

(2007) 05 MAD CK 0004

In the Madras High Court

Case No : C.M.A. No's. 111 to 118 of 2007

Srikumar Textiles (P) Ltd., N. Vishalakshi and V. Sathappan

APPELLANT

Vs

Sundaram Finance Ltd.

RESPONDENT

Date of Decision : 31-05-2007

Acts Referred:

Arbitration Act, 1940 — Section 2

Arbitration and Conciliation Act, 1996 — Section 37(3)

Civil Procedure Code, 1908 (CPC) — Section 151

Citation : (2008) 1 ARBLR 217

Hon'ble Judges : S. Manikumar, J

Bench : Single Bench

Advocate : B.S. Gnanadesigan, for the Appellant; A.R.M. Ramesh, for the Respondent

Final Decision : Allowed

Judgement

S. Manikumar, J.—The appeals are preferred against the orders, dismissing the petitions filed under Order 9 Rule 9 read with Section 151

of C.P.C., to restore the arbitration Original Petitions, which were dismissed for default, on 13.10.2004.

2. Since the appeals involve common question of law and facts, they are taken up together and disposed of by common judgment.

3. Brief facts leading to the appeals are as follows:

The first appellant is an industrial Textiles Mill. registered as a Private limited company under Indian Companies Act. The appellants 2 and 3, wife

and husband are the Directors and Guarantors to the first appellant company. They borrowed money from M/s. Sundaram Finance Ltd., the

respondent herein. On the applications filed by the finance company/respondent, the Arbitrator passed a common award. Aggrieved by the award,

the appellants filed Arbitration Original Petitions before the Principal Sub Judge, Madurai u/s 34 of the Arbitration and Conciliation Act, 1996

(hereinafter referred to as "the Act") r/w Section 151 of C.P.C., to set aside the common award passed by the Arbitrator dated 16.02.2002.

4. On 13.10.2004 when the matters were posted, on the request of the respondent's counsel for filing written objections, the matters were passed

over till afternoon. When the matters were taken up in the evening, learned Counsel for the appellants was absent, and therefore, the Arbitration

Original Petitions were dismissed for default. Thereafter, the appellants filed applications under Order 9 Rule 9 r/w Section 151 C.P.C., to restore

the Arbitration Original Petitions which were dismissed for default on 13.10.2004.

5. The respondent herein filed counter affidavit and contended that appellants Advocate had failed to represent his case, when the matters were

called in the Morning and the same was passed over till afternoon and in the absence of representation from appellants 2 and 3, the petitions were

dismissed for default. The respondent further submitted that the reasons stated by the appellants for their absence in the interlocutory petitions are

not properly explained and hence, prayed for dismissal of the applications.

6. Learned Principal District judge, Madurai, on evaluation of pleadings, dismissed the applications filed for restoration on the ground that the

restoration applications lack merits and there is no provision for filing application under Order 3 Rule 9 r/w Section 151 of C.P.C, The learned

judge further observed that though the Arbitration Original petitions were dismissed on 13.10.2004, the appellants could have filed the applications

for restoration on the same, day or the next day, if the Advocate's clerk was present, in the Court. Whereas, the applications for restoration, were

filed only on 19.10.2004. Though it is stated that the second appellant had gone to Thiruchendur, no reasons were assigned for the absence of the

third appellant and therefore, there is no proper explanation. The other reason assigned by the lower Court for the dismissal of the restoration

applications is that though, it was stated in the affidavit, that the applications for restoration under Order 9 Rule 9 r/w Section 151 of C.P.C, are

maintainable, the appellants have failed to satisfy the Court, with reference to legal provisions in law.

7. Aggrieved by the orders dismissing the petitions filed for restoration, the

appellants have preferred the above appeals.

