Ashok Kumar Sachdeva And Another vs Vinod Kumar Sachdeva And Others on 1 August, 2017

Author: Raj Mohan Singh

Bench: Raj Mohan Singh

IN THE HIGH COURT OF PUNJAB AND HARYANA AT
CHANDIGARH

Date of Decision-01.08.2017

1. CR No.2819 of 2017

Ashok Kumar Sachdeva and another ... Petitioners
Versus
Vinod Kumar Sachdeva and others ... Respondents

2. CR No.2820 of 2017

Ashok Kumar Sachdeva and another ... Petitioners
Versus
Vinod Kumar Sachdeva ... Respondent

CORAM:-HON'BLE MR. JUSTICE RAJ MOHAN SINGH

Present: Mr. Arun Jain, Sr. Advocate with
Mr. Sunil Sharma, Advocate for the petitioners.
Ms. Munisha Gadhi, Sr. Advocate with
Mr. Viraj Gandhi, Advocate for the respondents.

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RAJ MOHAN SINGH, J.

[1]. Vide this common order, CR No.2819 of 2017 titled Ashok Kumar Sachdeva and another Vs. Vinod Kumar Sachdeva and others and CR No.2820 of 2017 titled Ashok Kumar Sachdeva and another Vs. Vinod Kumar Sachdeva are being decided. Facts are taken from CR No.2819 of 2017.

[2]. Petitioners have assailed the order dated 27.03.2017 passed by Civil Judge (Junior Division), Amritsar, whereby application under Section 8 of the Arbitration and Conciliation Act, 1 of 12 1996 (for short 'the Act') for referring the dispute to Arbitrator was dismissed.

[3]. Plaintiff/respondent No.1 filed a suit for permanent injunction restraining defendants No.2 to 4 (Canara Bank in different cities) from disbursing any loan or any other finance facility to and in the names of defendants No.1 and 2 (petitioners herein) as against the properties mentioned in the plaint. Plaintiff and defendant No.1 (petitioner No.1) are real brothers. There was a business

establishment under the name and style of Sachdeva & Sons. The said business concern was a partnership concern in which plaintiff and defendant No.1 were partners. The lands underneath the aforesaid business establishment were situated at different villages i.e. Chabba, Sangrana Sahib, Tarn Taran Road, Amritsar. Originally, the lands situated in the aforesaid villages were purchased by the plaintiff and his deceased father namely Chaman Lal Sachdeva. Subsequently, the ownership of the aforesaid lands was transferred in the name of business concern, in which plaintiff and defendant No.1 were the partners. Initially, the plaintiff and defendant No.1 were the partners of the business concern, but subsequently, other relatives were also joined in the partnership concern. Due to some unfortunate incidents, a dispute arose between the partners and the civil suit came to be filed by plaintiff/respondent No.1. In para No.7 of the plaint, the plaintiff has referred to a Memorandum of Understanding dated 14.09.2010 2 of 12 arrived at between the plaintiff and defendant No.1. Clause 15 of the aforesaid Memorandum of Understanding reads as under:-

> "that in case of any clarification needed or dispute arising, the same shall be referred for settlement and arbitration to revered late Maa Deva Ji and Surinder Kumar @ Chhindi Ji of Ghaziabad and if required, to any other person to be mutually appointed and decision of the arbitrator shall be binding on both the parties. The arbitration shall however, always be in accordance with the Arbitration and Conciliation Act 1996, as amended from time to time."

[4]. Plaintiff has pleaded that the liabilities taken over by J.M. Financial services were cleared with the joint efforts of the plaintiff, defendant No.1 and their family members. After clearance of such liabilities, defendant No.1 i.e petitioner No.1 started acting contrary to the spirit of understanding. He intended to mortgage the properties of the business concern for discharging his individual liability, rather to discharge joint liabilities of the partners. Plaintiff claimed that the said intended effort of defendant No.1 was out of the purview of the aforesaid Memorandum of Outstanding and therefore, the suit in question was filed.

