
(2000) 11 KAR CK 0032

In the Karnataka High Court

Case No : Civil Miscellaneous Petition No. 60 of 1999

UB Global Corporation Limited

APPELLANT

Vs

Kaveri Impex and Others

RESPONDENT

Date of Decision : 15-11-2000

Acts Referred:

Arbitration and Conciliation Act, 1996 — Section 11, 11 (2), 11 (6), 16, 7 (4) (c)

Citation : (2001) 1 KCCR 376

Hon'ble Judges : R.V. Raveendran, J

Bench : Single Bench

Advocate : P.M. Vasudev and Company, for the Appellant; Sudarshan Reddy, for Respondents 1 to 3 and S and S Associates for Respondents 4 and 5, for the Respondent

Final Decision : Dismissed

Judgement

R.V. Raveendran, J.—The Petitioner claims that it is a company engaged in International Trade, providing financial assistance to Indian Exporters.

2. First Respondent is a partnership firm. The second Respondent is a company incorporated under the Companies Act, 1956. The third Respondent is the Managing Partner of first Respondent and Managing Director of the second Respondent.

3. Petitioner claims that it had provided financial assistance to Respondents 1 to 3 for their export business, by advancing Rs. 40 lakhs on 27.5.1996 to the first Respondent; that 4th and 5th Respondents who are the owners of property bearing Sy. No. 371, No. 11, Chettipalayam Panchayath, Tirupur, created an equitable mortgage over the said property in favour of the Petitioner as security for the amount advanced to Respondents 1 to 3; that subsequently the Petitioner was induced by Respondent No. 3 and two others to part with Rs. 45,45,074/-; that a sum of Rs. 46,67,254/- was due to Petitioner in that behalf; and that as the dues were not cleared, Petitioner have issued a notice dated 5.4.1999

(Annexure-B) through Counsel, to Respondents 1 to 5 herein and two others (Sri V. Balaji L. Rao and Sri T.M. Balasubramanian) calling upon them to pay Rs. 46,67,254/- with interest thereon @ 24% per annum from the date of advance till realisation. In the said notice, the Petitioner also stated that if the amount due was not paid within 21 days from the date of receipt of notice, Petitioner will initiate legal action (Civil and Criminal) and also initiate action for winding up the second Respondent. At the end of the notice the Petitioner stated "you have also agreed without client that the recovery and security issues can be referred to arbitration in Bangalore".

4. Respondents 1 to 3 issued a reply dated 21.4.1999 (Annexure-C) denying liability, and also putting forth plea of discharge and bar of limitation. Respondents 4 and 5 also issued a reply dated 31.5.1999 (Annexure-D) denying liability and alleging fraud by Petitioner and demanded return of the documents of title relating to their property.

5. Thereafter Petitioner claims to have sent one more notice dated 5.5.1999 (Annexure-E) appointing Sri Kalasa Shamanna, Advocate, Bangalore as its Arbitrator and calling upon the Respondents 1 to 5 and two others, to appoint their arbitrator, so that the two Arbitrators, can appoint a third Arbitrator to complete the Arbitral Panel. The Petitioner also filed a claim statement before Sri Kalasa Shamanna. The said Sri Kalasa Shamanna however sent a letter dated 11.8.1999 (Annexure-H) to the Petitioner stating that he required enabling orders from this Court u/s 11 of Arbitration and Conciliation Act, 1996 ("Act" for short) to proceed with the reference. In this background, Petitioner has filed this petition on 23.8.1999, for appointing Sri Kalasa Shamanna, Advocate of Bangalore as Sole Arbitrator.

6. Initially, Petitioner did not implead any one as Respondents. The petition showed that there were no Respondents. Thereafter, this Court directed that the parties against whom the claim was made and relief was sought should be impleaded as Respondents. Only thereafter the Petitioner impleaded the Respondents 1 to 5. Here also, strangely, Petitioner has not impleaded the other two persons to whom notices were issued in addition to Respondents, namely Sri V. Balaji L. Rao and Sri T.M. Balasubramanian. Be that as it may.

7. The Petitioner admits that there is no arbitration agreement signed by the parties. He also admits that there is no exchange of letters, telex, telegrams or other means of telecommunication which provided any record of an arbitration agreement. According to Petitioner, the arbitration agreement has come into existence in view of the Petitioner making an allegation in the notice dated 5.4.1999 about Respondents agreeing to refer the disputes to arbitration and the non-denial of such allegation regarding arbitration in the replies issued by Respondents 1 to 3 and Respondents 4 and 5. Petitioner contends the issue of a demand notice and the replies thereto amount to an exchange of "statements of claim and defence" in which the existence of the arbitration agreement has been alleged by it and not denied by the other and that therefore there is an

arbitration agreement as contemplated u/s 7(4)(c) of the Act.

