

(2008) 06 MAD CK 0020
In the Madras High Court
Case No : CRP (PD) No. 2941 of 2007

Union of India (UOI) and Another	Vs	APPELLANT
Rajesh Damani, Proprietor, Allied General Sales Corporation		RESPONDENT

Date of Decision : 16-06-2008

Acts Referred:

Arbitration Act, 1940 — Section 2, 8, 8(3)

Citation : (2008) 4 ARBLR 615

Hon'ble Judges : K.K. Sasidharan, J

Bench : Single Bench

Advocate : V.G. Suresh Kumar, for the Appellant; H. Kishore, for the Respondent

Final Decision : Allowed

Judgement

K.K. Sasidharan, J.—This civil revision petition is directed against the order dated 23.11.2006 in IA No. 9425 of 2004 in OS No. 6112 of

2003 on the file of XVII Assistant City Civil Court, Chennai.

2. The suit in OS No. 6112 of 2003 has been preferred by the respondent against the revision petitioners before the City Civil Court, Chennai

praying for a declaration that the action of the revision petitioners in invoking the risk purchase recovery in respect of the purchase order dated

19.08.1999, as amended by the order dated 12.05.1999, is illegal, invalid and unenforceable and for a direction to the revision petitioners to pay

to the respondent a sum of Rs. 99,072 with further interest on Rs. 57,600 at 24% per annum from the date of the plaint till realisation and for other

incidental reliefs.

3. In the plaint in OS No. 6112 of 2003, it was the case of the respondent that the revision petitioners have placed purchase orders with him for

supply of fibre glass type R.P. tissues as per I.C.F. Specification and the supply made by the respondent was not accepted by the revision

petitioners and by virtue of their rejection advice, the revision petitioners have rejected the goods, as according to them, the supplied goods were

found to be 0.30 mm thick as against the required thickness of not less than 0.4 mm as per P.O. Specification.

The revision petitioners appear to have called upon the respondent to pay the test charges and ground rent and as per their communication dated

07.10.1999, they threatened the respondent that if the goods are not removed within 7 days, the goods would be scrapped and disposed of. It

was the further case of the respondent in the plaint that he was prepared to take back the goods. But, however, the revision petitioners informed

the respondent that the goods were scrapped and disposed of without mentioning the value for which they were disposed of and subsequently, the

revision petitioners have also invoked the risk purchase clause. In the said circumstances, the respondent has filed the suit for declaration and for

other consequential reliefs.

4. In response to the summons issued by the trial court, the revision petitioners entered appearance and filed an application in IA No. 9425 of

2004 praying for a reference of the parties to arbitration, in accordance with the terms as contained in Clause 2900 of the Indian Railway Standard

Conditions of Contract.

5. In the affidavit filed in support of the application in IA No. 9425 of 2004, it was the case of the revision petitioners that the purchase order has

been placed under the terms and conditions of the Indian Railway Standard Conditions of Contract as is evident from the purchase order itself and

as such, the remedy of the aggrieved is only to approach the Railways to refer the matter for arbitration in terms of the contract and not to file a suit

before the civil court.

6. The application in IA No. 9425 of 2004 was contested by the respondent by filing counter, wherein it was his contention that there is no

agreement for arbitration and no such agreement has also been produced before the court to show that in fact there was such an agreement which

contains provision for arbitration.

7. The learned Trial Judge considered the application as well as the counter filed

by the respondent and ultimately, the application was dismissed as per order dated 23.11.2006. The main reason for rejection of the application is found to be the non-production of the agreement containing the arbitration clause before the trial court.

The order dated 23.11.2006 in IA No. 9425 of 2004 is the subject matter of the present revision.

I have heard Mr. V.G. Suresh Kumar, learned Counsel appearing for the petitioners and Mr. H. Kishore, learned Counsel appearing for the respondent.

8. It is evident from the purchase order placed by the revision petitioners that the order was placed subject to the Indian Railway Standard

Conditions of Contract. It was only on the basis of the said purchase order, the respondent had supplied the materials to the revision petitioners

and as such, the general conditions of contract of the Railways governs the transaction. As per Clause 2900 of the terms of contract, in the event

of any question, dispute or difference arising under the conditions or special conditions of contract, the same shall be referred to the sole arbitration

of a Gazetted Railway Officer appointed to be the arbitrator, by the General Manager in the case of contracts entered into by the Zonal Railways

and Production Units; by any Member of the Railway Board, in the case of contracts entered into by the Railway Board and by the head of the

organisation in respect of contracts entered into by the other organizations under the Ministry of Railways.

The learned Trial Judge rejected the application filed by the revision petitioners on the ground that the arbitration agreement has not been produced before the court.

9. However, the learned Trial Judge failed to note that even the purchase order produced by the respondent refers to the standard terms of

contract of Indian Railways and there is a clear indication in the purchase order that the order has been placed as per the terms of the said

contract. Therefore, I am of the view that the learned Trial Judge was not correct in rejecting the application on the ground of non-production of

the arbitration agreement.

10. It is trite that an agreement containing a clause for arbitration need not expressly refer the term "arbitration" and in case there is indication that

the parties have agreed to a specific procedure for settlement of their dispute by referring the matter, the said consensus could be termed to be an arbitration agreement.