[5]. Defendants No.1 and 2 (petitioners) filed an application under Section 8 of the Act for referring the dispute to the Arbitrator as per clause in the Memorandum of Understanding. Plaintiff/respondent No.1 filed reply to the said application. The existence of Memorandum of Understanding was an admitted fact between the parties as per para No.7 of the plaint itself, but, still 3 of 12 plaintiff/respondent No.1 took the stand in the reply that the defendants (petitioners) be called upon to produce on record original Memorandum of Understanding for referring to the terms and conditions contained therein. Para Nos.4, 5 and 11 of the reply are reproduced hereasunder:-

"4. Para No.4 of the application is denied being wrong and incorrect. The applicant may be called upon to produce on record such original memorandum of understanding for referring to the terms and conditions of the memorandum of understanding. It is absolutely wrong that it was ever agreed upon in between the parties that in case of any dispute the matter would be referred to the arbitrator for its adjudication. It was never agreed upon that such dispute would be referred to the arbitrator as claimed in the present case.

5. That para No.5 of the application is denied being wrong and incorrect. There is no such clause, neither it was ever agreed upon in between the parties that in case of arising of any dispute in between the parties, the matter would be referred to the arbitrator.

11. Para No.11 of the application is denied being wrong and incorrect. The facts and circumstances of the case do not warrant attraction of provision of Arbitration & Conciliation Act. The present application being moved with wrongful motive and with a wrongful intention deserves to be dismissed." [6]. Civil Judge (Junior Division), Amritsar vide order dated 27.03.2017 dismissed the application by observing that the dispute of the nature as pleaded by the plaintiff was not covered under the Arbitration Clause and the Civil Court has got jurisdiction and the protection of civil right of the plaintiff cannot be left to contingent 4 of 12 decision of the arbitrators. It was observed that once the plaintiff has submitted to the jurisdiction of the Civil Court for protection of his civil right i.e possession, then, in such circumstances, the matter cannot be referred to the arbitrators and the subject matter cannot be adjudicated upon in two different Forums as it would lead to contrary findings and would bring about multiplicity of the litigation. [7]. I have heard learned counsel for the parties. [8]. Learned Senior Counsel for the petitioners by referring to the Arbitration Clause 15 in the Memorandum of Understanding contended that the subject matter of dispute is well within the competence of the arbitrators. The existence of Memorandum of Understanding was admitted by the plaintiff in para No.7 of the plaint itself. In reply to the application under Section 8 of the Act, mala fide stand has been taken by the plaintiff in para Nos.4 and 5, thereby, asking the petitioners to produce original Memorandum of Understanding. The existence of arbitration clause was never in dispute. By alleging contents as contained in para Nos.4, 5 and 11 of the reply, the plaintiff has virtually brought the application of Section 16 of the Arbitration and Conciliation Act, 1996 into being. Learned Senior Counsel placed reliance upon Agri Gold Exims Ltd. Vs. Sri Lakshmi Knits & Wovens and others, (2007) 3 Supreme Court Case 686, The Branch Manager, M/s Magma Leasing & Finance Limited and another Vs. Potluri Madhavilata and another, 2009(4) RCR (Civil) 900, Bharat Rasiklal Ashra Vs. 5 of 12 Gautam Rasikla Ashra and another, 2011(4) RCR (Civil) 869 and contended that the provisions in terms of Section 8 of the Act are preemptory in nature. In the event of finding existence of arbitration clause, the Court is obligated to refer the parties to arbitration. The breach of agreement by any of the party to the agreement and even if, there is termination of agreement, the same will not affect the arbitration clause. The matter can be referred to the arbitration for reconciliation of dispute between the parties. [9]. Learned Senior Counsel further emphasized that the existence of Memorandum of Understanding was never in dispute. The grouse of the plaintiff was that the defendants/petitioners were intending to utilize the properties of the firm by way of creating encumbrance in order to discharge their individual liability, rather to satisfy the joint liabilities of the partners. [10]. Per contra, learned Senior Counsel for the respondents submitted that as per Memorandum of Understanding, there were specified joint liabilities of the firm, which were to be discharged by the partners. The properties at serial No.1 to 7 were mortgaged to the banks/financial institutions against the loans raised and the group was to discharge the liabilities thereunder towards liability of paying to M/s J.M. Financial Asset Reconstruction Company (P) Limited, liability towards State Bank of India Town Hall Amritsar Branch and liability towards Kotak Mahindra Bank Limited (in account of Sachdeva & Sons Rice Mills Limited). Parties mutually 6 of 12 agreed that realization of scrap, machineries, installations etc. and immovable properties comprising of land and building including all the rights attached thereto, shall first be

