KAR CK 0022

In the Karnataka High Court

Case No : Civil Revision Petition No. 2278 of 1999

Sports Authority of India

APPELLANT

Vs

Private Eye Investigation Security Services

RESPONDENT

Date of Decision : 17-11-2000

Acts Referred:

Arbitration Act, 1940 — Section 34, 4
Arbitration and Conciliation Act, 1996 — Section 8
Civil Procedure Code, 1908 (CPC) — Section 115

Citation : (2001) 2 KCCR 728

Hon'ble Judges : Hari Nath Tilhari, J

Bench : Single Bench

Advocate : Cariappa and Company, for the Appellant; B. Sreenivasa Gowda, for the Respondent

Judgement

Hari Nath Tilhari, J.—I have heard Sri J. Samuel, learned Counsel of Cariappa and Company, for the revision Petitioner and Sri B. Sreenivasa Gowda, learned Counsel for the Respondents.

This revision petition u/s 115 of the CPC arises from the judgment and Order dated June 25, 1999, whereby, the Trial Court has dismissed I.A. No. I, filed by the Defendant-(revision Petitioner) in O.S. No. 6175 of 1994.

2. The Plaintiff filed the above suit for recovery of a sum of Rs. 65,312/-, with interest current and future at the rate of 24%.

The Plaintiff's case has been that the Plaintiff-company had been carrying on business of security personnel to various institutions and companies. According to Plaintiff who is Respondent, in this Court, Spots Authority of India, i.e., the Defendant in the suit represented by its Director invited tenders from the armed Security personels to provide security through News Paper Publication and the Plaintiff-Respondents submitted its proposal and the Plaintiff's proposals had been accepted by the Defendant-Government. An agreement was entered into on May 1st, 1991, to avail the services of security personnel vide copy of the

agreement filed in the suit, namely, O.S. No. 159 of 1991. According to Plaintiff's case the initial trial period was one year and after completion of one year's trial, if the Defendants were satisfied it may be extended by mutual agreement. Plaintiff further alleged that Defendant after being satisfied with the services of the Plaintiff, extended service for one more year, that is, upto 30th April, 1993, and later on by a letter dated 9th March, 1993, terminated the services of the Plaintiff. According to Plaintiff, huge amount of money was already accumulated by the time Plaintiff's services were terminated. Thereafter, according to Plaintiff's case there was an outstanding amount of Rs. 1,24,297.45 Ps, and so, Plaintiff issued a letter to Defendant demanding and showing the details and made requests to the Defendant to clear out those sums. According to Plaintiff, Defendant cleared out a portion of bills of January and February 1993, and according to it, a sum of Rs. 1,07,679.45 Ps, remained outstanding as on March 3rd, 1993, which Defendant had promised to clear off, but failed to do and according to Plaintiff, he sent reminder on 27.5.1993, showing that outstanding and according to Plaintiff's case, instead of clearing the entire bill for Rs. 1,07,679.45, the Defendant as per plaintiff allegations sent a cheque on 25.6.1993, for a sum of Rs. 55,087.50 Ps., with letter dated 28.6.1993, deducting the sum of Rs. 32,430/-, towards alleged costs of amplifier, VCR etc., without explaining the reason for balance amount of Rs. 20,161.95 Ps. According to Plaintiff's case Plaintiff, again issued a registered notice to the Defendant to pay the outstanding sum of Rs. 52,591.95 Ps. and requested the Defendant to clear off the bill. According to Plaintiff's case, Defendant sent a reply on 7.10.1993, and denied the claim of the Plaintiff and asserted that, it was untenable. According to Plaintiff, Defendant alleged that he is entitled to deduct that amount towards theft, pilferage etc. of the materials. Plaintiff in the suit claimed a sum of Rs. 71,622.95 Ps., as per details given in para-18 of the plaint, the true copy of which has been placed before me by the Plaintiffs-Respondents' Counsel and claimed interest at the rate of 24%.

3. The Defendant moved an application without filing any written statement u/s 8 of the Arbitration and Conciliation Act, 1996, for reference of the matter of Arbitration.