8. Mr. B.S. Gnanadesigan, learned Counsel for the appellants raised an important issue as to whether the provisions of C.P.C., are applicable to

the proceedings arising out of an arbitration award or any order passed by an Arbitrator, and challenged before the Court u/s 34 of the Act. By

referring to the provisions of the Act, learned Counsel for the appellants submitted that whenever orders of the Arbitral Tribunal or any

proceedings arising out of the Arbitration Act are challenged in a Court of law, the competent Court as defined in Section 2(e) of the Arbitration

Act, governed by the procedure contained in CPC and the non-obstante clause in Section 5 of the Act is confined only to the proceedings before

the Arbitral Tribunal and does not control the procedure to be followed by the civil Court. He further submitted that in the absence of specific

exclusion of the applicability of C.P.C., to the proceedings arising out of the orders passed by the Arbitral Tribunal, any order challenged" under

Sections 9, 27, 34, 36 and 37 of the Act are governed by the provisions of Civil procedure Code. In support of his contention, learned Counsel

for the appellants placed reliance on the decisions reported in I.T.I. Ltd. Vs. Siemens Public Communications Network Ltd., and Om Sakthi

Renegies Limited Vs. Megatech Control Limited and A.P. Transco, . He further submitted that the amount involved in the Arbitration Proceedings

is huge, the appellants have adduced proper reasons in the restoration petitions, that there is no undue delay in seeking the restoration of the

Arbitration Original Petitions and in order to render substantial justice, the original petitions have to be restored on file for adjudication.

9. Per contra, Mr. A.R.M. Ramesh, learned Counsel appearing for the respondent submitted that the object of the Arbitration and Conciliation

Act, 1994, is to have a speedy disposal of the disputes in matters relating to the commercial transactions and to arrive at an amicable settlement.

Any delay or dilatory tactics adopted by the parties to the arbitration proceedings would defeat the object of the Act. He further submitted that the

reasons assigned by the appellants in the restoration petitions lack bona, fide and therefore, the order of the lower Court in dismissing the petition is

justified. He further submitted that the dismissal of the Arbitration Original Petitions have reached its finality on 13.10.2004. The applications for

restoration emanate from Original Proceedings filed u/s 34 of the Act. When Section 37(3) of the Act prohibits filing of a second appeal against an

order passed u/s 34 of the Act, whether on merits or default, no interlocutory application, is maintainable, arising out of an order u/s 34 of the Act.

10. Considering the quantum of the amount involved and the attitude of the appellants in delaying the payment, learned Counsel for the respondent

submitted that if this Court in the event of coming to the conclusion that the applications under Order 9 Rule 9 r/w Section 151 of C.P.C., are

maintainable in law, then the appellants should be directed to deposit a substantial amount to meet the ends of justice, pending further proceedings.

11. Heard Mr. B.S. Gnanadesigan, learned Counsel for the appellants and Mr. A.R.M. Ramesh, learned Counsel for the respondent.

12. Before considering the submission of the learned Counsel for the parties with reference to the facts of this case, it is necessary to refer to

certain provisions of the Act.

13. The Arbitration and Conciliation Act 1996 is divided into four parts.

Part I deals with arbitration;

Part II deals with enforcement and decrees;

Part III deals with Consideration; and

Part IV deals with supplementary provisions relating to the powers of the High Court to make rules, repeal and miscellaneous provisions etc.,

14. Part I deals with the general provisions and as per the definition of Section 2(e) of Act,

Court"" means the Principal Civil Court of original jurisdiction in a district, and includes the High Court in exercise of its ordinary original civil

jurisdiction, having jurisdiction to decide the questions forming the subject-matter of the arbitration if the same had been the subject-matter of a

suit, but does not include any civil Court or a grade inferior to such Principal Civil Court, or any Court of small causes.

15. Section 5 of the Act demarcates the extant of judicial intervention and it is extracted hereunder:

Notwithstanding anything contained in any other law for the time being in force, in matters governed by this part, no judicial authority shall

intervene, except where so provided in this part.

16. Chapter II deals with the arbitration agreement and orders passed by the Court as an interim measure pursuant to the Arbitration agreement, as defined in Section 7 of the Act.

17. Section 8 of the Act empowers the judicial authority to refer parties to arbitration and it reads as follows:

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 to 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 an 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.

