

(2006) 08 GAU CK 0094
In the Gauhati High Court

Union of India (UOI) and Others

APPELLANT

Vs

C and C Construction (P.) Ltd.

RESPONDENT

Date of Decision : 11-08-2006

Acts Referred:

Arbitration and Conciliation Act, 1996 — Section 8
Civil Procedure Code, 1908 (CPC) — Section 115
Constitution of India, 1950 — Article 227

Citation : (2007) 1 GLR 782

Hon'ble Judges : H.N. Sharma, J

Bench : Single Bench

Final Decision : Dismissed

Judgement

H.N. Sarma, J.—Precise question that falls for consideration in this revision petition filed u/s 115 of the CPC read with Article 227 of the Constitution as to what are the necessary requirement of law for insisting the civil court to refer a matter to arbitral tribunal in a case containing an agreed arbitration clause vis-a-vis the legality and validity or otherwise of the impugned orders dated 3.12.2004 and 12.7.2004 passed by the learned Civil Judge (Senior Division), Dibrugarh in Title Suit No. 28/2004. The aforesaid suit was registered on the filing of a plaint filed by the plaintiff-respondent seeking for declaration and/or cancellation of the contract earlier allotted to him by the defendant authorities is illegal, invalid and incomplete and for other usual reliefs. Summon of the suit having been served, the defendant-petitioners appeared before the learned trial court and submitted their written statement on 31.3.2004, wherein a plea about the non-maintainability of the suit, in view of the existence of an arbitration clause in the contract arrived at between the parties was also taken up. The learned trial court vide order dated 12.7.2004 after elaborate discussion the merit of the contention raised by the parties rejected the prayer made by the petitioners to refer the matter for arbitration in terms of Para 1 of the written statement to the effect that the suit be referred for arbitration in exercise of powers u/s 8 of the Arbitration and Conciliation Act, 1996. Aggrieved defendants yet filed another

application for review of the said order dated 12.7.2004 and the learned trial court vide order dated 3.12.2004 also rejected the said prayer for review. Both the aforesaid two orders have been challenged in this revision petition.

2. I have heard Mr. D. Barua, learned Addl. C.G.S.C. for the defendant/petitioner and Mr. A.K. Bhattacharya, learned senior counsel appearing on behalf of the plaintiff/respondent.

3. Mr. D. Barua, the learned Addl. C.G.S.C. submits that both the impugned orders are not sustainable in view of the existence of an arbitration clause in the contract so arrived at by the parties and the learned trial court was required to refer the matter to be decided by way of arbitration in exercise of powers u/s 8 of the Arbitration and Conciliation Act and that not having done, the learned trial court committed jurisdictional error, in passing the impugned orders.

4. Per contra Mr. A.K. Bhattacharya, learned senior counsel submits that this revision petition having been filed on 28.2.2005, the impugned order dated 12.7.2004 is apparently barred by limitation and in the order dated 3.12.2004 no specific adjudication has been made by the learned trial court. By the said order the learned trial court only rejected the earlier order passed on 12.7.2004 and it does not attract the provision of 115 of the CPC. The further contention of the learned senior counsel is that the petitioner not having complied with the provisions of Section 8 of the Act, by filing an application u/s 8 of the Arbitration and Conciliation Act praying for referring the matter to the Arbitrator, is not entitled to insist for an adjudication by way of arbitral reference.

5. In support of his contention, the learned Addl. C.G.S.C. has referred to a decision of the Apex Court rendered in ABL International Ltd. and Another Vs. Export Credit Guarantee Corporation of India Ltd. and Others, . Mr. A.K. Bhattacharya, on the other hand, has referred the following decisions of the different High Courts -

(1) C.R.P. No. 406/2002 decided on 3.2.2003 (The West Bengal State Electricity Board and Ors. v. Shanti Conductors (P.) Ltd. reported in 2004(2) Arb. L.R. 159 (Gauhati).

(2) 2005 (4) R.A.J. 552 (HP) (Shobit Construction and Anr. v. T.K. International Ltd.).

(3) 2005 (2) R.A.J. 652 (Del.) (Anis Ahmad v. Hongkong & Shanghai Banking Corporation).

6. I have given my anxious consideration to the rival contentions raised by the learned Counsel for the parties. As alluded above, the plaintiff has filed the aforesaid suit for declaration and/or cancellation of the contract allotted to the him by the defendant authorities and for other reliefs. Appearing in the suit the defendant-petitioners filed their written statement. It is no doubt true that in the written statement in the first paragraph itself the plea of existence of the arbitration clause is taken by the petitioner and finally it is prayed for dismissal

of the suit for lack of jurisdiction to decide the matter by the learned trial court.

7. It is an admitted fact that no separate application has been filed by the defendant-petitioners for referring the matter for arbitration. The learned trial court rejected the prayer of the defendant-petitioners vide order dated 12.7.2004 holding, inter alia, that the parties concerned must pray for referring the dispute before submitting the first statement of the substance of the dispute and that not having done, the prayer was rejected.

8. Section 8 of the Arbitration and Conciliation Act confers such a right upon the parties to the dispute to apply for referring dispute for arbitration for our ready reference. Section 8 is quoted herein below:

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 of an arbitration agreement shall, if a party so applies not later than when submitting his first statement of 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.

