

Vijay Vishwanath Talwar vs Mashreq Bank, Psc And Ors. on 17 October, 2003

Equivalent citations: 2004(1)ARBLR399(DELHI), 109(2004)DLT838, 2004(74)DRJ323

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Bench: R.C. Chopra

ORDER

R.C. Chopra, J.

1. In this application under Section 8 read with Section 5 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as 'the Act' only), the main question raised before the Court is as to whether in the face of Section 16 of the Act, this Court can embark upon or not an inquiry into the existence or validity of an Arbitration Agreement between the parties.

2. The facts relevant for the disposal of this application, briefly stated, are that the plaintiff has filed a suit for a declaration that the Memorandum of Understanding dated 2nd July, 2003, between him and defendant No. 1, which contains an Arbitration Clause, is void ab initio and honest. Besides declaration, the plaintiff claims damages also from all the three defendants and a permanent injunction against defendant No. 1 to restrain it from presenting the post-dated cheques for encashment. He also claims mandatory injunction commanding defendant No. 1 to return the post-dated cheques to the plaintiff. According to the plaintiff, the aforesaid Memorandum of Understanding as well as post-dated cheques were obtained from him by the defendants in furtherance of a conspiracy under which the plaintiff was got arrested from his house on 2nd July, 2003 and thereafter confined at Police Station Connaught Place, New Delhi, in pursuance of non-bailable warrants obtained against him by defendant No. 1, from the Court of CJM, Ahmednagar, Maharashtra. It is pleaded that under threats of incarceration, removal to Ahmednagar in custody and confining him in jail for long, the plaintiff was forced to agree to pay to defendant No. 1 a sum of Rs. 60 lacs in full and final settlement of the alleged claims of defendant No. 1 and was also compelled to sign the aforesaid Memorandum of Understanding and deliver a Pay Order of Rs. 5 lacs in favor of defendant No. 1. The plaintiff alleged that the atmosphere of the police station, the tone and tenor of the threats held out by defendant No. 2, who was acting on the instructions of defendant No. 1, the fear of loss of social and business reputation and apprehension of bodily and mental injury, compelled him to do whatever the defendants were asking for. According to him, the Memorandum of Understanding dated 2nd July, 2003, was already typed and ready, and he had no opportunity to read, understand or appreciate its contents before putting his

signatures thereon because mentally and physically he was fully under the control and domination of the defendants. In the plaint, details were given as to how after the signing of the aforesaid Memorandum of Understanding, issuance of a Pay Order and eight post-dated cheques, the defendant No. 2 agreed before the Court of ACMM, New Delhi as well as CJM, Ahmednagar, to release the plaintiff on bail in criminal case in which non-bailable warrants had been obtained from the Court of CJM, Ahmednagar.

3. In the application under consideration, moved by the defendant Nos. 1 and 2, the allegations made by the plaintiff have been controverted and it is asserted that the plaintiff, who had run away from UAE after obtaining a loan from defendant No. 1/Bank had signed the aforesaid Memorandum of Understanding voluntarily and out of his free volition and since the said Memorandum of Understanding contains an Arbitration Clause also the proceedings in the present suit are liable to be stayed. In the course of arguments, it was pointed out that the defendant No. 1 had already appointed the named Arbitrator who had entered upon the reference.

4. I have heard learned Counsel for applicant/defendant Nos. 1 and 2 and learned Counsel for the plaintiff. I have gone through the records.

