(2005) 2 ARBLR 366 : (2005) 2 RLW 1000 : (2005) 2 WLC 66

Rajasthan High Court (Jaipur Bench)

Case No: Civil Writ Petition No. 6371 of 2003

Aksh Optifibre Ltd.		APPELLANT
	Vs	
Shin Etsu Chemical Co., Ltd. and Another		RESPONDENT

Date of Decision: Jan. 12, 2005

Acts Referred:

- Arbitration and Conciliation Act, 1996 - Section 11, 16, 16(2), 16(3), 16(5)
- Civil Procedure Code, 1908 (CPC) - Order 7 Rule 11, 151, 9
- Contract Act, 1872 - Section 24, 25, 26, 27, 28
- Foreign Awards (Recognition and Enforcement) Act, 1961 - Section 3

Citation: (2005) 2 ARBLR 366 : (2005) 2 RLW 1000 : (2005) 2 WLC 66

Hon'ble Judges: K.S. Rathore, J

Bench: Single Bench

Advocate: Manish Singhvi and Manish Bhandari, for the Appellant; Paras Kuhad, Surender Singh Maan, Madhav Rao and Gautam Rishi for Respondent No. 1 and Alok Sharma, for the Respondent

Judgement

K.S. Rathore, J.

The present writ petition has been filed against the order dated 29.9.2003 passed by the Civil Judge (JD), Tizara, Alwar on the ground that while allowing the application of the respondent No. 1 filed u/s 8 of the Arbitration and Conciliation Act, 1996, the Trial Court has committed serious irregularity as Section 8 is only applicable in case of domestic arbitration and or in the International Commercial Arbitration but not in the case of the Arbitration between the parties belonging to the Convention countries, therefore, the provisions of Section 8 has no application where the parties to the agreement belongs to the countries which are contracting States under the New York Convention.

2. Learned counsel for the petitioner submits that Section 45 begins with a non-obstante clause and expressly overrides the provisions of Section 8 contained in the first part of

the said Act, as such, the Civil Judge ought to have dismissed the application of the respondent No. 1 filed u/s 8 of the Act.

3. After referring provisions of Section 45, learned counsel for the petitioner submits that Civil Judge committed gross error in holding that Section 45 of the Arbitration & Conciliation Act, 1996 is in part II which has been enacted for enforcement of the foreign awards and in this case, no award has been passed so far, therefore, there is no question of enforcement thereof. Section 45 applied where there is an arbitration agreement between the parties belonging to the Contracting States who are signatories to the New York Convention and the National Court of the Contracting State is already seized of an action in the matter in respect of which the parties have made an agreement and one of the parties requests that the parties be referred to arbitration. It is also given out that Section 45 applies to a pre-award stage and not to the post award stage as has been wrongly held by the Civil Judge.

4. Learned counsel for the petitioner also referred Section 46 to 52 of Part II which applies to the Post Award Stage whereas Section 45 is meant for Pre-Award Stage, therefore, the reason given by the Civil Judge with regard to Section 45 is erroneous and (he impugned order is liable to be set aside on this ground alone.

5. Learned counsel has given much emphasis with regard to application of Section 8 as the application which has been filed u/s 8 cannot be treated as application u/s 45. He also point out the significant difference in the two provisions that u/s 45, before referring the parties to arbitration, the judicial authority is required to record a finding that the arbitration agreement is not null and void inoperative, or incapable of being performed, while Section 8 does not required the Court to record any such finding. u/s 3 of the Act of 1961, the Court could refuse stay of proceedings if it was satisfied that the agreement was null and void, inoperative or incapable of being performed or that in fact there was no dispute between the parties with regard to the matter agreed to be referred.

6. Section 8 though based on Article of the Model Law, does not adopt the words "unless it find that the agreement is null and void, inoperative or incapable of being performed", used in it. It is also submitted that omission is deliberate because in view of the competence of arbitral tribunal to rule on its jurisdiction u/s 16 in Part I, the legislature did not intend to encroach on that jurisdiction.

7. Learned counsel for the petitioner in support of his submissions referred the judgment rendered by Hon"ble Supreme Court in case of Commissioner of Income Tax, Mumbai Vs. Anjum M.H. Ghaswala and Others, After placing reliance on the aforesaid judgment, learned counsel for the petitioner submits that the respondents are denuded from raising this point for the first time before this court as that shall tantamount to circumventing and stifling the safeguard provided to a party like petitioner u/s 45 of the Act. Over- riding provisions of Section 45 appearing in Part II shall render the application of Part I inapposite and impermissible in law. To strengthen his submissions, he placed reliance

on the judgment reported in 1984 SCC 196 Chandavarkar Sita Ratna Rao Vs. Ashalata S. Guram,

8. It is further submitted that application Order 7 Rule 11 for dismissal of the suit is still pending and since no application u/s 45 has been moved before the trial Court till the date of conclusion of hearing in this matter and no written statement has been filed by the respondents, therefore, the averments contained in the writ petition remained uncontroverted.