8. Respondents 1 to 3 and Respondents 4 and 5 have filed separate statement of objections, denying liability and specifically denying any arbitration agreement between the Petitioner and themselves as alleged by the Petitioner. Respondents 4 and 5 have denied existence of any privity of contract also.

9. The question that therefore arises for consideration is whether there is an arbitration agreement. But the Petitioner contends that as nominee of the Chief Justice, exercising administrative functions u/s 11 of the Act, I should not examine the contentious issue as to whether there is any arbitration agreement. According to him, the moment someone files an application u/s 11 of the Act, the Chief Justice or his nominee should automatically refer the matter to Arbitration by appointing an Arbitrator and should not examine whether there is any arbitration agreement or not.

10. On the other hand, the Respondents contend that Petitioner has approached this Court u/s 11 alleging existence of an Arbitration agreement; and Petitioner should therefore establish the existence of an Arbitration Agreement before it can seek appointment of an Arbitrator. It is pointed out that a citizen's right to have a claim against him to be adjudicated by Courts established by law cannot be denied by forcing him to go before the Arbitration, even when there is no arbitration agreement.

11. Before, deciding this question, let me refer to the decisions of Supreme Court cited by the parties regarding exercise of power u/s 11 of the Act by Chief Justice or his nominee.

11.1 In *Wellington Associates Ltd. Vs. Mr. Kirit Mehta*, , the nominee of Chief Justice of India (M. Jagannadha Rao, J) held that the jurisdiction of the Chief Justice or his nominee to decide the question as to whether there is an arbitration agreement or not is not excluded by Section 16 of the Act which enables the Arbitrator to decide such question and the said power can be exercised by the Chief Justice or his nominee in suitable cases. He held:

Even if the Chief Justice of India or his designate u/s 11(2) is to be treated as an administrative authority, the position is that the said authority is approached seeking appointment of an arbitrator/arbitral Tribunal u/s 11 and a question is raised that there is, to start with, no arbitration clause at all between the parties, the Chief Justice of India or his designate has to decide the said question.

(Emphasis supplied)

11.2 In *Konkan Railway Corpn. Ltd. and Others Vs. M/s. Mehul Construction Co.*, , the Supreme Court observed as follows:

Section 16 empowers the arbitral Tribunal to rule on its own as well as on objection with respect to the existence or validity of the arbitration agreement. Conferment of such power on the Arbitrator under 1996 Act indicates the

intention of the legislature and its anxiety to see that the arbitral process is set in motion. This being the legislative intent, it would be proper for the Chief Justice or his nominee just to appoint an Arbitrator without wasting any time or without entertaining any contentious issues at that stage, by a party objecting to the appointment of an arbitrator. If this approach is adhered to, then there would be no grievance of any party and in the arbitral proceeding, it would be open to raise any objection, as provided under the Act. But certain contingencies may arise where the Chief Justice or his nominee refuses to make an appointment of an arbitrator and in such a case a party seeking appointment of arbitrator cannot be said to be without any remedy.

(emphasis supplied)

11.3 In *Nimet Resources Incorporated v. Essar Steel Limited* AIR 2000 SCW 3459, the Chief Justice's nominee (Rajendra Babu, J) considered the decisions in *Wellington* and *Konkan Railway*. He observed that "it is no doubt permissible u/s 11 of the Act to decide the question as to the existence or otherwise of the Arbitration agreement", but where the correspondence or exchange of documents between the parties are not clear as to the existence or non-existence of the arbitration agreement in terms of Section 7(4)(b) of the Act, the appropriate course would be to leave the matter to the decision of the Arbitrator u/s 16 of the Act. He however clarified that where the Chief Justice or his nominee is absolutely sure that there exists no arbitration agreement between the parties, he can refuse to refer the matter to arbitration.

12. Section 11 relating to appointment of Arbitrators is found in Chapter III relating to composition of Arbitral Tribunal. Section 16 relates to competence of Arbitral Tribunal to rule on its Jurisdiction and it is found in Chapter IV dealing with Jurisdiction of Arbitral Tribunals. The power and jurisdiction of the Chief Justice or his nominee/designate to appoint an Arbitrator or Arbitral Tribunal (even if such power is administrative) is dependent upon the existence of an Arbitration Agreement. If there is no arbitration agreement at all, there is no question of either the Chief Justice or his designate exercising power u/s 11 and appointing an Arbitrator or an Arbitral Tribunal.

13. The exercise of power of the Arbitral Tribunal to rule on its own jurisdiction which includes the power of deciding as to whether there is any arbitration agreement or whether the arbitration agreement which is in existence is valid or not, would arise only where the arbitrator has entered upon the reference on appointment by the parties without intervention of any proceedings u/s 11, or where the Arbitral Tribunal has been appointed u/s 11 without deciding the existence or validity of the Arbitration agreement.