4. The application was moved on February 12th, 1997. Objection to the application was filed by the Plaintiff-Respondent and the Trial Court after having considered the material, dismissed the application observing:

Defendant appeared before the Court and has not filed any written statement stating their case, but, filed the present application. Even if the contention of Defendant is accepted, there must be some dispute as to Plaintiff's claim. No doubt, there is a clause in the agreement regarding reference being made to Arbitrator though at the stage of argument, Defendant's Counsel submitted that there was certain theft during security service provided by the Plaintiff and the value of stolen articles has to be deducted in the service charges being paid to the Plaintiff.

However, it is pointed out by the Plaintiff that no such complaint had been given to the police nor were Plaintiff informed about thefts and only after the claim was made by the Plaintiff presenting the bill the Defendant has come up with the story. Moreover, he also points out that there is no clause in the agreement that such amount is to be deducted. However, that is besides the Plaintiff has made the claim and has filed the suit none of the contentions taken by the Defendant are reduced to writing and nothing to show that there is any dispute regarding payment of amount in such a case. There is nothing to refer the matter to Arbitration on only if there is any dispute the matter can be referred to arbitration.

After having made these observations, the learned Trial Judge dismissed the Defendant's application which Defendant had made u/s 8 of Arbitration and Conciliation Act, 1996, that is, Act No. 26 of 1996.

5. Feeling aggrieved from the Trial Court's order, the Defendant has come up in revision u/s 115 of the Code of Civil Procedure.

As mentioned earlier, I have heard the learned Counsels for the parties.

6. Learned Counsel for the revision Petitioner contended that u/s 8 of Act of 1996, it was the mandatory duty of the learned Court below to have made a reference to the Arbitration as learned Counsel contended that, the language of Section 8 provide that, Judicial Authority, shall refer parties to Arbitration. Learned Counsel contended that, the Defendant had a right to seek Arbitration, as, the obligation is fastened on the Court to refer it to Arbitrator. The learned Counsel contended, as such the Court below acted illegally and has illegally refused to exercise the jurisdiction vested u/s 8, by rejecting the application. Learned Counsel for the revision petition further contended that the Trial Court committed an error of law in opining that, there was no dispute to be referred to Arbitrator, as, no written statement has been filed by the Defendant in the suit, even though, contentions had been made orally to show that there has been any dispute. Learned Counsel contended that, when oral contentions indicated the points under the dispute the Civil Court was wrong in taking that, there is nothing to refer to Arbitrator and illegally refused to follow the mandate of law u/s 8 of Arbitration and Conciliation Act. As such, this is a case in which there is jurisdictional error and revision may be allowed.

These above, as just contentions, of the Petitioner's Counsel have hotly been contested on behalf of the Respondents by Sri Sreenivasa Gowda. Sri Gowda, contended that, this order may not amounts to be the case decided and it is an order in course of the proceedings of the suit and that, as the order does not amount to a case decided, revision is not maintainable. Sreenivasa Gowda contended that Defendant had taken good many adjournments in course of the suit before filing the application u/s 8 of Arbitration and Conciliation Act, there has been laches and ill-motive in seeking adjournments, time again, and after almost 3 years of the filing of the suit, the application had been filed with ill-

motives, and therefore, revision Petitioner is not entitled to exercise of revisional jurisdiction in his favour. Sreenivasa Gowda contended that, no written statement had been filed except during course of the argument dispute had been raised and once there as no written statement filed the Trial Court rightly held that there was no dispute to be referred to Arbitrator, and as such revisional order cannot be said to suffer from any jurisdictional error and revision may be dismissed.

7. I have applied my mind to the contentions raised by the learned Counsel for the parties.

No doubt, one of the first initial condition for invoking the jurisdiction of this Court u/s 115 is that, order impugned must be shown to be a case decided. When parties to an Arbitration agreement enter into and select the forum for decision of the dispute between them under the agreement through the arbitration the law is that, they should be enabled to have recourse to that forum, when they have a right to seek. That when a party applies for to have the recourse to that forum under the Arbitration agreement and the Court rejects the application and in particular when law, so, gives him a right to have recourse to arbitration, as per Section 8 of the Act, the order refusing or rejecting the application u/s 8, really appears, to and amounts to determination and decision with regard to the right of the party to approach the forum agreed under the agreement, and in such a case, it further amounts to denying him of his right to have determination to decision from forum agreed upon. Thus considered the order in the nature of order impugned, in my opinion, can be said to amount to be case decided for the purpose of Section 115 of the Code.