9. As already submitted hereinabove, the petitioner again given much emphasis that the Trial Court shall have to consider the validity of agreement before referring the matter to the arbitral tribunal, and therefore Section 45 applies to pre-award stage as opposed to post-award stage as held by the Trial Court. The Trial Court has erred in mentioning Section 45 without complying detailed requirements as enjoined by Section 45 of the Act. There are certain conditions precedent which have to be fulfilled before invoking Section 45 of the Act and those conditions have not been fulfilled in this case. Thus, mere observations of Trial Court regarding Section 45 shall not mean that requirements of Section 45 have been completed.

10. It is also given out that similar matter is also pending before the Hon''ble Supreme Court and to show the similarity, the petitioner has submitted a detailed chart regarding the similarity of contentions raised by the respondent before the Trial Court regarding applicability of Section 8 of the Act and one of the parties respondent Shin Etsu is the same and the agreement in both the matters are ad verbatim including the arbitration Clause No. 10 of the agreement which contemplates arbitration at Tokyo. The cases are identical and the matter is subjudice before the Hon''ble Supreme Court.

11. Per contra, learned counsel appearing on behalf of respondent No. 1 strongly opposed the submissions made by the petitioner and has given emphasis on the factual matrix of the case.

12. The petitioner being a consumer of perform, approached the answering respondent for supply of the said material on long term commitment basis. After detailed negotiations spanning over several months, the parties entered into a ''Long Term Sale and Purchase Agreement elated 16/18th November, 2000. Subsequent thereto, on mutual agreement, the parties modified the said agreement by supplementary agreements dated 8th May, 2001, 1st July, 2001 and 19th September, 2001. The said agreements were acted upon by both the parties for a period of over two years and benefits in terms of the said agreements were sought for and availed by the petitioner from time to time. By their letter dated 13th February, 2002, the petitioner sought, deferment of their procurement obligation on the ground that they were facing a Force-majeure situation in terms of the force-majeure clause of the Agreement. Subsequently, by their letter dated 30th May, 2002, the petitioners sought absolution from their obligation to lift the contracted quantity of Perform of the month of June, 2002. By their communication dated 8th August, 2002,

the petitioner again requested respondent No. 1 to not make the shipment on the ground that the erection of their manufacturing tower was delayed and was not likely to be completed before December, 2002. In this manner, right from 13th February, 2002, they relief upon the terms of the agreement whenever it failed to fulfill its obligation under the agreement. At no point of time did the petitioner ever contend that the agreement was null, void, inoperative or incapable of being performed.

13. Eventuality, by their letter dated 31st December, 2002, the petitioner terminate the agreement. Consequent thereto, respondent No. 1 through its counsel informed the petitioner by their letter dated 5th January, 2003 that under the circumstances, they have no choice but to initiate arbitration proceedings in terms of the Arbitration Agreement.

14. It is submitted on behalf of the respondents that with a view to wrongfully stall the arbitration proceedings, on 27th February, 2003, the petitioner instituted a civil suit before the Civil Judge, Tijara, seeking a declaration that the agreement between the parties was null and void alongwith a prayer for permanent injunction.

15. The respondent No. 1 initiated arbitration before the ICC on June 9, 2003. Upon receipt of the notice of the said suit, respondent No. 1 filed an application u/s 8 of the Arbitration and Conciliation Act, 1996 read with Section 151 CPC, contending that the action of which the court was seized, was covered under the scope of the Arbitration Agreement that was in existence between the parties and the matter may accordingly be referred to arbitration.

16. On 19th August, 2003, the petitioner submitted its reply to the respondent No. 1''s application u/s 8 of the Act of 1996. In their reply, the petitioner contended that the provisions of Section 45 and not Section 8 of the Act of 1996 were applicable as the parties are governed by the New York Convention, both India and Japan being signatories to the said Convention. It was also contended by the petitioner that even if it is found that an agreement exists between the parties in terms of Articles, the matter need not be referred to arbitration if the court finds that the agreement is null and void inoperative and incapable of being performed. The petitioner also contended that alongwith the plaint, the petitioners have placed on record sufficient material in the form of documentary evidence which establish that the disputed agreement inclusive of arbitration clause was secured by undue influence and that subsequent thereto the petitioners remained under the undue influence of the respondent and that further the said agreement were not binding on them.

