

Case No. 71

2004(5) CTC 699

IN THE HIGH COURT OF MADRAS

M. Thanikachalam, J.

C.R.P. (PD).No.2860 of 2003

25.6.2004

Kotak Mahindra Finance Ltd.,

Door No. 1054/3, III Floor, Gowtham Centre,

Avinashi Road, Coimbatore-10

Petitioner

Vs.

T.N. Balasubramanian

Respondent

Parties governed by arbitration agreement - one party files a civil suit - other party files application under Section 8 of the Arbitration and Conciliation Act, 1996 - certified copy not enclosed with the application at the time of filing - but filed before the disposal of the application - the expression 'entertained' interpreted - filing certified copy along with the application not mandatory.

CASES REFERRED

M/s. Mahabaleswar Service Station v. M/s. Indian Oil Corporation Limited, 2002 (1) MLJ 497.....(Para 8); P. Anand Gajapathi Raju v. P.V.G. Raju, AIR 2000 SC 1886.....(Para 11); Sukanya Holdings Pvt. Ltd. v. Jayesh H. Pandya, 2003 (2) CTC 431.....(Para 12).

Mr. M.M. Sundaresh, Advocate for petitioner.

Mr. N. Manoharan, Advocate for Respondent.

C.R.P. ALLOWED

ORDER

1. The revision petitioner, aggrieved by the order of the trial Court, in not accepting its claim under Section 8 of the Arbitration Act, has preferred this revision.

2. The respondent in this revision petition as plaintiff has filed a suit, for mandatory injunction, for the return of R.C.Book and for permanent injunction not to seize the vehicle with other ancillary relief in O.S.No. 147/2003 on the file of the District Munsif, Erode. In the suit, it is alleged that because of his continuous illness, he was unable to pay certain instalments, due to the 4<sup>th</sup> defendant, resulting seizure

of the vehicle.

3. After the filing of the suit and before the filing of the written statement, the defendants filed an application under Section 8 of the Arbitration and Conciliation Act, 1996, requesting the Court to refer the parties to the suit to arbitration, in accordance with the clause of the hire purchase agreement dated 22.3.2001, entered into between the parties, thereby praying for the dismissal of the suit.

4. The petition was opposed by the plaintiff, reiterating the allegations in the plaint and even disputing the clause of arbitration in the hypothecation agreement, since the revision petitioner has not produced the agreement before the Court, even after filing of the suit, as well as the petition.

5. The learned Principal District Munsif, Erode, considering the rival contentions of the parties, came to the conclusion, that the petition filed without the original agreement or the certified copy of the agreement, at the time of filing of the petition, is a bar to entertain this application, since Section 8 of the Act contemplates, that the application shall not be entertained, unless it is accompanied by original arbitration agreement or a duly certified copy thereof. Thus concluding, the petition came to be dismissed on 31.7.2003, which is under challenge in this revision petition.

6. Heard the learned counsel for the petitioner, Mr. M.M.Sundaresh and the learned counsel for the respondent, Mr.N. Manoharan.

7. The learned counsel for the petitioner submits, that the non filing of the original arbitration agreement or a duly certified copy thereof, at the time of filing of the application is not mandatory and it is sufficient, if the original arbitration agreement has been filed, before the disposal of the application i.e. before deciding the petition on merit. In this view, he would contend that the word "entertained" deployed in Section 8(2) of the Act would mean final disposal of the case and it shall not mean mere admitting the application for consideration or otherwise. It is not mandatory that the original agreement should be accompanied along with the application, at the time of filing of the application itself viz, the initial stage.

8. According to the learned counsel, in this case, since the original agreement has been filed before entertaining the application i.e. before the disposal of the same, requirement of Section 8(2) is fully satisfied. According to him, without

considering the word “entertained” properly from its proper perspective, by giving legal meaning for it, the trial Court had committed an error in construing, that the petitioner ought to have filed the arbitration agreement at the inception itself, which is against the judicial precedent also. In support of the above contention, he would invite my attention to a decision of this Court in **M/s. Mahabaleswar Service Station v. M/s. Indian Oil Corporation Limited**, 2002 (1) MLJ 497

9. The learned counsel for the respondent opposing the above said contentions, urged that a plain reading of Section 8 of the Act, makes it abundantly as well as crystal clear, that at the time of filing of the application itself, it should be accompanied by the original arbitration agreement or a duly certified copy thereof and admittedly in this case, at the time of filing of the application. It was not so done by the petitioner and therefore, the subsequent filing will not cure the defect already committed. In this view, he further contended that the trial Court is fully justified in not allowing the application, since the plaintiff/ respondent had no opportunity even to know about the clause of the agreement, in order to agitate his claim, etc.

10. Before me, it is not the case of the parties that there is no agreement of hire purchase, containing arbitration clause. From the pleadings, it is seen, there is no dispute regarding the existence of an agreement, between the parties to the suit, which does contain an arbitration clause, for deciding the dispute, if arises. Since the plaintiff/ respondent is a party to the hypothecation agreement, he cannot plead ignorance of the same also.