18. As per Section 9 of the Act, a party to the arbitral proceedings, before or during arbitral proceedings or at any time, after making the arbitral award but before it is enforced in accordance with Section 36, can apply to the Court for seeking relief for any of the purposes mentioned in the

Section as an interim measure of protection, preservation, custody, securing the amount in dispute, etc. Section 9 reads as follows:

9. Interim measure etc., by Court:- A party to the arbitral proceedings, before or during arbitral proceedings or at any time, after making of the arbitral award but before it is enforced in accordance with Section 36, applies to the Court:

(i) for the appointment of a guardian for a minor or person of unsound mind for the purpose of arbitral proceedings; or

(ii) for an interim measure of protection in respect of any of the following matter of the arbitration agreement;

(a) the preservation, interim custody or sale of any goods which are the subject-matter of the arbitration agreement;

(b) securing the amount in dispute in the arbitration;

(c) the detention prevention or inspection of any property or thing which, is the subject-matter of the dispute in arbitration or as to which. any

question may arise therein and authorising for any of the aforesaid purpose any person to enter upon any land or building in the possession of any

party or authorising any samples to be taken or any observation to be made, or experiment to be tried, which may be necessary or expedient for

the purpose of obtaining full information or evidence;

(d) interim injunction or the appointment of a receiver;

(e) such other interim measure of protection as may appear to the Court to be just and convenient,

and the Court shall have the same power for making orders as it has for the purpose of, and in relation to, any proceedings before it.

19. Chapter 3 of the Act deals with the composition, of Arbitral Tribunal, number of Arbitrators and appointment of Arbitrators. Chapter 4 of the

Act deals with the jurisdiction of the Arbitral Tribunals. Chapter 5 of the Act deals with the conduct of the arbitral proceedings. As per Section 27

of the Act, with the approval of the Arbitral Tribunal, the Arbitral Tribunal may apply to the Court for assistance in taking evidence. Section 27 is

extracted hereunder:

27. Court assistance in taking evidence:

(1) The Arbitral Tribunal, or a party with the approval of the tribunal, may apply to the Court¹ for assistance in taking evidence.

(2) The application shall, specify-

(a) the names and addresses of the parties and the arbitrators

(b) the general nature of the claim and the relief sought;

(c) the evidence to be obtained, in particular-

(i) the name and address of any person to be heard as witness or expert witness and a statement of the subject-matter of the, testimony required;

(ii) the description of any document to be produced or property to be inspected.

(3) The Court may, within its competence and according to its rules on taking evidence, execute the request, by ordering,, that the evidence to be

provided directly to the Arbitral Tribunal.

(4) The Court may, while making an order under Sub-section (3), issue in suits tried before it.

(5) Persons failing to attend in accordance with such process, or making any other default, or refusing to give their evidence, or guilty of any

contempt to the Arbitral Tribunal during the conduct of arbitral proceedings shall be subject to the like disadvantages, penalties and punishments by

order of the Court on the representation of the Arbitral Tribunal as they would incur for the like offences in suits tried before the Court.

(6) In this section the expression ""processes"" includes summons and commissions for the examination of witnesses and summons to produce documents.

20. Chapter 6 deals with making of arbitral award and termination of proceedings. Chapter 7 deals with the challenge made by the aggrieved

person against the award passed by the Arbitral Tribunal. Section 34 deals with an application for setting aside the arbitral award, which is

extracted hereunder:

34. Application for setting aside arbitral award: (1} Recourse to a Court against an arbitral award may be made only by an application for setting

aside such award in accordance with Sub-section (2) and Sub-section (3)

(2) -----

(3) -----

(4) on receipt of an application under Sub-section (1), the Court may, where it is appropriate and it is so requested by a party, adjourn the

proceedings for a period of time determined by it in order to give the Arbitral Tribunal an opportunity to resume the arbitral proceedings or to take

such other action as in the opinion of Arbitral Tribunal will eliminate¹ the grounds for setting aside arbitral award.

21. Chapter 8 deals with the finality and enforcement of the arbitral awards. As per Section 36 of the Act, if the time for making an application to

set aside the arbitral award u/s 34 has expired, or such application having been made, if it has been refused, the award shall be enforced under

Code of Civil Procedure, 1908 in the same manner, as if it were a decree of the civil Court. Chapter 9 of the Act deals with the appeals arising out

of an order u/s 9 granting, or refusing to grant any interim measure, pending disposal of the arbitral proceedings or at any time, after making the

award, but before it is enforced in accordance with Section 36. Chapter 10 deals with Miscellaneous provisions such as deposits, security,

insolvency, limitation, etc.,

22. The issue to be decided is, what is the extent of judicial intervention, which the "Court" as defined in Section 2(2) of Act, could intervene in the proceedings covered under the Arbitration Act?