5. Learned Counsel for defendant Nos. 1 and 2 has contended that in view of Section 16 of the Act. The Arbitrator alone can determine questions relating to validity and existence of the Arbitration Agreement between the parties. Referring to Section 5 of the Act, he has argued that this Court must not scuttle Arbitral proceedings because under the new Act, judicial intervention has been reduced to minimal. In support of his submissions, he relies upon the judgments pronounced in *Konkan Railway Corporation Ltd. v. Rani Construction Pvt. Ltd.*, reported in I (2002) CLT 177 (SC)=(2002)1 Arbitration Law Reporter Page 326; *Union of India v. Popular Construction Co.*, ; *A.G. Vaitra v. State Trading Corporation*, ; *Olympus Super Structure Pvt. Ltd. v. Meena Vijay Khaitan*, , and asserts that the existence as well as validity of the Arbitration Agreement have to be looked into by the Arbitrator only. Relying upon the judgments of the Punjab and Haryana High Court in *Harike Rice Mills. v. State of Punjab*, reported in (1998) 118 Punj. L.R. 395 and *Punjab State Co-operative Supply and Marketing Federation v. Shiv Rice and General Mills*, , it is submitted that after the amendment of the Act, judicial intervention has been curtailed and the arbitration proceedings cannot be interdicted by Courts. Reliance is also placed on a judgment of this Court in *Sita Holiday Resorts Ltd. v. Mohan Lal Harbans Lal Bhayana and Co.*, reported in (2000) 1 Recent Arbitration Judgments page 103, in which it was held that all possible objections with regard to the existence or validity of the Arbitration Agreement have to be raised before the Arbitral Tribunal only. Relying upon the cases of *Kalpna Kothari v. Sudha Yadav*, reported in IV (2001) CLT 181 (SC)=(2002) 1 SCC 303 and *P. Anand Gajapati Raju v. P.V.G. Raju*, , it is argued that Section 8 mandates reference of disputes to the Arbitral Tribunal if the conditions laid therein are satisfied. It is also submitted that by unnecessarily enlarging the scope of the disputes in a suit or adding unnecessary parties, a plaintiff cannot wriggle out of Arbitration Agreement and avoid adjudication of the disputes by the Arbitrator. Referring to an order of this Court passed under Order 39 Rules 1 and 2, CPC, it is submitted that this Court has already come to a conclusion that the Arbitrator alone can decide the objections relating to the existence or validity of the Arbitration Agreement between the parties. Reliance is placed upon the judgment of the Apex Court in *Hindustan Petroleum Corporation Ltd. v.*

Pinkcity Midway Petroleums, , in which the Apex Court while dealing with Section 8 of the Act has held that when an Arbitration Clause exists, Court is under a duty to refer the parties to the Arbitrator and has no jurisdiction to continue with the suit.

6. On the other hand, learned Counsel for the plaintiff has vehemently argued that a distinction has to be drawn between the powers vested in a Civil Court under Section 8 and those under Section 11 of the Act. He submits that under Section 11 of the Act the Chief Justice or his designate exercises administrative function only for the appointment of an Arbitrator and as such the disputes in regard to the existence or the validity of the Arbitration Agreement are left to be determined by the Arbitrator in terms of Section 16 of the Act whereas under Section 8 of the Act, the Court discharges judicial functions and has to exercise judicial discretion in the matter of allowing or disallowing an application under Section 8 of the Act. He submits that Section 16 of the Act does not say that Arbitrator "shall" decide the questions relating to the existence or validity of the Arbitration Agreement but merely says that "he may" and this section does not preclude or oust the jurisdiction of the Civil Court for deciding the existence or validity of the Arbitration Agreement between the parties. According to him Section 16 is only an enabling provision and does not give exclusivity to the Arbitrator in the matter of deciding the questions in regard to the existence or validity of an Arbitration Agreement. He relies upon the judgment of the Apex Court in Sukanya Holdings (P) Ltd. v. Jayesh H. Pandya and Anr., , in which it has been held that for interpretation of Section 8 of the Act, Section 5 has no bearing. The Court dismissed the appeal against rejection of an application under Section 8 of the Act. He also relies upon the judgment of the Apex Court in Haryana Telecom Ltd. v. Sterlite Industries (India) Ltd., , in which it was held that Section 8 of the Act permits reference to the Arbitrator only that dispute or matter which the Arbitrator is competent or empowered to decide.