utilized for discharging the liabilities towards banks/financial institutions/private lenders and any other source from where the firm had raised funds. Liabilities towards Government and Semi Government offices and institutions, liabilities towards staff and employees and liabilities towards creditors and suppliers were also to be discharged at the first instance.

[11]. With the aforesaid understanding, Memorandum of Understanding was executed and it was agreed in pursuance of the agreement and in consideration of the premises that the parties have agreed that till the time all liabilities are finally settled and cleared, no party shall utilize the proceeds for the purposes other than for discharge of the liabilities. Any amount previously realized against the assets of the joint ownership by any of the party, but utilized for its own individual use shall be forthwith added back in the joint property. Learned Senior Counsel further submitted that the liability qua M/s J.M. Financial Asset Reconstruction Company (P) Limited has already been discharged by the partners, but now the property on which premises of the plaintiff is situated, the defendant wants to create encumbrance over the same by way of mortgage to Canara Bank so as to discharge his liability and that has prompted plaintiff/respondent No.1 to file the suit in question.

7 of 12 [12]. I have considered the submissions made at the bar. [13]. In Hindustan Petroleum Corporation Limited Vs. M/s Pinkcity Midway Petroleums, 2003 RCR (Civil) 686, the Hon'ble Apex Court while interpreting under Sections 8 and 16 of the Arbitration and Conciliation Act, held that once the agreement and existence of arbitration clause are admitted then as per mandatory language of Section 8 of the Act, the Court is bound to refer the dispute to the Arbitrator. The question whether that arbitration clause applied to the facts of the dispute, has to be raised and decided before the Arbitrator. The Arbitrator is competent and has the jurisdiction to adjudicate upon and decide upon his jurisdiction and validity and existence of arbitration agreement with reference to arbitrability of the subject matter of dispute under arbitration clause. Once the existence of agreement between the parties is found containing arbitration clause, the jurisdiction of the civil Court in such matter is barred.

[14]. The application under Arbitration and Conciliation Act is meant to encourage alternate mode of redressal of dispute. Once the bilateral agreement is executed between the parties and the same provides for arbitration clause by way of alternate mode of redressal, then, it would be just and appropriate to honour the onerous obligations. The ratio of Hindustan Petroleum Corporation Limited's case (supra) was approved in Swiss Timing Ltd., Vs. Commonwealth Games 2010 Organizing Committee, (2014) 6 SCC 677.

8 of 12 [15]. In Rewa Electricals Vs. Movil, 2012(II) SCC 93, it was held by the Hon'ble Apex Court that the Legislature in Section 16 of the Act made it clear that any obligation with regard to objection or validity of arbitration agreement has to be treated as an agreement independent of other terms of the contract. The contentious issues should not be gone into or to be decided at the stage of appointment of arbitrator and no time should be wasted in such an exercise. The remedy of the aggrieved party is to raise the objections before the arbitral Tribunal. The arbitral Tribunal is always empowered under Section 16 of the Act to rule about its own jurisdiction. It is, therefore, open to the plaintiff to raise all these issues and pleas before the arbitral Tribunal, including all the pleas. The Arbitration Act in itself is a complete code and provides for all channels of adjudication.