23. Section (sic) of the Act restricts the powers of the judicial authority to intervene, except so provided in part-1 of the Act. As per Section 8 of the Act, the judicial authority, before which, an action is brought in a matter which is subject to an Arbitration agreement, shall, if the party so applies not later than when submitting his first statement on the substance of the dispute, refer the parties to arbitration. This provision enables the judicial authority to entertain the suit and pass orders until is brought to the notice of the authority in the first statement that there is an arbitration clause, whereby the part it is could be referred for settlement. No. sooner it is brought to the notice of the judicial authority that the e in an arbitration clause, the Court has to consider the said clause and provide an opportunity to the parties so that the disputed it; resolved as per the arbitration agreement rather than but judicial adjudication.

24. u/s 9 of the Act, a party may, before or during the arbitral proceedings or at any time, after making of an arbitral award, but before it is enforced in accordance with law u/s 36 of the Act, pass interim orders for the protection, preservation of the property etc. The Court shall have the same power for making order as it has for the purpose of, and in relation to, any proceedings before it. Therefore, the Court has got the power to pass interim orders for the purpose mentioned in Section 9 of the Act, even if, the proceedings are pending before the Arbitral Tribunal.

25. u/s 27 of the Act, Arbitral Tribunal or a party with the approval of the Arbitral Tribunal, may apply to the Court for assistance in taking evidence and the Court may pass appropriate orders to issue summons to the witness, etc. Section 34 of the Act provides for recourse to the Court against the arbitral award by way of an application for setting aside such award in accordance with Sub-Sections 2 and 3 of the Arbitration Act.

26. Section 36 of the Act contemplates enforcement of the award and it is made clear that the award passed under the Arbitration Act, shall be enforced, as if, it is the decree of the Court. Therefore, the provisions contained in CPC relating to execution of the decree, apply for enforcement

of the award. Section 37 of the Act, as stated supra, deals with the filing of the appeal from original decrees of the Court with regard to granting or

refusing to grant orders as an interim measure, provided u/s 9 of the Act and for setting aside or refusing to set aside the arbitral award u/s 34 of

the Act. u/s 37(2) of the Act, the appeals shall lie to a Court from the order or Arbitral Tribunal. Sub-sections (2) and (3) of Section 37 are

extracted hereunder:

(2) An appeal shall also lie to a Court from an order of Arbitral Tribunal

(a) accepting the plea referred to in Sub-section (2) of Sub-section (3) of Section 16; or

(b) granting or refusing to grant an interim measure u/s 17.

(3) No second appeal shall lie from an order passed in appeal under this section, but nothings in this section shall affect or take away any right to

appeal to the supreme Court.

27. Reading of the provisions contained in part-1 of the Act disclose that there is a prohibition under Sub-section 37 of the Act, that no second

appeal shall lie against the order passed u/s 34 of the Act. The word ""Court"" used in Sections 8, 9, 27, 34, 36 and 37 in part-1 of the Arbitration

and conciliation Act, 1996 is referable to the Court as defined in Section 2(e) of the Act, which means the principal civil Court of Original

jurisdiction in a District and inclusive of High Court in exercise of its powers of ordinary original jurisdiction, having jurisdiction to decide the

question forming the subject matter of the arbitration, if the same had been the subject matter of the suit, it does not include any civil Court or a

grade inferior to such Principal Civil Court or any Court of small causes.

28. While deciding the maintainability of the revision petition filed u/s 115 of C.P.C., against the order made by the Civil Court in an appeal

preferred u/s 37 of the Act, the supreme Court in I.T.I. Ltd. Vs. Siemens Public Communications Network Ltd., , held that when there is no

express exclusion in the Arbitration Act, it cannot be inferred that the C.P.C., is not applicable to the proceedings arising out of an order passed

under the provisions of the Arbitration Act. In Paragraph Nos. 10 and 11, the supreme Court held as follows:

it is true in the present Act application of the Code is not specifically provided for but what is to be noted is: Is there an express prohibition against

the application of the Code to a proceeding arising out of the Act before a civil Court? We find no such specific exclusion of the Code in the

present Act. When there is no express exclusion, we cannot by inference hold that the Code is not applicable.