7. Learned Counsel for plaintiff further argues that in the present suit, the plaintiff is not only claiming declaration that the Memorandum of Understanding dated 2nd July, 2003 is null and void and unenforceable but is also claiming damages against defendants, which controversy will not be looked into and adjudicated upon by the Arbitrator as it falls outside the ambit of alleged Arbitration Agreement between the parties. He also relies upon a judgment of the Supreme Court in ITI Ltd. v. Siemens Public Communications Network Ltd., , in which it was held that the jurisdiction of the Civil Courts has to be strongly presumed in respect of all disputes of civil nature and in case an inference is to be drawn, the same should be drawn in favor of the jurisdiction of the Civil Court rather than the exclusion thereof.

8. Learned Counsel for plaintiff submits that the defendants have played a fraud upon the Courts and judicial process by first filing a criminal complaint in the Court of CJM, Ahmednagar, in which non-bailable warrants were obtained against the plaintiff, and then after taking him into custody compelled him to sign the Memorandum of Understanding dated 2nd July, 2003 which contained an Arbitration Clause also. It is submitted that while in custody at Police Station Connaught Place, not only that the plaintiff was forced to sign the Memorandum of Understanding the defendant Nos. 1 and 2 managed to obtain post-dated cheques also from him and now they want disputes also to be adjudicated upon by their own Arbitrator who is unknown to the plaintiff. They intend to obtain an award against the plaintiff leaving him with little remedy in law. Learned Counsel for plaintiff

concedes that while exercising powers under Section 8 of the Act, the Court should normally go by the terms of the agreement between the parties and let the Arbitrator decide the questions relating to the existence or validity of the Arbitration Agreement in accordance with Section 16 of the Act but in certain exceptional and rare cases, where there are circumstances to indicate that the Arbitration Agreement does not exist at all or that it is not a validly executed agreement between the parties, the Court must not leave the aggrieved party at the mercy of the Arbitrator and should exercise discretion in favor of adjudication of disputes by the Civil Court which is a superior forum as compared to an Arbitral Tribunal. He submits that if this course is not adopted, a plaintiff in spite of having filed a suit and bringing on record sufficient facts and circumstances to negative the existence or validity of the Arbitration Agreement may be deprived of his remedy in Civil Court and put at the mercy of an Arbitrator who may be other party's man. In such a situation the plaintiff will be compelled to participate in the Arbitral proceedings till the end and then raise objections under Section 34 of the Act which provides very few and limited grounds to challenge an Award.

9. A perusal of the judgment in *Konkan Railway v. Rani Construction* (supra), leaves no room for doubt that under Section 11 of the Act, the Chief Justice or his delegate does not exercise any judicial powers while appointing an Arbitrator. These powers are purely administrative in nature and leave the parties to raise their legal and factual pleas including the disputes in regard to the existence or validity of the Arbitration Agreement before the Arbitrator. The Court dealing with an application under Section 11 of the Act, therefore, is not required to look into the pleas of a respondent including challenge to the existence or validity of the Arbitration Agreement, which can be looked into by the Arbitrator himself in terms of Section 16 of the Act. The other judgments cited by learned Counsel for the defendants, show that Section 5 of the Act is aimed at restricting judicial intervention in Arbitral proceedings so that the proceedings before the Arbitrator are expeditious and smooth. The judgments of the Apex Court in *Kalpana Kothari v. Sudha Yadav*; *P. Anand Gajapathi Raju v. PVG Raju* and *Hindustan Petroleum Corporation v. Pinkcity Midway Petroleums* (supra), convey that the provisions of Section 8 of the Act are mandatory in nature and as soon as the conditions prescribed therein are found to exist the Court has no option but to refer the disputes to the Arbitrator.

