

(1998) 09 AP CK 0076

In the Andhra Pradesh High Court

Case No : AAO No. 1018 of 1998 and CRP No. 1827 of 1998

Terry Gold (India) Limited, Hyd. and Another

APPELLANT

Vs

TCI Finance Limited, Sec''bad

RESPONDENT

Date of Decision : 22-09-1998

Acts Referred:

Arbitration Act, 1940 — Section 34

Civil Procedure Code, 1908 (CPC) — Order 37 Rule 3, Order 37 Rule 4

Citation : (1998) 6 ALD 831 : (1999) 1 ALT 265

Hon'ble Judges : Umesh Chandra Banerjee, C.J.;P. Ramakrishnam Raju, J

Bench : Division Bench

Advocate : Mr. I. Venkatanarayana, for the Appellant; Mr. L. Ravichander, Mr. E. Mandohar, for the Respondent

Judgement

UMESH CHANDRA BANERJEE, C.J.—The CMA and CRP are directed against the orders of the Additional Special Judge for SPE and ACB Cases-cum-V Additional Chief Judge, City Civil Court, Hyderabad.

2. The principal grievance, as against the orders pertains to an error of law said to have been committed by the learned Judge. In this context, the factual aspects ought to be adverted to at this stage. A summary suit under Order 37 CPC was filed by TCI Finance Limited, being the respondent herein against both the petitioners herein for recovery of a sum of Rs.90,83,701/-. Admittedly, the case of the plaintiff is that the defendants approached the plaintiff for finance, and having obtained the benefit of the money, issued 60 several post-dated cheques for an amount of Rs. 1,61,700/- each commencing from 8-9-1995 to 8-8-2000 towards payment of lease rentals of the machinery. The defendants have also executed a demand promissory note for a sum of Rs.92,40,000/-. Defendant No.2 is a guarantor. It is admitted that there is an arbitration agreement between the plaintiff and defendant No.1, and defendant No.2, however, is not a party to the arbitration agreement. Incidentally, two issues have been raised. On the first count it has been contended by Sri

Venkatanarayana, in support of the appeal and revision that the Court below is in clear error to the effect of rejecting the application for leave under Order 37 Rules 3 and 4 CPC by reason of substantial question of law being involved therein. Unfortunately, however, neither the learned Judge nor we, at the appellate stage have been able to appreciate of there being any issue of law involved. 60 several cheques were issued, and the defendants have also executed demand promissory note for payment of the sum, and as such, question of granting leave to defend, does not and cannot arise. We therefore cannot, but record our concurrence with the findings of the Court below as regards the rejection of the leave application. On the second count, it has been stated that since the agreement between the parties contained an arbitration clause, question of continuing with the suit, does not and cannot arise. The same, however, in the contextual facts, cannot be sustained by reason of the fact that defendant No.2 was not a party to the arbitration agreement, and he was only a guarantor, and the law is well settled on this score. In this context, reference may be made to a Bench decision of the Calcutta High Court in the case of Asiatic Shipping Co. (Private) Ltd. Vs. P.N. Djakarta Lloyd and Another, , wherein paragraph 2 it was observed as follows:

"The appellant made an application in the Court below on the 2nd February, 1967 asking for stay of proceedings u/s 34 of the said Act. The learned Judge, by his order dated July 7, 1967 has refused to grant a stay. The ground upon which the stay was refused is as follows: The learned Judge has noticed that in the suit the claim is not only against the principal debtor but also against guarantor. Admittedly, there is no arbitration agreement with regard to the guarantor. Therefore, the suit will have to be decided as against defendant No.2. The learned Judge has rightly observed that a decision upon the liability of a guarantor necessarily involves the determination of the question as to whether the principal debtor was liable, for if the principal debtor was not liable no liability could be attributed to the guarantor. Now, the principal debtor wants to go to arbitration in London. Apart from the fact that nothing whatsoever has happened in London but everything happened in India and the Far East, the learned Judge has expressed an apprehension that the same issue as regards the liability of the principal debtor will have to be gone into, both in the suit and in the arbitration proceedings and there was every likelihood of conflicting findings. Therefore, by using his discretion he has held that he is not inclined to exercise his discretion in this case and on the facts of the instant case refused to stay the suit. The application was accordingly dismissed."

3. Subsequently, this Court also had an occasion to deal with a similar situation in the case of The Barium Chemicals Ltd. Vs. Bombay Industrial and Chemical Company, Bombay, , and it recorded in similar way that question of stay of suit u/s 34 would not arise. In paragraphs 3 and 5 of the judgment, this Court recorded as follows:

"3. The impugned order cannot be sustained in law. Goods were sold by the

plaintiff to the first defendant. Therefore, the amount which was due as a result of that transaction was primarily recoverable from the first defendant. The second defendant came into the picture because he was the sole selling agent of the plaintiff. There was no agreement between the plaintiff and the first defendant, secondly the first defendant was not a party to the agreement which contained the arbitration clause. It was an agreement between the plaintiff and second defendant. The first defendant is therefore not bound by that agreement and the dispute between the parties cannot be referred to arbitration so far as the first defendant is concerned.

4. So far as the second defendant was concerned really there was no claim against him. However even if there was one the dispute between the plaintiff and the second defendant could not be referred to arbitration because the suit in which a single claim is made against defendants 1 and 2 cannot be split up and the dispute as against one cannot be referred to arbitration while it is tried against another by the Court. Therefore, the dispute between the parties cannot be referred to arbitration on account of the fact that the first defendant is not a party to the arbitration agreement. The view that the suit cannot be split up between one who is a party to the agreement and one who is not a party to it is supported by the decisions of the Calcutta High Court in *Asiatic Shipping Co. v. P.N.D. Lloyd*, (supra) and also of Nagpur High Court in *C.H.O. & C.S. Co. v. Brijnath Singhji* AIR 1956 Nag 61."

5. On the wake of the above, question of interference in the matter, does not and cannot arise. As such, the appeal as well as the revision are dismissed. No order as to costs.