14. The observations in *Konkan Railways* case is not intended to completely exclude the jurisdiction of Chief Justice or his nominee to find out whether there is an arbitration agreement or not. The two questions considered by the Supreme Court in *Konkan Railways* were: (1) What is the nature of the order that is

passed by the Chief Justice or his nominee in exercise of power under Sub-section (6) of Section 11 of the Act? and (2) Even if said order is held to be administrative in nature what is the remedy open to the person concerned if his request for appointment of an Arbitrator is turned down by the learned Chief Justice or his nominee, for some reason or other? While considering the Second question, the Supreme Court has stated what should be the approach of the Chief Justice or his nominee when an application for appointment of an Arbitrator is made invoking the jurisdiction u/s 11(6) of the Act. It held that whenever there is a contentious issue regarding the existence or validity of the arbitration agreement, the Chief Justice or his nominee should appoint the Arbitral Tribunal and leave the matter to the Arbitral Tribunal for decision. But the said observation will not apply where the person approaching the Court u/s 11 does not even refer to the arbitration agreement, nor makes out atleast prima facie, the existence of any arbitration agreement. In such situation the power u/s 11 will not be exercised to appoint an Arbitrator. This may be clarified by an illustration. Let us say that in a particular case there is no arbitration agreement at all; and that however one of the parties files a petition u/s 11 alleging that there is an arbitration agreement, without specifying the particulars of arbitration agreement or the appointment procedure. Should the Chief Justice or his nominee proceed to appoint an Arbitral Tribunal and leave it to such Arbitral Tribunal to decide whether there is an arbitration agreement at all? The answer obviously is in the negative.

15. When there is no arbitration agreement, a party has no right to file a petition u/s 11 and the Chief Justice or his nominee will have no jurisdiction to appoint an Arbitrator or Arbitral Tribunal. The Chief Justice or his nominee can exercise power u/s 11 and appoint an Arbitrator or Arbitral Tribunal only where (a) all parties admit or agree that there is an Arbitration agreement; or (b) the Chief Justice or his nominee is satisfied Prima facie about the existence of the Arbitration agreement. This position has clearly been recognised in the decision in Konkan Railways, by observing that in appropriate cases, the Chief Justice or his nominee may reject the request for appointment u/s 11 and refuse to appoint an Arbitral Tribunal. The contention of Petitioner that having regard to the decision in Konkan Railways, the Chief Justice or his nominee should merely act as a post office and make appointment of Arbitrators in all cases, irrespective of whether there is an arbitration agreement or not, cannot be countenanced. The following observations of the Supreme Court makes this position clear:

But certain contingencies may arise where the Chief Justice or his nominee refuses to make an appointment of an arbitrator.

(emphasis supplied)

16. The contingencies referred are where the Petitioner does not make out, even prima facie, that there is no arbitration agreement, or where an earlier petition u/s 11 for the same relief has been rejected. There may be other cases also where Chief Justice or his nominee may have to refuse to make an appointment.

17. The following position emerges from the said decisions and the above discussion:

(i) Where any arbitration agreement is admitted, but there is a contentious issue in regard to the arbitrability of the disputes, normally the question of arbitrability should be left to the decision of the arbitrator. (The recurring instance is an arbitration clause in Building contracts with a provision excluding arbitration in regard to certain technical matters. In such cases the much vexed question is whether the dispute falls under the exception clause excluding arbitration or not).

(ii) But where the existence of any arbitration agreement is denied in toto and the Petitioner is not able to make out, even prima facie, the existence of an Arbitration Agreement, the Chief Justice or his nominee may refuse to appoint an Arbitrator. Similarly, where an arbitration agreement is claimed under Clauses (b) or (c) of Sub-section (4) of Section 7 of the Act, and there is absolutely no basis for it in the documents relied on by the person who has filed an application u/s 11 of the Act, the Chief Justice or his nominee may refuse to appoint the Arbitrator.

(iii) Where there is no clause in a contract termed as "arbitration agreement" or provision for "Arbitration", but the Petitioner contends that a particular clause in the contract providing for settlement of dispute or otherwise amounts to an arbitration agreement, the Chief Justice or his nominee may decide whether there exists any arbitration agreement by considering the clause.

The contention of the Petitioner that having regard to the decision of the Supreme Court in *Konkan Railway*, the power exercised by the Chief Justice or his nominee is administrative, and not judicial or quasi-judicial, and therefore the Chief Justice or his nominee has no power to examine the matter under any circumstances and should mechanically appoint an Arbitrator whenever an application is made u/s 11, cannot be accepted. The contention that where the exercise of power is held to be administrative in nature, no application of mind is necessary and the power should be exercised in an mechanical and automatic manner, is contrary to all known principles of law. When the Chief Justice or his nominee, on examination of the material produced, is clear in his mind that there is no arbitration agreement, it will be a travesty of justice to appoint an Arbitrator and leave the matter to the Arbitrator to decide about existence of arbitration agreement or about arbitrability. That is not the intention of Section 11 or Section 16.