11. In **P. Anand Gajapathi Raju v. P.V.G. Raju**, AIR 2000 SC 1886, the Apex Court has laid down the following conditions, which are required to be satisfied, before the Court exercises its power to refer parties to arbitration:

“ The conditions which are required to be satisfied under sub- sections (1) and (2) of Section 8 before the Court can exercise its power to refer parties to arbitration 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 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. This last provision creates a right in the person bringing the

action to have the dispute adjudicated by Court, once the other party has submitted his first statement of defence.”

If the conditions are satisfied, then the Court has no option, except to issue direction to parties concerned to refer the matter for arbitration.

12. In **Sukanya Holdings Pvt Ltd. v. Jayesh H. Pandya**, 2003 (2) CTC 431, the Apex Court has made it very clear that,

“When parties to arbitration agreement have not filed any application for referring dispute to arbitrator and in pending suit such application was not filed before submitting first statement on substance of dispute or such application is not accompanied by original arbitration agreement or certified copy thereof, then matter is not required to be referred to arbitration.”

13. On the basis of the above trite law, it is to be seen, whether at the time of filing of the application, it should be accompanied by original arbitration agreement or a duly certified copy thereof. In other words, it should be seen, whether it is sufficient, if the original agreement is produced, when the same is pending for consideration. In this context, we have to see the meaning for “entertained”

14. The dictionary meaning of the word “entertain” means either to deal with or admit to consideration. If the petition is admitted for consideration, it will take the subsequent proceedings also and in that view, while pending proceedings or while pending consideration, which should include entertain, filing of the original agreement before entertaining the application would be sufficient. In **Mahabaleswarar Service Station’s case**, this Court while considering the word “entertain” deployed in Section 8 (2) of the Act, placing reliance upon various decisions of various High Courts and the Apex Court concluded that,

“The word ‘entertain’ in Sec.8 (1)(i) of the Arbitration and Conciliation Act does not mean filing or admission of application and the Court entertains an application only when it is actually adjudicating or disposing the application on merit. In the present cases when the Court below took up the application, the original agreement was before it. Thus when the application under Sec. 8 of the Act was ‘entertained’ the original of the agreement was before the judicial authority.”

No other contra decision was brought to my notice.

15. In this case, admittedly, at the time of presenting the application before the Court, neither the original arbitration agreement nor a duly certified copy thereof, has been filed. Only at the time of consideration of the application, the original agreement was filed and there is no dispute that it contains an arbitration clause. More or less, on the same set of facts, the above decision was rendered by this Court, taking into consideration, when the Court took up the application, the original agreement was before it, thereby concluding that when the application was entertained, the original of the agreement was before the judicial authority. This ratio is squarely applicable to our case.

16. A contra view could be taken, if the Section says, an application shall not be registered, unless it is accompanied by original arbitration agreement or unless the original agreement is filed, the Court shall not take the application of file. On the other hand, the word used is "entertained" which should include, not only to file, but also to deal with the application, till it is finally determined. As aforementioned, before the final determination of the application, admittedly, original agreement was filed before the Court, thereby complying the provisions of Section 8 of the Act. The trial Court instead of giving wide interpretation to the word "entertained" giving restricted meaning, as if it should mean only at the time of the filing of the application alone, deprived the rights of the parties, that emanated under the hypothecation agreement, which consists of an arbitration clause. In this view of the matter, I am of the considered opinion, the trial Court has committed an error in rejecting the application on technical ground, requiring setting aside.

17. The contention of the learned counsel for the respondent is, that unless the agreement was filed along with the application, the other side may not have the opportunity to know, what are all the terms of the agreement and it will deprive his defence, if available. This opportunity should be given to the other side, cannot be disputed. The plaintiff/respondent is a party to the agreement, not challenged. Before considering the application, admittedly, in this case, original agreement was produced before the Court. Therefore, the respondent/ plaintiff had every opportunity to say, whether the arbitration clause in the agreement relates to the subject matter of the suit or his claim is outside the purview of the arbitration clause. It is not the case of the respondent/ plaintiff that the dispute between the parties, which had arisen, does not cover by arbitration clause. It seems, all the dispute between the parties relating to the hire purchase agreement have to be referred to the arbitration, which includes the seizure of the vehicle, selling of the same, etc., which are all the subject matter of the suit. Therefore, as contemplated under the arbitration

agreement, the matter has to be decided only by the arbitrators and in this view, Section 8 is squarely applicable. Before the filing of the written statement i.e. raising substantial defence, though taking some time, a petition was filed requesting the Court to refer the parties to arbitration, since there is an arbitration agreement. The plaintiff being one of the parties to the agreement had brought an auction in the Court against the other party. The subject matter of the auction brought for decision is the same as the subject matter of the arbitration agreement. Thus, the defendant had satisfied all the requirements, needed to refer the matter for arbitration, as contemplated under Section 8 of the Act. In this view of the matter, the parties should have been referred to arbitration and it may not be proper, for the Civil Court, to decide the case.

For the foregoing reasons, the civil revision petition is allowed, setting aside the order of the Court below in I.A.No. 665/2003 and allowing the I.A. No costs throughout C.M.P.No. 21519 of 2003 is closed.