10. Under Section 8 of the Act also a Civil Court, before which an action is brought in respect of a matter, which is the subject matter of an Arbitration Agreement, and the conditions stated in the provision are satisfied, has to refer the parties to arbitration. However, this Court is of the considered view that a subtle distinction exists between the parameters of powers prescribed for the Courts exercising powers under Section 11 and Section 8 of the Act, Section 11 of the Act does not permit the Court to exercise any judicial power or discretion in the matter of the appointment of an Arbitrator whereas Section 8 calls upon the Court to exercise its judicial discretion in term of the provision. Before referring the parties to arbitration the Court has to hold that the action brought before it is the subject matter of an Arbitration Agreement and the parties before it are parties to the said agreement. Under Section 8 of the Act the Court cannot on the mere asking of a defendant refer the parties to arbitration and stay the suit. If the Courts while exercising powers under Section 8 of the Act adopt the course as envisaged in Section 11 of the Act, a plaintiff may be easily browbeaten by a defendant, feeling shy of resisting the plaintiff's claim in a Civil Court, by filing a forged, fabricated, non-existent or invalid Arbitration Agreement. Such a defendant may drag the plaintiff into arbitral proceedings and that too before defendant's nominee who may be more than willing to

pass an adverse Award against the plaintiff and leave him to challenge the same under Section 34 of the Act which provides very limited grounds of challenge. The Court cannot remain a silent spectator to such an oppressive, vexatious and unjust tactic adopted by a mischievous defendant. Arbitral proceedings in such like situation will be anathema to fundamentals of justice and rule of law.

11. In Sukanya Holding Pvt. Ltd. (supra), the Apex Court has clearly held that for interpretation of Section 8 of the Act, Section 5 has no bearing and has further held that the matter is not required to be referred to the Arbitral Tribunal when the subject matter of the suit includes other disputes also as there is no provision for splitting the causes of the parties and referring the subject matter of the dispute to the Arbitrator. It was also held that there is no provision in the Act as to what is required to be done in a case where some parties to the suit are not parties to the Arbitration Agreement. In Haryana Telecom Ltd. (supra), also the Apex Court had held that Section 8 postulates that what can be referred to arbitration is that dispute which the Arbitrator is competent or empowered to decide. In Hindustan Petroleum (supra), also the Apex Court speaks of a valid Arbitration Agreement between the parties. Therefore, it cannot be said that while deciding an application under Section 8 of the Act the Court is precluded from examining as to whether the subject matter of the suit is covered by Arbitration Agreement or not and further as to whether the Arbitration Agreement exists or not between all the parties to the suit. While exercising powers under Section 8 of the Act, the Court is not discharging an administrative function as it does under Section 11 of the Act.

12. It is true that while disposing of plaintiff's application under Order 39 Rules 1 and 2 of the CPC, in the present case, this Court had observed that in terms of Section 16 of the Act the Arbitrator alone has to hear and decide objections relating to the improper constitution of the Arbitral Tribunal or existence of Arbitration Agreement but the said observations were tentative and on prima facie basis only for the disposal of the application under Section 39 Rules 1 and 2 of the CPC. At that stage the Court was not considering the questions raised by the parties in regard to application under Section 8 of the Act and as such those observations do not preclude this Court from examining the merits of the defendants' application under Section 8 of the Act. It may also be mentioned that in the said order also, this Court had observed that the contentions were being considered without prejudice to the defendants' application under Section 8 of the Act.

13. Coming to the facts of the case in hand this Court finds that in the present suit the plaintiff is seeking a declaration that the MOU dated 2.7.2003, which contains the alleged Arbitration Agreement, was got signed from him after taking him in custody in pursuance of non-bailable warrants obtained from the Court of CJM, Ahmednagar. It is specifically alleged by the plaintiff that his signatures on the said MOU were obtained by exercising undue influence, duress, coercion and as such it is void ab initio and honest. Upon examination of the averments made in the plaint and documents on record, it can be safely held that there are good and sufficient grounds to hold that at the time of signing MOU dated 2.7.2003, the plaintiff was in police custody and he genuinely apprehended that in case he did not sign the aforesaid MOU and agree to demands of the defendants 1 and 2, he would be taken to Ahmednagar in custody and there also he may not get bail and as such remain incarcerated for a long period. The bail orders passed by ACMM, New Delhi as well as CJM Ahmednagar clearly indicate that the plaintiff could get bail only upon the concessions

