
(2003) 07 KAR CK 0021

In the Karnataka High Court

Case No : Civil Revision Petition No. 990 of 2002

Subhash Projects and Marketing Limited

APPELLANT

Vs

Jain Farms and Resorts Ltd. and Another

RESPONDENT

Date of Decision : 25-07-2003

Acts Referred:

Arbitration and Conciliation Act, 1996 — Section 16, 7, 8, 85

Citation : (2003) ILR (Kar) 4343

Hon'ble Judges : S. Abdul Nazeer, J

Bench : Single Bench

Advocate : R.N. Narasimha Murthy for L.M. Chidanandayya, for the Appellant;

Final Decision : Allowed

Judgement

Abdul Nazeer, J.—This revision has been filed by the first defendant challenging the order dated 30.11.2001 passed by the XXX Additional City Civil Judge, Bangalore City, on I.A.No. IV in O.S. No. 1234/1998.

2. The first respondent herein is the plaintiff and the second respondent is the second defendant in the said suit. The plaintiff has filed the said suit for recovery of Rs. 42,30,000/- with a further relief of permanent injunction restraining the defendants from interfering with the wind-mills. After filing of the said suit, the first defendant has filed I.A.No. IV u/s 8 of the Arbitration and Conciliation Act, 1996, with a request to stay all further proceedings in the suit and refer the parties to Arbitration in view of the arbitration Clause contained in the Agreement dated 1.8.1995, The Plaintiff has opposed the said application. The Trial Court by the order impugned in this case has rejected the said application. The grounds urged in the affidavit supporting I.A.No. 4 and the objections of the plaintiff to the said I.A. will be referred, in the following paragraphs.

3. Though notice of this revision was served on the respondents (plaintiff and defendant No. 2 in the Trial Court) they have remained absent.

4. I have heard Sri R.N. Narasimha Murthy, learned Senior Counsel for the

petitioner.

5. In the affidavit supporting I.A.No. 4, the Manager of defendant No. 1 Company has stated that the agreement dated 1.8.1995 entered into between the plaintiff and defendant No. 1 for supply, erection and construction of the subject project includes a clause for arbitration in case of dispute between the parties of any nature. Plaintiff and defendant No. 1 have expressly and validly subjected themselves to arbitration in the event of any dispute of whatsoever nature out of or relating to the said agreement, which cannot be settled amicably by the parties in accordance with the Arbitration Act, 1940. The present suit is with respect to the matters agreed to be resolved by having recourse to arbitration under the Arbitration and Conciliation Act, 1996. The subject matter of dispute necessarily to be adjudicated under Clause 28 of the said agreement dated 1.8.1995.

6. The plaintiff has filed objections contending that the application u/s 8 of the Arbitration and Conciliation Act, 1996, is devoid of merits and is misconceived. Even though the agreement dated 1.8.1995 contained arbitration clause, the same is nullified as the Act under which the plaintiff and defendant No. 1 had agreed to subject themselves to arbitration proceedings has since been repealed and the new Act has come into force. As the old Act cannot survive, it is not open to the defendants to invoke the provisions of the new Act.

7. The Trial Court dismissed I.A.No. IV, mainly on two grounds:-

i) that the arbitration proceedings has not commenced under the old Act, 1940, which is repealed under the new Act, the provision of the old Act cannot be applied to the case on hand;

ii) Subsequent to the agreement dated 1.8.1995, another agreement dated 22.1.1997 has come into existence between the plaintiff and defendant No. 1 and there being no arbitration clause in the subsequent agreement, question of invoking the provisions of Section 8 of the new Act does not arise.

8. Therefore, the points for consideration in this Revision are as follows:

i) Whether the arbitration proceedings in respect of an agreement dated 1.8.1995 can be commenced on or after commencement of the New Act.

ii) Whether the defendant No. 1 is justified in invoking the provisions of Section 8 of the new Act, in the light of the subsequent agreement dated 22.1.1997, which does not contain an arbitration clause.

9. REGARDING POINT NO. 1: The agreement is dated 1.8.1995, which is not in dispute. Clause 28 of the said agreement provides for arbitration, which reads as follows;

"Claim dispute between the parties hereto of any nature arising out of or relating to this Agreement which cannot" be settled amicably by the parties, shall be settled by binding arbitration in accordance with the rules of India Arbitration

Act, 1940."

10. Further, Clause 34 of the said agreement provides for modification, amendment or supplementation by mutual written agreement, which reads as follows:-

"This Agreement may be modified, amended or supplemented only by the mutual written agreement of the parties hereto."

11. Section 7 of the New Act defines an "Arbitration Agreement" to mean an agreement by the parties to submit to arbitration all or certain disputes which have arisen or which may arise between them in respect of the defined legal relationship, whether contracted or not. It may be in the form of an arbitration clause in a contract or in the form of an agreement and it shall be in writing. Section 8 of the New Act empowers a judicial authority before whom action is brought to refer the parties to arbitration. It directs the judicial authority to refer the parties to arbitration if one of the parties applies.