[16]. In view of Section 16 of the Arbitration and Conciliation Act, 1996, it is explicitly clear that the arbitral Tribunal has the power to rule on its own jurisdiction even when any objection with reference to existence or validity of arbitration agreement is raised. A conjoint reading of sub Sections (2), (4) and (6) of Section 16 of the Arbitration Act would make it clear that such a decision would be amenable to be assailed within the ambit of Section 34 of the Arbitration Act. The Act does not make any specific provision excluding any category of dispute on the ground of its being non-arbitrable. Once there is an arbitration clause with clear and unambiguous meaning, then in such an event, judicial intervention 9 of 12 would be very limited and minimal. Even after the arbitral Tribunal rules on its jurisdiction and decides that arbitration clause is valid, the aggrieved party has to weight till final award is pronounced and thereafter, the aggrieved party would be entitled to raise any objection before the Court in the proceedings under Section 34 of the Act while challenging the arbitral award. The ratio in Kvaerner Cementation India Ltd. Vs Bajranglal Agarwal and another, (2012) 5 SCC 214 has been relied by the Hon'ble Apex Court in a subsequent judgment i.e. A. Ayyasamy Vs. A. Paramasivam and others, 2017(2) RCR (Civil) 518.

[17]. From the aforesaid proposition, it can be noticed that respondent No.1 would be having a right to file objection in terms of Section 34 of the Arbitration Act only after passing of the award by the arbitral Tribunal/Arbitrators.

[18]. In M/s Sundaram Finance Limited and another Vs. T. Thankan, 2015(2) RCR (Civil) 920, it was held that once an application in due compliance of Section 8 of the Act is filed, the approach of the Civil Court should be not to see whether Court has jurisdiction, but it should see whether its jurisdiction has been ousted. The general law should yield to special law-generalia specialibus non derogant.

[19]. In the recent judgment passed by the Hon'ble Apex Court i.e. Mrs. Hema Khattar and another Vs. Shiv Khera, 2017(3) RCR (Civil) 277, the ratio of P. Anand Gajapathi Raju and others Vs. 10 of 12 P.V.G. Raju (Dead) and others, (2000) 4 SCC 539 was relied and it was endorsed that once the conditions which are required to be satisfied under sub Sections 1 and 2 of Section 8 of the Act are fulfilled, the Court is bound to refer the matter to a arbitrator/arbitrators. Conditions which are required to be satisfied are that:-

> "(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 the substance of the dispute."

It was held that the language of Section 8 of the Act is pre-emptory in nature, therefore, it is mandatory for the Civil Court to refer the dispute to a arbitrator/arbitrators. [20]. Similar view has

been expressed by the Hon'ble Apex Court in Greaves Cotton Limited Vs. United Machinery and Appliances, 2017(1) RCR (Civil) 737, wherein while relying upon the ratio of Booz Allen and Hamilton Inc. Vs. SBI Homes Finance Limited and others, 2011(5) RCR (Civil) 168, the Hon'ble Apex Court emphasized upon the aforesaid proposition.

11 of 12 [21]. Respondent No.1 would be having remedy of objection under Section 34 of the Act only after passing of the arbitral award by the Arbitrator.

[22]. In view of observations made hereinabove, I deem it appropriate to set aside the impugned order dated 27.03.2017 passed by Civil Judge (Junior Division), Amritsar and allowed the application under Section 8 of the Arbitration and Conciliation Act, 1996. Trial Court is directed to do the needful in the aforesaid context.

[23]. A photocopy of this order be placed on the file of connected case.

(RAJ MOHAN SINGH)
JUDGE

01.08.2017
Prince

Whether reasoned/speaking Yes/No

Whether Reportable Yes/No

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