11. It has been held by this Court in more than one case that the jurisdiction of the civil Court to which a right to decide a lis between the parties

has been conferred can only be taken by a statute in specific terms and such exclusion of right cannot be easily inferred because there is always a

strong presumption that the Civil Courts have the jurisdiction to decide all questions of civil nature, therefore, if at all there has to be an inference

the same should be in favour of the jurisdiction of the Court rather than the exclusion of such jurisdiction and there being no such exclusion of the

Code in specific terms except to the, extent stated in Section 37(2), we cannot draw an inference that merely because the Act has not provided the

C.P.C., to be applicable, by inference it should be held that the Code is inapplicable. This general principle apart, this issue is not settled by the

judgment of a three Judge Bench of this Court in the case of Bhatia International v. Bulk Trading S.A. and Anr. in C.A. No. 6527 of 2001

decided on 13.03.2002 wherein while dealing with a similar argument arising out of the present Act, this Court held: ""while examining a particular

provision of a statute to find out whether the jurisdiction of a Court is ousted or not, the principle of universal application is that ordinarily the

jurisdiction may not be ousted unless the very statutory provision explicitly indicates or even by the inferential conclusion the Court arrives at the

same when such a conclusion is only conclusion.

In paragraph 13 of the said judgment, the supreme Court repelled the contention of the learned Counsel of the appellant therein that the revision is

not maintainable in view of the bar u/s 5 of the Act. Paragraph 13 of the judgment is extracted hereunder:

The term "Court" referred to in the said provision is defined u/s 2(e) of the Act. From the said definition, it is clear that the appeal is not to any

designated person but to a civil Court. In such a situation, the proceedings, before such Court will have to be controlled by the provisions of the

Code therefore, the remedy by way of a revision u/s 115 of the Code will not amount to a judicial intervention not provided for by part-1 of the

Act. To put it in other words, when the Act u/s 37 provided for an appeal, to the Civil Court and the application of the Code not having been

expressly barred, the reversional jurisdiction of the High Court gets attracted. If that be so, the bar u/s 5 will not be attracted because conferment

of appellate power on the Civil Court in part 1 of the Act attracts the provisions of the Code also.

29. Following the dictum laid down by the supreme Court that in the absence of specific exclusion and express bar against the application of the

CPC to proceedings arising out of Act, before the civil Court, a Division Bench of this Court in *Om Sakthi Rennergies Limited Vs. Megatech*

Control Limited and A.P. Transco, considered the objection relating to ouster of jurisdiction and the applicability of C.P.C. In paragraph 12 of

the judgement, this Court held that,

It is also required to be noted that this is not a case of lack of territorial jurisdiction, but only a waiver of a contractual clause. If a party allows the

Trial Court to proceed to judgment without raising the objection as to the place of suing and takes a change of verdict in his favour, he clearly

waives the objection and will not subsequently be permitted to raise it. The present proceedings u/s 9 are in effect final proceedings. The objection

to the jurisdiction though taken before the Trial Court should have been pressed to its normal end and failure to do so would amount to waiver as

per Section 21 of the Code of Civil Procedure. It is true that Section 21 of the C.P.C., is not specifically made applicable to the proceedings

arising under the Act, but there is no express prohibition against the application of the Code to the proceedings arising out of the Act before the

Civil Court. In *I.T.I. Ltd. Vs. Siemens Public Communications Network Ltd.*, a two Judge Bench of the Supreme Court has clearly held that the

jurisdiction of the Civil Court to which a right to decide a lie between the parties has been conferred can only be taken away by a statute in specific

terms and such exclusion of right cannot be easily inferred because there is always a strong presumption that the Civil Courts has the jurisdiction to

decide all questions of the Civil nature, therefore, if at all there bar to be an inference the same should be in favour of the jurisdiction of, the Court

rather than the exclusion of such jurisdiction and there being no such exclusion of the Code in specific terms except to the extent stated in Section

37(2) of the Act, an inference that merely because the Act has not provided the C.P.C., to be applicable cannot be drawn.