9. An analysis of Section 8 shows that the judicial authority before which an action is brought, i.e., the suit filed is to refer a dispute for adjudication by way of arbitration, if a party so applies not later than submitting his first statement of the substance of the dispute. In the instant case, the defendants/petitioners has not applied for referring the dispute for arbitration before filing the first statement of the substance of the dispute.

10. The learned C.G.S.C. contends that the Act nowhere provide that such an application for referring for arbitration is to be filed before filing first statement as referred to in the impugned orders and he may be right in his submission, but such an application is to be filed not later than first statement is filed in the suit and such statement was filed on 31.3.2004. Again before filing the written statement contesting the suit on merit or along with the written statement also no such application has been made by the defendants/petitioners praying for referring the matter for arbitration. After filing such statement, at present the petitioner is not entitled to file such application in terms of Section 8 of the Act, inasmuch as, the first statement has already been submitted.

11. Interpreting the provisions of Section 8 of the Arbitration and Conciliation Act by the Apex Court in the case of P. Anand Gajapathi Raju and Others Vs. P.V.G. Raju (Died) and Others, , the Apex Court held that the language of Section 8 of the Act is peremptory. At para 5 of the said judgment, the Apex Court held as

follows:

The conditions which are required to be satisfied under Sub-sections (1) and (2) of Section 8 before the court can exercise its powers are:

- (1) there is an arbitration agreement;
- (2) a party to the agreement brings an action in the court against the other party;
- (3) subject-matter of the action is the same as the subject-matter of the arbitration agreement;
- (4) the other party moves the court for referring the parties to arbitration before it submits his first statement on has substance of the dispute.

This last provision creates a right in the person bringing the action to have the dispute adjudicated by the court, once the other party has submitted his first statement of defence. But if the party, who wants the matter to be referred to arbitration applies to the courts after submission of his statement and the party who has brought the action does not object, as is the case before us, there is no bar the court referring the parties to arbitration.

12. Section 8 of the Act provide a legislative mandate that judicial authority before whom an action is brought in a matter which is the subject of an arbitration agreement is to refer such parties to arbitration. But in order by refer the dispute, the concerned party is to be vigilant enough so as to file such an application before he submits the first statement on the substance of the dispute. The language of Section 8 shows that Section 8(1) relates to the power of the judicial authority before whom an action is brought is subjected to an arbitration agreement which is again subjected to compliance of the later part of the sections which provides a mandate upon such party to apply for such reference not later than submitting his first statement of the substance of the dispute. The power of the judicial authority to refer the matter for arbitral dispute is depended upon fulfilment by the applicant the necessary conditions precedent as laid down therein. On a plain reading of the language of Section 8(1) it do not permit a dissection of the aforesaid power of the judicial authority and the duty cast upon the applicant, and both are interwoven and inseparable.

13. Thus, applying the above test, it is seen that the necessary condition precedent as required to be observed u/s 8(1) of the Act has not been complied with by the petitioner in the instant case. Section 8 of the Act in fact does not oust the jurisdiction of the judicial authority to try the suit, but what is provided is that the parties having agreed the matter to be decided by an alternative forum, the matter should be left to be decided by such forum provided they exercise such right in compliance of Section 8 of the Act. It is not absolute bar of jurisdiction to decide such matter but by their conduct the parties have agreed as such and in the event of not exercising such right u/s 8(1) of the Act, the judicial authority is entitled to decide the dispute on merit, by ordering adjudicatory

process.

14. The discussion as alluded above clearly demonstrative of the fact that the defendants/petitioners did not comply with the necessary condition precedent that are necessary for invoking the jurisdiction u/s 8(1) of the Act. Even though the impugned order dated 12.7.2004 is barred by time as pointed out by Mr. Bhattacharya, learned senior counsel for the purpose of scrutinizing u/s 115 of the CPC, this court is not precluded from examining the jurisdictional competence of the learned trial court under the superintending power provided under Article 227 of the Constitution.

15. In the above premises, I do not find that the learned court below has committed any jurisdictional error in passing the impugned orders so as to interfere with the same by this court in exercise of powers under Article 227 of the Constitution of India or u/s 115 CPC.

16. In the result, this revision petition stands dismissed without any order as to cost. The interim order dated 7.3.2005 passed by this court stands vacated.

17. Before parting with the record, it is submitted by the learned C.G.S.C that the dispute in question relates to construction of Chabua Air Field and the same was allotted to the plaintiff on 16.12.2002, but the plaintiff having failed to execute the work within the stipulated period and having shown a lackadaisical attitude has adversely affecting utmost public importance involved in the matter, had no other alternative but to cancel the contract on greater public interest, which is now being injuncted by the learned trial court and, hence, the matter needs urgent disposal finally. Mr. A.K. Bhattacharya, learned senior counsel has no objection in early disposal of the suit. Considering the urgency of the matter and involvement of greater public interest, the learned trial court is directed to dispose of the suit as expeditiously as possible, and any rate not later than 4(four) months. The parties shall appear before the learned trial court on 14.9.2006 to receive further instruction.

18. Registry is directed to send down the case records to the learned trial court forthwith.