12. Though the Arbitration proceeding is not commenced under the Old Act of 1940, which is repealed under the New Act, whether the proceedings can be commenced on or after the New Act came into force. Section 85 of the Arbitration and Conciliation Act, 1996 provides for repeal and savings. The said Section reads as follows:

"Repeal and savings - (1) The Arbitration (Protocol and convention) Act, 1937 (6 of 1937), the Arbitration Act, 1940 (10 of 1940) and the Foreign Awards (Recognition and Enforcement) Act, 1961 (45 of 1961) are hereby repealed.

(2) Notwithstanding such repeal:

a) the provisions of the said enactment shall apply in relation to arbitral proceedings which commenced before this Act came into force unless otherwise agreed by the parties but this Act shall apply in relation to arbitral proceedings which commenced on or after this Act comes into force:

b) all rules made and notifications published, under the said enactments shall, to the extent to which they are not repugnant to this Act, be deemed respectively to have been made or issued under this Act."

13. In the case of M.M.T.C. Limited Vs. Sterlite Industries (India) Ltd., the Hon"ble Supreme Court has answered a similar question. The point involved in the said case before the Supreme Court was the effect of the Arbitration and Conciliation Act, 1996, on the arbitration agreement made prior to the commencement of the New Act. In the said case, it is held as follows:-

"The question is whether there is anything in the New Act to make such an agreement unenforceable? We do not find any such indication in the New Act. There is no dispute that the arbitral proceeding in the present case commenced after the New Act came into force and, therefore, the New Act applies. In view of the term in the arbitration agreement that the two arbitrators would appoint the

umpire or the third arbitrator before proceeding with the reference, the requirement of sub-section (1) of Section 10 is satisfied and sub-section (2) thereof has no application. As earlier stated the agreement satisfies the requirement of Section 7 of the act and, therefore, is a valid arbitrators agreement. The appointment of arbitrators must therefore, be governed by Section 11 of the New Act."

14. In Thyssen Stahlunion Gmbh Vs. Steel Authority of India Ltd., the Hon''ble Supreme Court, while considering Section 85 of the New Act has held that the New Act would be applicable in relation to arbitral proceedings, which commenced on or after the New Act comes into force.

15. Following the above decisions, the Hon''ble Supreme Court in the case of NATIONAL ALUMINIUM COMPANY LTD., v. METALIMPEX LTD. 2001 (6) SCC 372 has held as follows;

"I have examined the request of NALCO. I find there is an arbitration agreement between the parties, which relates to international commercial arbitration. Arbitration would be governed by the Act though the arbitration was entered into before the enforcement of the Act, which was on 15.1.1996."

16. In the light of the above decisions of the Hon''ble Supreme Court, the Trial Court is not justified in holding that the provisions of the New Act is not applicable to an arbitration agreement made prior to the commencement of the Act. I am of the view that even though any proceedings have not been commenced under the Old Act, it can be commenced under the New Act.

17. REGARDING POINT NO. 2:- The Trial Court has rejected the application on yet another ground. The Court has held that by virtue of a subsequent Agreement dated 22.1.1997 which does not contain an arbitration clause, referring the matter u/s 8 of the Arbitration and Conciliation Act, does not arise.

18. In the objections to I.A.No. IV, the plaintiff has not pleaded the existence of the Subsequent Arbitration Agreement. The Trial Court appears to have made out a case on its own basing upon the submissions at the Bar. Without there being any objections on record and merely on oral submission of the parties the Trial Court could not have non-suited the defendant on this ground. As rightly argued by the learned Senior Counsel, as per Clause 34 of the previous Arbitration Agreement, there is a provision to have a supplemental agreement. Accordingly, learned Counsel submits that the subsequent Agreement dated 22.1.1997 has been entered into between the parties which is supplementary in nature. He further submits that merely because a supplemental Agreement dated 22.1.1997 has been entered into, the previous agreement will not disappear in its entirety. He submitted that, Clause 28 of the previous agreement still holds the field. A reading of both the agreements together gives an impression that the subsequent agreement is supplementary in nature and it has been entered into between the parties in exercise of power vested in Clause 34 of the previous agreement.

19. Section 16 of the Arbitration and Reconciliation Act, 1996 empowers the Arbitrator to rule on its own jurisdiction including the ruling on any objection with respect to existence or validity of Arbitration Agreement. Therefore any objections in respect to existence or validity of arbitration agreement have to be considered by the Arbitrator in the light of the pleadings and materials that may be placed by the parties on record and the attendant circumstances. It is premature to decide the existence or validity of the arbitral Agreement at this stage. It is open to the arbitrator to decide this issue at an appropriate stage without being influenced by any of the observations made in the course of this Order.

20. In the light of the above discussion, I pass the following . order;

- i) Revision Petition is allowed and the order passed by the Trial Court on I.A.No. IV is set aside, I.A.No. IV filed by the defendant No. 1 is allowed.
- ii) Parties to the suit are referred to arbitration as per Section 8 of the Arbitration and Conciliation Act, 1996.

No Costs.