

Case No. 77

2001 -2 - L.W. - 583

MADRAS HIGH COURT

23rd April 2001 / C.R.P. No. 654 of 2001

Prabha Sridevan, J.

1. The Executive Director, Hindustan Petroleum Corporation Ltd., 17, Jamshedji Tata Road, Mumbai - 20. 2. The General Manager, Hindustan Petroleum Corporation Ltd., Thalamuthu Natarajan Buildings, Gandhi Irwin Road, Egmore, Chennai-8. 3. The Chief Regional Manager, Hindustan Petroleum Corporation Ltd., Plot No. 167 to 172, Sidco Industrial Estate, South Base, Kappalur, Madurai - 8. 4. The Depot Manager, Hindustan Petroleum Corporation Ltd., Scott Road, Madurai-1.

Vs

M/s. Sri Prabh Transport, rep. by P. Chokalinga Prabhu, 201, Rajan Complex, 56, Tamil Sangam Road, Madurai - 625 001.

Arbitration clause in the agreement - Section 8 of the Arbitration and conciliation Act, mandatory - where arbitration agreement provides for arbitration of all disputes, the only option is to go before the arbitrator - where a mere injunction suit is filed and the injunction order obtained, its pendency is not a bar to invoke arbitration proceedings -Section 8 application is filed only when an action brought before court regarding a matter covered by arbitration clause .

The revision petitioners were the defendants in lower court - public corporations which supply petroleum products. According to the respondent - plaintiff (a transport company), the petitioners had illegally and unlawfully taken action suspending the supply of petroleum products on the ground that the respondent was guilty of malpractice by supplying adulterated petroleum products. A letter was issued on 29-8-2000 demanding the reimbursement of an amount towards lab testing charges etc. According to the respondent this demand was unlawful and therefore, the suit was filed. The respondent also filed an application for interim injunction restraining the 3rd and 4th petitioners from giving effect to the order dated 29-08-2000 and from preventing the respondent from participating in the future tenders. The petitioner filed an application under Section 8 of the Arbitration and Conciliation Act, 1996

before the Court below for referring the petitioner and respondent to arbitration proceedings as per Clause 51 of the Agreement between them. This was dismissed and therefore, the present Civil Revision Petition has been filed.

Held : In this case, there could be no doubt that there is an arbitration agreement within the meaning of the Act, vide Clause 51 of the Agreement dated 29.01.1999. (2) The respondents had filed the action viz, the suit against the petitioner (3) subject matter of the arbitration agreement, the dispute between the parties, arises out of the contract which is covered by the arbitration clause and finally the petitioner at the earliest juncture before filing their written statement had moved the Court under Section 8 of the Act. Section 8 also requires the party to file the original arbitration agreement or a duly certified copy along with the application. All the requirements as per Section 8 of the Act have been satisfied. Para 6

According to the respondent in the suit the petitioners had violated the terms of the contract by arbitrarily suspending supply and tendering the truck and also with holding payment. These are disputes which shall be decided by the arbitrator. The learned Judge has found that there was nothing in the agreement to show that in the case of adulteration and malpractice the party should resort to arbitration and therefore, the Court dismissed the petition on the ground that it was not possible to accept the petitioner's request for arbitration, since there is nothing in the arbitration clause which provides punishment of the parties for malpractice and adulteration. The resort to arbitration is not to punish anyone for malpractice. The arbitrator would have to decide the dispute between the parties and thereafter, arrive at a decision as to whether the complaint of the petitioner is justified and will also have to give his finding on the other issues of contention between the parties regarding non-payment, alleged illegal detention, etc. The purpose of resorting to arbitration is not to penalise a party. The object for which arbitration clause is provided in contracts and the scope of the arbitration proceedings have not been understood properly.

The pendency of the injunction order is not a bar to the invocation of the arbitration proceedings. Section 8 (1) application is filed only when an action is brought before a Judicial Authority regarding a matter covered by the arbitration clause.