11. In Punjab State and Others Vs. Dina Nath, the Apex Court considered the definition of arbitration agreement as contained in Section 2(a) of

the Arbitration Act and held thus (para 7 of Arb. LR):

8. A bare perusal of the definition of arbitration agreement would clearly show that an arbitration agreement is not required to be in any particular

form. What is required to be ascertained is whether the parties have agreed that if any dispute arises between them in respect of the subject matter

of the contract, such dispute shall be referred to arbitration. In that case such agreement would certainly spell out an arbitration agreement [See

Smt. Rukmanibai Gupta Vs. Collector Jabalpur and Others,]. However, from the definition of the arbitration agreement, it is also clear that the

agreement must be in writing and to interpret the agreement as an "arbitration agreement" one has to ascertain the intention of the parties and also

treatment of the decision as final. If the parties had desired and intended that a dispute must be referred to arbitration for decision and they would

undertake to abide by that decision, there cannot be any difficulty to hold that the intention of the parties was to have an arbitration agreement; that

is to say, an arbitration agreement immediately comes into existence.

12. In Hindustan Petroleum Corpn. Ltd. Vs. Pinkcity Midway Petroleums, the Apex Court considered the question of exercise of jurisdiction by

civil court pertaining to matters coming under the purview of arbitration and observed thus:

14. This Court in the case of P. Anand Gajapathi Raju and Others Vs. P.V.G. Raju (Died) and Others, has held that the language of Section 8 is

peremptory in nature. Therefore, in cases where there is an arbitration clause in the agreement, it is obligatory for the court to refer the parties to

arbitration in terms of their arbitration agreement and nothing remains to be decided in the original action after such an application is made except

to refer the dispute to an arbitrator. Therefore, it is clear that if, as contended by a party in an agreement between the parties before the civil court,

there is a clause for arbitration, it is mandatory for the civil court to refer the dispute to an arbitrator. In the instant case, the existence of an arbitral

clause in the agreement is accepted by both the parties as also by the courts below but the applicability thereof is disputed by the respondent and

the said dispute is accepted by the courts below. Be that as it may, at the cost of repetition, we may again state that the existence of the arbitration

clause is admitted. If that be so, in view of the mandatory language of Section 8 of the Act, the courts below ought to have referred the dispute to

arbitration.

13. In *Agri Gold Exims Ltd. Vs. Sri Lakshmi Knits and Wovens and Others*, the Apex Court reiterated the legal position pertaining to resolution of

disputes by way of arbitration and the bar of civil court jurisdiction in such disputes and held thus (page 240, para 23 of Arb. LR)

20. Section 8 of the 1996 Act is peremptory in nature. In a case where there exists an arbitration agreement, the court is under obligation to refer

the parties to arbitration in terms of the arbitration agreement [See *Hindustan Petroleum Corpn. Ltd. Vs. Pinkcity Midway Petroleums*, and

Rashtriya Ispat Nigam Ltd.]. No issue, therefore, would remain to be decided in a suit. Existence of arbitration agreement is not disputed. The

High Court, therefore, in our opinion, was right in referring the dispute between the parties to arbitration.

14. It was contended that the certified copies of the relevant portion of the Indian Railway Standard Conditions of Contract were placed before

the learned Trial Judge and even then the application was rejected on the ground of non-production of the entire agreement containing the

arbitration clause. It is found from the plaint averments that the respondent has also relied on the very same Indian Railway Standard Conditions of

Contract, as a basis for his claim, as according to him, as per the Indian Railway Standard Conditions of Contract, if the goods were found to be

not in conformity with the purchase order, the same have to be returned to the supplier within 21 days of such receipt.

15. Therefore, it is evident that the respondent was also in the know of things pertaining to the standard terms of contract of Railways. At any rate,

the learned Trial Judge should have directed the revision petitioners to produce the copy of the entire agreement, in case the certified copies of the

relevant clause of the Indian Railway Standard Conditions of Contract as produced by the revision petitioners were found not sufficient to decide

the matter.

16. In *The General Manager, Northern Railway Vs. The Metal Powder Company Limited and Indian Overseas Bank*, learned Single Judge of this

Court considered the effect of non-production of the arbitration agreement along with the application u/s 8(3) of the Arbitration Act and observed

as under (at p. 310 of Arb. LR):

10. Though initially the counsel for the first respondent has raised an objection with regard to non-filing of the arbitration agreement along with IA

No. 54 of 2003 stating that it is mandatory, the learned Counsel for the respondent Nos. 1 and 2 later fairly submitted that they are not pressing

that point. In view of the said fact and also in view of the fact that it has been held by the Apex Court as well as by this Court that the agreement

between the parties need not be produced along with the application u/s 8(3) of the said Act, I am constrained to hold that non-production of the

agreement between the parties along with the application will not disentitle the petitioner from claiming the relief under the said Act.

17. For the reasons aforesaid, I am of the view that the learned Trial Judge committed a serious error in rejecting the application filed by the

revision petitioners for reference to the arbitrator and as such, the order of the learned Trial Judge is liable to be set aside.

18. Since the suit has been preferred as early as in the year 2003, the revision petitioners are directed to take steps for appointment of an

arbitrator as expeditiously as possible and in any case within a period of 30 days from the date of receipt of a copy of this order.

19. The civil revision petition is allowed, subject to the above direction. However, in the facts and circumstances of the case, there shall be no

order as to costs.