30. The extent of judicial intervention or the restriction placed on the Court is confined only to the proceedings pending before the Arbitral Tribunal

to the extent so provided under the Act. In other words, the provisions of the Civil Procedure Code, may not be applicable to the proceedings

pending before the Arbitral Tribunal except so provided in part-I of the Act. The jurisdiction of a Civil Court is determinable by application of the

provisions of Civil Procedure Code. Once the matter goes out of the hands of the Arbitral Tribunal to the Civil Court, the provisions, contained in

the CPC are applicable to all the proceedings, i.e., orders or appeals arising out of provisions of Arbitration Act. Since the proceedings before the

Court are of civil nature, whatever procedure applicable and followed for other civil proceedings, equally apply to the proceedings arising out of

orders passed under Sections 9, 27, 34, 36 and 37 of the Act. In view of the decision of the Supreme Court and this Court, the issue as to

whether the CPC is applicable to the Arbitral proceedings pending on the file of the civil Court is no longer res integra. The statute does not

exclude the applicability of CPC to the proceedings arising out of the Arbitration Act. The non-obstinate clause in Section 5 of Act. does not take

away the powers of the Principal Civil Court i.e., original jurisdiction in a District of the High Court in applying the Civil Procedure Code, while

deciding the matters arising out of the Act. As regards the decision made by the Arbitral Tribunal, any party aggrieved by the decision can apply to

the Civil Court u/s 34 of the Act to set aside the award. Judicial intervention is permissible in any matters arising out of Sections 9, 27, 34, 36 and

37 in part-1 of the Act and provisions, of the Code of the CPC are applicable to such proceedings.

31. Once the Court defined u/s 2(e) of the Act exercises powers of a Civil Court it is not a persona designata, the powers of the Civil Court are

not curtailed by the non-obstinate clause in Section 5 of the Act, except so provided in part 1 of the Act. If the defaulting party offers sufficient

cause for his absence, the application for restoration is maintainable in law as it is a proceeding emanating from the orders passed u/s 34 of the

Act. For the reasons stated supra, the contention of the learned Counsel for the respondent that the restoration applications are not maintainable,

cannot i.e. countenanced in law. Therefore, this Court is considered opinion that the lower Court has manifestly erred in dismissing the applications

filed for restoration dealing with the relevant provisions of the Arbitration Act and failed to consider the judgment of the Supreme Court in I.T.I.

Ltd. Vs. Siemens Public Communications Network Ltd., . Therefore, the applications filed under Order 9 Rule 9 r/w Section 151 C.P.C., for

restoration of the Arbitration Original petitions. Which were dismissed for default on 13.10.2004, are maintainable in law.

32. The question left for consideration is whether the appellants have offered sufficient cause for their absence on 13.10,2004. It is stated in the

affidavit filed in support of I. As., that when the Arbitration petitions were posted on 10.10.2004, on the request of the respondent for filing written

objections, it was passed over till afternoon. When matters were taken up in the evening learned Counsel for the appellants was absent and the

Arbitration Original Petitions, were dismissed for default and the restoration applications were filed after 6 days. There is no undue delay in filing

the above applications. The track record of the appellants does not indicate that they have deliberately delayed the proceedings before the Civil

Court and therefore this Court is of the view that there is no need to impose any condition such as payment or deposit of a portion of award

amount into the Court, as a condition precedent for restoration of the Arbitration Original Petitions. I am satisfied with the adequacy of the cause

shown by the appellants for restoration of the Original Petitions and I am not inclined to accept the objection of the respondent that the appellants

have deliberately protracted the proceedings. Considering the quantum of the award, ends of justice would be met if sufficient opportunity is given

to the appellants before the competent Civil Court to adjudicate the correctness of the award passed by the Arbitral Tribunal.

33. In the result, the orders passed by the lower Court in interlocutory Application Nos. 623, 624, 625, 627, 626, 621, 628 and 620 of 2005 in

Ar O.P. Nos. 58, 57, 56, 54, 55, 52, 53 & 51 of 2002 respectively, are set aside and Interlocutory Applications are allowed as prayed for and

the lower Court is directed to restore the Arbitration Original Petitions on the file and dispose of the same in accordance with law.

34. These Civil Miscellaneous Appeals are allowed. No costs.