The order of the Court below is clearly erroneous and must be set aside. The Interlocutory Application No. 21144 of 2000 is ordered as prayed for directing the petitioner to refer the matter to arbitration in accordance with the Arbitration Conciliation Act, 1996 and as held by the Supreme Court nothing remains to be

decided in the original action, namely the suit, in which this interlocutory application has been filed.

M/s. Sugai & Damani Finlease Ltd. rep. by its Executive Director, Vs P. Subramania Reddy 2001 - 1 - L.W. 828 = (2000(3) CTC 74);

India Cements Capital Finance Ltd., rep. by President, Vs Kwaliti Spinning Mills Ltd., Udummalpet Road, Pollachi; 2002-2-C.T.C., 267;

Ghewarchand Rampuria Vs. Shiva Jute Bailing Ltd., (AIR (37) 1950 Calcutta 568); and *Sundardas Thackersay & Bros. Vs. The New Commercial Mills Co. Ltd.,* (AIR 1971 Calcutta 398).
Referred to :

CRP allowed

Mr. Ranganatha Reddy for M/s. King & Patridge for Petitioners.

Mr. Y.K. Rajagopal for Respondent.

ORDER

The defendants are the petitioners. The petitioners are public corporations which supply petroleum products and its offices. Tenders are called for and the petitioner enter into a contract for supply of petroleum products with the successful tenderers. The relationship between the parties are governed by the contract between them. According to the respondent, the petitioners had illegally and unlawfully taken action suspending the supply of petroleum products on the ground that the respondent was guilty of malpractice by supplying adulterated petroleum products. A letter was issued on 29.08.2000 demanding the reimbursement of an amount towards lab testing charges etc. According to the respondent this demand was unlawful and therefore, the suit was filed. The respondent also filed an application for interim injunction restraining the 3rd and 4th petitioners from giving effect to the order dated 29.8.2000 and from preventing the respondent from participating in the future tenders. The petitioner filed an application under Section 8 of the Arbitration and Conciliation Act, 1996 before the Court below for referring the petitioner and respondent to arbitration proceedings as per Clause 51 of the Agreement between them. This was dismissed and therefore, the present Civil Revision Petition has been filed.

2. Mr. Ranganatha Reddy, learned counsel appearing for M/s/ King & Patridge for the petitioners referred to the contract between the parties especially Clause 51. As per Clause 51 of the contract, any dispute or difference of any nature whatsoever,

claim, cross- claim, counter- claim or debt of the Corporation against the contract/ s or regarding any rights, liability act omission on account of any of the parties hereto arising out of or in relation of this agreement/ contract shall be referred to the sole arbitration of the Chairman and Managing Director/Director(Marketing) of the Corportaion are his nominees. Section 51(e) of the said contract gives the right to prefer a cross to the parties against whom the arbitration proceedings have been initiated that is to say the respondents in the proceedings in respect of any matter without seeking a formal reference and the arbitrator will deal with the same as if the matter has been referred to him originally and forms part of the reference. The manner in which the award shall be made are all set down in the contract and it also specifically states that the arbitrator shall be entitled to exercise all powers under the Indian Arbitraton and Conciliation Act, 1996. The learned counsel therefore, submitted that when there is an arbitration agreement the parties are bound to refer the matter to arbitration and they cannot go before the Civil Court. Further, the learned counsel submitted that Section 8 of the Arbitration and Conciliation Act provides that a Judicial Authority before which an action is brought in matter which is a subject of an arbitration agreement shall, if a party so appeals not later than when submitting his first statement on the substance of the dispute, refer the parties to arbitration. According to the learned counsel, the language is peremptory. The Judicial Authority namely the Civil Court has no option but to refer the matter to arbitration. Section 8 of the Arbitraion and Conciliation Act lays down certain conditions which are prerequisite for invoking the power under the said section.