given by defendant Nos. 1 and 2 by saying in the Courts that the matter had been amicably resolved. This Court had observed in its order dated 14.8.2003 even that according to defendants themselves the plaintiff had defrauded them of about Rs. 86 lakhs in the year 1997 and had failed to pay back the amount for 5-6 years. Therefore a sudden change of heart on the part of the plaintiff to enter into MOU and pay a large sum to defendant No. 1 on 2.7.2003 could not have been out of his own volition and free will. It was definitely on account of arrest and threats held out by defendant Nos. 1 and 2 to take him to Ahmednagar in custody, that the plaintiff felt compelled to sign MOU dated 2.7.2003. As such it is clearly shown that the MOU was got signed from plaintiff under pressure, coercion and undue influence and not out of free will of the plaintiff. Therefore, on the basis of such an Arbitration Agreement the suit filed by the plaintiff cannot be permitted to be scuttled and plaintiff compelled to go to the Arbitrator for whose appointment he never agreed, whom he does not know even and who appears to be defendants' man.

14. This Court must emphasise that as a general rule a Civil Court, while dealing with an application under Section 8 of the Act must ordinarily refer the parties to Arbitrator and should not get impressed by a bald plea of non-existence or invalidity of Arbitration Agreement. It is not required to hold an in-depth inquiry also in regard to the existence or the validity of the Arbitration Agreement between parties because under Section 16 of the Act the Arbitrator can look into these questions but in certain rare and exceptional cases where the facts and circumstances on record irresistibly suggest that the Arbitration Agreement has been manipulated and the defendant is trying to overreach the Court and judicial process to scuttle a civil trial, the Court may examine the question of existence of validity of Arbitration Agreement and decline to refer the parties to Arbitrator if it finds that the Arbitration Agreement is forged, fabricated or invalid.

15. In the course of the arguments on this application a suggestion was given by the Court to appoint some independent Arbitrator in place of the Arbitrator named in the agreement so that there is a mutually agreed and impartial Arbitrator. Learned Counsel for the plaintiff readily agreed and even offered to pay initially the entire fee to the newly appointed Arbitrator but the defendant Nos. 1 and 2 strenuously opposed the suggestion and insisted that the named Arbitrator alone has the jurisdiction to adjudicate the disputes between the parties. This conduct also creates a serious doubt in the mind of this Court in regard to the existence of Arbitration Agreement, bona fides of the defendants and impartiality of the Arbitrator appointed by them.

16. Not only that the alleged Arbitration Agreement between the parties appears to have been got signed from the plaintiff under pressure, coercion and duress, it also appears that the subject matter of the suit is not fully covered by the Arbitration Agreement. The plaintiff is claiming not only a declaration that the MOU dated 2.7.2003 is Void, he is claiming damages also from the defendants on account of his illegal arrest, incarceration and the duress exercised upon him for signing the MOU and making payments. The Arbitrator will have no jurisdiction to adjudicate all these controversies as these do not form part of the disputes covered by the alleged Arbitration Agreement between the parties. The MOU dated 2.7.2003 which contains the Arbitration Agreement is allegedly between the plaintiff and defendant No. 1 whereas the claim for damages by the plaintiff is against other defendants also and that being so even the parties to the suit and parties to the Arbitration Agreement are different.

17. In view of the foregoing reasons, the Court is of the considered view that under the peculiar facts and circumstances of this case, there are no good grounds for allowing the defendant' application under Section 8 read with Section 5 of the Act and refer the parties to Arbitration as played.

18. The application is, therefore, dismissed.

19. It is however made clear that nothing stated herein shall be taken as an expression of opinion on the merits of the suit pending before this Court which shall be tried in accordance with law. The observations made herein are in relation to application under consideration only.

Suit No. 1412/2003:

Vide separate orders, the defendant Nos. 1 and 2 application (IA No. 8013/2003) under Section 5 read with Section 8 of the Arbitration and Conciliation Act, 1996, has been dismissed.

List for disposal of remaining IA Nos. 9455/2003, 8952/2003 and 8690/2003 at the end of Short Matters on 16th January, 2004.