8. The yardsticks in this regard has been laid down by their Lordships of the Supreme Court in the case of Baldevdas Shivilal and Another Vs. Filmistan Distributors (India) P. Ltd. and Others, , where their Lordships laid down that:

A case may be said to a case decided, if the Court adjudicates for the purpose of the suit some right or obligation of the parties in controversy; every order in the suit cannot be regarded as a "case decided" within the meaning of Section 115.

As mentioned earlier, in this case, the right of the party, for the purpose of adjudication, to seek adjudication from Arbitrator is denied by and appears to have been decided by Civil Courts by rejecting the application u/s 8. Therefore, order impugned as mentioned earlier, amounts to a case decided. It is no doubt, to be taken note that revisional jurisdiction u/s 115, can be exercised to correct the jurisdictional error or error effecting or touching jurisdiction. In other words, if the order appears to suffer from jurisdictional error within the framework of Clauses (a), (b) or (c) of Section 115 of the Code in a case whereby, giving of erroneous decision with reference to a jurisdictional fact or a question of affecting its jurisdiction either the Court illegally usurps the jurisdiction not vested or has illegally refused to exercise the jurisdiction vested then also, a case may arise for the purpose of exercise of jurisdiction u/s 115 vide the principles of law laid down in AIR 1949 156 (Privy Council) and in the case of AIR 1949 239

(Privy Council) , and in the case of Chaube Jagdish Prasad and Another Vs. Ganga Prasad Chaturvedi, as well as in Sri Ratnavaramaraja Vs. Smt. Vimla, .

It is also to be taken note of that if, a Court while exercising its jurisdiction, without application of its mind to the pleading of the parties or the pleading, before it takes a decision, then Court can be said to be acting illegally and with material irregularity in exercise of jurisdiction vested in it. It was a settled principle of law that, necessary pleadings must be taken note of when a question has to be decided, to the extent it is necessary.

9. In the present case it appears that, the Court below firstly, completely ignored the language of Section 8 of Arbitration and Reconciliation Act and its mandatory nature and secondly, it did not apply its mind to the pleadings contained in the plaint filed by the Plaintiff which per se reveal that, there was a dispute and so, suit was filed. That was another question to be considered, no doubt; Whether the dispute came within the framework of Arbitration clause that, will be considered hereinafter.

10. In the present case as per plaint allegations specially those contained in para-15, paras 16 and 17, which read and which are being quoted hereunder, reveal the existence of the dispute between the parties. That paras 15, 16 and 17 of plaint read as under:

Plaint Para-15: The Defendant, instead of clearing the bill of the Plaintiff as, it is for Rs. 1,07,679.45 Ps., sent a cheque bearing Nos. 232475 dated 25.6.1993, for Rs. 55,087.50 Ps., along with letter dated 28.6.1993, deducting a sum of Rs. 32,430/-, towards the costs of amplifier, VCR Camera, ceiling fan and hockey net to the surprise of the Plaintiff and even without explaining the reason for the balance amount of Rs. 20,161.95 Ps.

16: The Plaintiff left with no option issued a detailed letter dated 6.7.1993, by registered post requesting the Defendant to pay the balance amount of 52,591.95 Ps., copy of the same is produced herewith as Plaintiff's document No. 7. When Plaintiff did not receive any response from the Defendant, again, sent a letter dated 14.8.1993, requesting the Defendant to intimate their final decision about the payment of balance bill.

(17) The Defendant in reply dated 7.10.1993, denied the claim of the Plaintiff on untenable ground that, they are entitled to deduct the amount towards theft, pilferage of the materials.

(18) The Plaintiff alleged that, they were not intimated about the loss of those items amounting to Rs. 32,430/-, during the course of service and they heard of the same for the first time when they submitted the bill.

These above noted paragraphs I have quoted from the copy of the plaint furnished by the Counsel for the Plaintiff-Respondent when especially the Counsel for the Plaintiff-Respondent especially the Counsel for the Plaintiff-Respondent and Defendant-Appellant's Counsel did not dispute its correctness.