- 1) There must be an arbitration agreement.
 - 2) The party to that agreement must initiate legal proceedings against the other party
 - 3) The subject matter of this proceedings should be a matter covered by the arbitration agreement.
 - 4) The party who applies under Section 8 of the Act shall do so before submitting his first statement before the Judicial Authority
 - 5) The application shall be accompanied by the original agreement or a duly certified copy.
3. The learned counsel submitted that all these criteria are satisfied and therefore,

the Court below ought to have ordered the application as prayed for. In support of the same be relied on the following decisions:

(1) M/s. Sugai & Damani Finance Ltd., rep, by its Executive Director, City Centre Plaza, 1st Floor, No.3 Anna Salai, Chennai 600 002 vs P.Subramania Reddy 2001 I L.W.828—2000 (3) CTC 74)and

(2) India Cements Capital Finance Ltd., rep by President, " Dhun Building" ' No 827 Anna Salai, Chennai 600 002 and another vs Kwaliti Spinning Mills Ltd., Udummalpet Road, Pollachi- 642 003 and two others (2000 II CTC 267.

4. Mr. Y.K.Rajagopal, learned counsel for the respondent on the other hand defended the order of the Court below on the ground that this was not a matter that was covered by the arbitration agreement and in fact, he referred to prayer (d) in the suit which is for the relief of mandatory injunction to give supply as per the contract. He also submitted that the complaint of the respondent in the suit is one that gives rise to tortious liability and therefore, the arbitration agreement cannot be invoked because it is common knowledge that there can be no arbitration award for a tortious claim. The learned counsel referred to the detention by the petitioner of the respondent's tank truck for 80 days, the endeavour of the petitioner to blacklist the respondent etc., and submitted that these are matters which go way beyond the scope of the arbitration agreement and therefore, there was no illegality in the order of the Court below. The learned counsel referred to the following decisions:

1. Ghewarchand Rampuria Vs. Shiva Jute Bailing Ltd., (AIR (37) 1950 Calcutta 568 and

2. Sundardas (Thackersay & Bros Vs. The New Commercial Mills Co. Ltd., (AIR 1971 Calcutta 398)

5. In the former, the Calcutta High Court held that there can be no arbitration in respect of the claim which is based on tort alone and has nothing to do with the claim under contract which alone would give rise to a dispute for arbitration. In the latter the Calcutta High Court held that where the claim in a suit is two-fold, one prior to the agreement and one subsequent to the same. There can be no stay of the suit on the ground wholly or in part on the basis of the arbitration agreement. The learned counsel would therefore submit that this a matter which has to be decided by the Civil Court alone and there was no need for referring the matter to arbitration.

Section 8 of the Arbitration and Conciliation Act reads as follows.

“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 on 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.”

The agreement between the party clearly and unambiguously provides not only for arbitration of the dispute between the parties but the arbitrator has also been empowered to deal with a cross claim as if that form part of the reference. In this case,, the complaint of the respondent is that the petitioner’s action to detain the tank truck of the respondent was arbitrary and violative of all norms and the detention of the tank truck was also illegal. The allegations and malpractices and adulteration was false and the attempt to black list the respondent is also illegal. Now if we go through the bulk transport agreement which is dated 29.01.1999 and produced before the Court below. The agreement deals with payment of bills, malpractices, adulteration evidence and contractors, liability of contractors, insurance security deposit, assigning force majeure clause and finally arbitration clause. All the issues that could arise between the parties out of the contract had been covered and the Clause 51 is the arbitration clause to deal with all these disputes. The Arbitration and Conciliation Act has been enacted to encourage resolution of dispute speedily and efficaciously. The Court’s intervention is designed to be minimal where there is an arbitration agreement. In the decision reported in 2000 (4)SCC 539, the Supreme Court has laid down the conditions to be satisfied under sub-section 1 and 2 of Section 8 before the Court can exercise its powers. They are:

(1) there is 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 the substance of the dispute.

The Supreme Court further in that matter held as follows.

8. In the matter before us, the arbitration agreement covers all the disputes between the parties in the proceedings before us and even, more than that. As already noted, the arbitration agreement satisfies the requirements of Section 7 of the New Act. The language of Section 8 is peremptory. It is, therefore, obligatory for the Court to refer the parties to arbitration in terms of their arbitration agreement. Nothing remains to be decided in the original action or the appeal arising therefrom. There is no question of stay of proceedings till the Arbitration proceedings conclude and the award becomes final in terms of the provisions of the new Act. All the rights, obligations and remedies of the parties would now be governed by the new Act including the right to challenge the award."