18. Let me now examine the facts of this case. There is no arbitration agreement signed by parties. It is also admitted by Petitioner that there is no exchange of letters, telex, telegrams or other means of telecommunication which provide a record of the arbitration agreement. The learned Counsel for Petitioner admitted that the matter does not fall under either Clause (a) or (b) of Section 7(4) of the Act. According to the Petitioner, its case falls u/s 7(4)(c) of the Act, which reads as follows:

An exchange of statements of claim and defence in which the existence of the agreement is alleged by one party and not denied by the other.

The Petitioner relies on his Counsel's notice dated 5.4.1999 (Annexure-B) and the reply notices, to contend that the allegation about the existence of arbitration agreement in the notice was not denied in the replies and therefore there is an arbitration agreement.

18.1) The notice dated 5.4.1999 issued by Petitioner's Counsel runs to 10 pages and 30 paragraphs. There is no reference to an arbitration agreement anywhere in the body of the notice referring in the facts. However, the final para (Para 30) which contains the demand of the Petitioner and the action proposed to be taken in the event of non-payment reads as follows:

We hereby call upon you to pay our client the sum of Rs. 46,67,254/- (Rupees Forty Six Lakhs Sixty Seven Thousand Two Hundred Fiftyfour) together with interest thereon as specified above. If you fail to do so within 21 (twentyone) days from the receipt of this notice, our client will be constrained to initiate appropriate legal action, civil and criminal, against you at your risk and cost, including winding up proceedings under the Companies Act, 1956 against the second of you. You have also agreed with our client that the recovery and security issues can be referred to arbitration in Bangalore.

(emphasis supplied)

18.2) Appointment of Arbitrator or reference of disputes to arbitration can be only in pursuance of a bilateral agreement and not a unilateral demand which is not agreed to by the other party. Section 7(4)(c) does not do away with the need for a bilateral agreement, but merely enables parties to prove an implied bilateral agreement instead of an express agreement. But, nevertheless the necessity of an "agreement" whether "express" or "implied", is not dispensed with.

18.3) Para 30 of the notice dated 5.4.1999 issued by Petitioner through Counsel, nowhere refers to any arbitration "agreement". It does not say whether the arbitration agreement is oral or in writing, or who are the parties to such agreement, or when and where such agreement was reached or entered. It does not even state that there is a mutual agreement to refer all disputes between the parties to Arbitration or that both parties agreed to arbitration. It vaguely and merely states that the persons to whom the notice is addressed, (that is, the Respondents 1 to 5 and two others who are not made parties to the petition) "agreed without client that recovery and security issues can be referred to arbitration in Bangalore". It does not refer to any bilateral agreement. Further the statement "you agreed without client" make the entire sentence meaningless and therefore there was no question of traversing the said sentence. Non-traversing of such a meaningless averment in the notice cannot be stated to be an implied admission of existence of an arbitration agreement.

18.4) It is also significant that in the petition filed in this Court, the Petitioner

does not state that there is an arbitration agreement between the parties to refer the disputes to arbitration. Petitioner has merely stated as follows in the petition:

In the notice in Annexure-B in paragraph 30, the Petitioner made an allegation that the other persons had agreed to refer the issue of recovery and enforcement of security to arbitration in Bangalore. To the said notice of the Petitioner in Annexure-B, Defendants 1 to 3 have issued a reply dated 21.4.1999 and Defendant Nos. 4 and 5 have issued a reply dated 31.5.1999... The Petitioner begs to point out that neither of the two replies contain any denial of the allegation made by the Petitioner regarding the existence of the arbitration agreement. Accordingly by operation of Section 7(4)(c) of the Act, it is submitted that valid arbitration agreement is deemed to exist among the parties.

The petition does not refer to any arbitration agreement between Petitioner and Respondents, but states "other persons had agreed to refer.... to arbitration". Thus there is no reference to any arbitration agreement either in the notice of 5.4.1999 or in the petition u/s 11. Petitioner has miserably failed to prove any arbitration agreement. As noticed above, the Petitioner has infact not even referred to existence of any arbitration agreement.

19. The attempt of the Petitioner to foist an arbitration on the Respondents, in the absence of any arbitration agreement virtually amounts to a sharp practice and requires to be deprecated.

20. I am clearly satisfied that there is no arbitration agreement between Petitioner and Respondents. Therefore, petition u/s 11 of the Act is not maintainable. The petition is therefore rejected.