A reading of these paragraphs per se reveal that, there was a dispute as atleast, with respect to the amount claimed, and as Defendant when the notices were given, did not pay the amount of Rs. 52,591.95 Ps., instead the Defendant asserted that, he is entitled to deduct that amount for the loss of items on account of theft and pilferage and asserted that, the Plaintiff was not entitled to that amount. That it emerges from allegations of Paragraph-17, according to which Defendant denied the Plaintiff's claim. The dispute definitely did exist firstly, when the demand was made and no payment was made of the sum of Rs. 52,000/-, and odd and when specifically it was denied by reply dated 7.10.1993. Definitely in my opinion, the Trial Court did commit the error of law and acted illegally in taking the view that, as Defendant has not filed any written statement, there is no dispute to be referred.

11. The learned Court below ignored the language and has shown ignorance about the language used in Section 8 and also the language as, used in Section 4 of Arbitration Act of 1940. Under both the Acts, it had been provided that, application either u/s 34 of Act, 1940 or u/s 8 of Act of 1996, has to be moved by the party or to say the Defendant before filing the written statement. Section 8 of the Arbitration and Conciliation Act, 1996, reads as under:

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 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.

The material expression used is after a party, so, applies not later than when submitting his first statement of substance of the dispute. This special expression clearly reveals that, application u/s 8, has to be moved before filing of the written statement indicating the dispute. So, there was no question of written statement being filed, dispute might have been indicated in application, but, no written statement had been filed, it could be pointed out during the arguments when he makes an application and there if it is found that the subject-matter of dispute is covered by the arbitration, i.e. the subject-matter of the action is covered by the arbitration agreement and party applies before filing a written statement then, a bounden duty has been fastened on the Judicial Authority, be it correct or otherwise, that, it shall refer the parties to the proceedings to Arbitration.

12. u/s 34, also of the Act, 1940, application could be moved only earlier to filing

of the written statement or taking any step in course of proceedings. The Section 10, no doubt, makes some change from Section 34.

Section 34 of Arbitration Act, 1940, clearly provides that any party to such legal proceeding may move an application u/s 34 of Act thereof at any time, but, before filing the written statement as well and before taking any other step in the proceedings. In other words, under Arbitration Act, 1940, an application Section 34, could be moved on before filing of written statement as well as before taking any other step in the proceeding and not thereafter. Here u/s 8, in the new Act, the legislature appears, to have deleted the expression, "or taking any other steps in the proceedings".

13. Had legislature used the same language as in Section 34, and not excluded the expression, "or taking other steps in the proceedings" as used in Section 34 of Act of 1940, no doubt, there would have been some substance in that case in the contention of Sri Sreenivasa Gowda, that, the Defendant appeared and moved the application for adjournment and took adjournment, and so, the application u/s 8 of Arbitration and Conciliation Act was not maintainable. But, as the legislature has intentionally omitted the expression "or taking any other steps in proceedings" in Section 8 of Act of 1996 and as there is no such expression in Section 8 thereof the application u/s 8, could be made before filing written statement, and even if some adjournments would have been taken, that would not have barred the moving of application u/s 8 of the New Arbitration Act. Had the application being made after filing of the written statement, the application could not have been entertained, but that is not the case here so, the contentions made by the Counsel for the Respondents on the basis that some adjournment may be sought, and that so application as not maintainable, is without substance and has to be rejected.

14. As regards the question: Whether dispute is covered by Arbitration clause, firstly, the observation of the Trial Court will have to be taken note of. These observations are:

Defendant has appeared before the Court but has not filed any written statement stating their case but has filed the present application. (a) Even if the contention of Defendant is accepted there must be some dispute as to the Plaintiff's claim. No doubt there is a clause in the arbitration agreement for reference being made to the Arbitrator.

Apart from that clauses 17 and 22 of the agreement per se reveal that the subject-matter of suit was subject-matter covered by arbitration.

15. Clause 17 of the agreement, as per the copy thereof being placed before the Court, reads as under:

Clause 17 of agreement.-In the event of theft, pilferage or pilferage of SAI's materials of properties, the contractor's personnel shall actively investigate and if it is necessary, report such incidents to the police and follow-up the same.