6. In this case also the arbitration agreement covers all the issues between the parties. As held by the Supreme Court the language of Section 8 is peremptory. The Court shall refer the matter to the arbitrator if the conditions are satisfied. In this case there could be no doubt that there is an arbitration agreement within the meaning of the Act vide Clause 51 of the Agreement dated 29.01.1999 to the party to the agreement must bring the Court against the other party. (2) The respondents had filed the action viz the suit against the petitioner (3) subject matter of the arbitration agreement the dispute between the parties arises out of the contract which is covered by the arbitration clause and finally the petitioner had at the earliest juncture before filing their written statement had moved the Court under Section 8 of the Act. Section 8 also requires the party to file the original arbitration agreement or a duly certified copy along with the application. This requirement is also been applied. Therefore: all the requirements as per Section 8 of the Act have been satisfied.

7. In the decision reported in *M/S. Sugul & Damani Finlease Ltd., rep. by its Executive Director v. P. Subramania Reddy* (2000 III CTC 74) the learned Judge held that the Court principle under the Act is if the parties are directed to submit their

disputes to arbitration they must go ahead.

A reading of the Section also makes it clear that Section 8(1) is a mandatory provision and when the conditions are satisfied the Court shall refer the parties to arbitration."

8. In fact, the provisions of the New Act makes it clear that the Court has no discretion in that matter. Then again in the decision reported in *India Cements Capital Finance Ltd., v. Kwaliti Spinning Mills Ltd.*, (2000 II CTC 267), the learned Judge held.

The language employed 'shall' is relevant to be considered. There is vast difference from the language employed under Section 34 of the old Act and under Section 8 of the New Act. When there is a clause for arbitraion in the agreement between the parties, it is mandatory and this is one more circumstance to show that the plaintiff ought to have referred the matter for arbitration invoking the provisions of the said Act.'

And in that case, the parties were directed to resort to arbitration proceedings and the suit was held to be not maintainable. These two decisions are clearly applicable to the instant case. The decision relied on by the learned counsel for the respondent on the other hand is not applicable since the dispute raised in the suit is not of a tortious nature. According to the respondent in the suit the petitioners had violated the terms of the contract by arbitrarily suspending supply and tendering the truck and also with holding payment. These are disputes which shall be decided by the arbitrator. The learned judge has found that there was nothing in the agreement to show that in the case of adulteration and malpractioce the party should resort to arbitration and therefore, the court dismissed the petition on the ground that if was not possible to accept the petitioner's request for arbitration, since there is nothing in the arbitration clause which provides punishment of the parties for malpractice and adulteration. The resort to arbitration is not to punish anyone for malpractice. The arbitrator would have to decide the dispute between the parties and thereafter, arrive at a decision as to whether the complaint of the petitioner is justified and will also have to give his finding on the othe issues of contention between the parties regarding non payment alleged illegal detention etc. The purpose of resorting to arbitraion is not to penalize a party. The object for which arbitration clause is provided in contracts and the scope of the arbitration proceedings have not been understood properly.

9. The pendency of the injunction order is not a bar to the invocation of the arbitraion proceedings. Section 8(1) application is filed only when an action is brought before a Judicial Authority regarding a matter covered by the arbitration clause. The order of the Court below is clearly erroneous and must be set aside. The civil revision petition is therefore, allowed. The Interlocutory application No. 21144 of 2000 is ordered as prayed for directing the petitioner to refer the matter to arbitration in accordance with the Arbitration and Conciliation Act, 1996 and as held by the Supreme Court referred to above nothing remains to be decided in the original action namely the suit in which this interlocutory application has been filed.

10. The civil revision petition is therefore allowed. No costs. Consequently, C.M.P.No. 3494 of 2001 is closed.