They would be liable for legal action if they are directly or indirectly involved in any theft. The contractors shall be liable for losses due to theft from the premises and the value of the articles lost shall be made good by contractors.

18.-The contractor shall be solely responsible for all accidents of personnel injuries to the security personnel employed by him.

Clause 22 of the agreement reads and is as follows:

Clause 22.-Except as otherwise provided, any dispute arising out of this agreement shall be referred to the sole arbitration of a person nominated by the Regional Director, SAI Southern centre, Bangalore, whose decision shall be final. The venue of arbitration shall be at Bangalore and the arbitration shall be under Indian Arbitration Act, 1940. The Arbitrator may from time to time with the consent of the parties, enlarge the time for making and publishing that award.

This clause per se appears, to be the arbitration agreement and the dispute in the present case, no doubt, arises out of contract vide clauses 5 and 17 of the agreement dated April 30th, 1993. It may be clarified that, Clause 5 relates and provides for charges for security services and the rates mentioned therein, so in my opinion, when the claim was made and it was not accepted and later on, denied, there did arise and there, was a dispute and that dispute per se, appear from the perusal of the plaint allegations quoted above. In this view of the matter, in my opinion, the learned Judge or subordinate Court acted illegally and with material irregularity on one hand in exercise of jurisdiction by rejecting the application, on its failure to read and apply its mind to the language of Section 8 of the Act of 1996 and Section 34 of 1940, as well as on account of its failure to apply its mind to the plaint which per se discloses that, there was a dispute about the amount and liability and right to deduct etc. and subject-matter was per se covered by arbitration agreement.

16. Really, by taking an erroneous decision on the subject, as to whether there exists a dispute, the Trial Court illegally refused to exercise the jurisdiction vested in it to refer the dispute to Arbitration which was sought by Defendant-revision Petitioner, and by holding that as, no written statement has been filed there existed no dispute and there is/has been no dispute to be referred to Arbitration u/s 8 of the Act of 1996. Thus considered in my opinion, the order impugned per se suffers from jurisdictional error which may come within the framework of Clauses (b) and (c) of Section 115. In this view of the matter, the revision petition has to be allowed and the application I.A.I, filed by the Defendant-revision Petitioner u/s 8 of Act of 1996, has to be allowed.

The dispute between the parties as indicated above to be in existence, as such, u/s 8 of Act of 1996 has to be referred to Arbitration. It is open to refer them to Arbitration and here the Arbitrator has to be named by the Regional Director and when the claim had been made and denied, it was the duty of the revision Petitioner, even, at that stage to have appointed and nominated the Arbitrator as, agreement per se reveals. The application could be rejected, had Act of 1996,

not been there because then, the Defendant would have had to show that he was always ready and willing to do that was necessary to do for progress of the arbitration and when the claim was placed before it and Regional Director did not nominate any Arbitrator, and it would have been said and shown that, he was not ready and willing to do all that necessary for arbitration.

17. Now really, Section 8, does not use that expression "of readiness and willingness". That u/s 8, any way, the parties are to be sent to and referred, (a) to the Arbitration (B) Arbitrator is to be nominated by the Regional Director of the Sports Authority of India, i.e., the present revision Petitioner. Let, revision-Petitioner ask in writing Regional Director to nominate the "sole Arbitrator, "within four months from today- or three months from date of receipt of copy of this order. Thus considered, the revision petition is allowed.

18. Let parties, and their dispute as appears from plaint allegation and the plaint of suit be referred to the Arbitrator to be nominated by the Defendant-revision Petitioner, as mentioned earlier within four months. The Trial Court in that case, may transfer the plaint or direct the Plaintiff to furnish to the Court required number of copies of the plaint to be sent to the Arbitrator to be nominated by Defendant No. 1, i.e., Regional Director within period mentioned above.

If no Arbitrator is nominated by Defendant-revision Petitioner's i.e., Regional Director and appointment is not communicated to the Court within aforesaid four months" period as above it will be open to Trial Court to proceed with the trial of the suit, according to law. The parties to the revision will bear their own costs respectively.

If Arbitrator is not nominated i.e., the Regional Director by the revision Petitioner as per Clause 32 of Agreement, the revision petition will stand dismissed and the Court will proceed to try the suit on merits itself.