17. By an order dated 29th September, 2003, the learned Trial Court examined respondent No. 1''s application for reference in the light of Section 45 and allowed the same holding as under:-

"Upon a serious consideration of the aforesaid contentions, even if the plaintiffs argument that in the aforesaid matter it is Section 45 of the Arbitration Act that would apply, is

accepted even then, the mandate of the law is that the judicial authority has to make a reference until the judicial authority is satisfied that the agreement is on account of invalidity or incompetence, null and void. It is noteworthy that in this case, the plaintiff has merely filed a plaint and the averments made in the plaint cannot be said to stand proved automatically."

18. After referring the factual matrix of the case, learned counsel for the respondent has raised the objections regarding maintainability of the writ petition as the scope under Article 227 and the present matter cannot be review while exercising power under Article 227 as held by the Hon''ble Supreme Court. In support of his submissions, he placed reliance on the following judgments:-

1. Sadhana Lodh Vs. National Insurance Company Ltd. and Another,

2. Koyilerian Janaki and Ors. v. Rent Controller (Munsif) Cannore and Ors., (2000) 9 SCC 406

3. Surya Dev Rai Vs. Ram Chander Rai and Others,

4. M/s. Estralla Rubber Vs. Dass Estate (Pvt.) Ltd.,

5. Ouseph Mathai and Ors. v. M. Abdul Khadir, 2002 SCC 319

6. Mohd. Yunus Vs. Mohd. Mustaqim and Others,

19. After referring the aforesaid judgment, learned counsel further raised the issue that whether Section 16 of the Act operates as statutory bar against institution of a civil suit u/s 9 of CPC assailing the validity of an Arbitration Agreement. Section 16 clearly bear out that under the Act, the competence to decide the issue of validity of Arbitration Agreement is explicitly conferred by the Parliament upon the Arbitral Tribunal.
Sub-Section (5) which provides for continuance of arbitral proceedings after rejection of a plea of invalidity of Arbitration Agreement and Sub-section (6) which provides that a party aggrieved by such an error may make an application for setting aside such an arbitral award, makes it clear beyond doubt that during the course of arbitral proceedings, the issue as to the validity of Arbitration Agreement can be raised only before the Arbitral Tribunal and that the Act does not envisage any role for judicial intervention during the course of arbitral proceedings and that the Court can examine the matter only after the issue as to the validity of the Arbitration Agreement is decided by the Tribunal.

20. Learned counsel for the respondents also referred Section 5 which deals with the judicial intervention as in the matters governed by this Part, no judicial authority shall intervene except where so provided in this Part. And the matter governed by Part I include all arbitration-domestic and foreign.

21. In support of his submissions, he placed reliance on the judgment rendered by Hon''ble Supreme Court in case of Bhatia International Vs. Bulk Trading S.A. and Another,

22. Further, the writ petition is challenged on the ground that Arbitration Agreement can be challenged only in a case where reference to arbitration is made by way of a petition u/s 11 and not in case where reference has been made directly by the parties as held by the Hon''ble Supreme Court in case of Hindustan Petroleum Corpn. Ltd. Vs. Pinkcity Midway Petroleums, Learned counsel also referred the judgment rendered in case of Wellington Associates Ltd. Vs. Mr. Kirit Mehta, wherein it was held that once the matter stands referred to Arbitral Tribunal the issue as to the validity, operativeness or capability of performance of the Arbitration Agreement has to be decided by the Arbitral Tribunal only and not by the Courts.

23. On merit, learned counsel for the respondent No. 1 submits that on a correct interpretation, Section 8 of the Act cannot be applied in the facts of the case, while it is the respondent''s case that since Part I applies to all commercial arbitrations.

24. It is not disputed by the respondents that Section 45 is applicable to the instant case and reference to arbitration under the impugned order is thus not based on Section 8. It is based on application of Section 35 as sought for by the petitioner. The trial applied Section 45 and found as a point of fact that the plaintiff had except for making vague allegations under the plant and not made any attempt to prove any of the said allegations. The reference was thus denied not on the ground of non-applicability of Section 45 but on the ground that the plaintiff had failed to establish by way of evidence that the Agreement was null and void, inoperative or incapable of being performed.

25. Learned counsel for the respondent also tried to distinguish the case relied upon by the petitioner as the petitioner is not able to set up the case that the arbitration agreement is inoperative or incapable of being performed. The petitioner case is that arbitration agreement is null and void. This plea of nullity has been sought to be founded solely on the ground that the Agreement provides for arbitration to be held in Japan and application of Japanese Law. It is in the context of these pleadings, that it has to be examined as to whether the Arbitration Agreement can be said to be null and void.

26. The issue as to when does an agreement become null and void is dealt with under Sections 24 to 30 of the Indian Contract Act, 1872. After referring the aforesaid provisions of the Contract Act, in support of his submissions, he placed reliance on the judgment rendered in case of State of Orissa Vs. Klockner and Company and Others,

27. Learned counsel further submits that arbitration agreements involving an Indian party stipulating a venue outside India have been held to be valid and enforceable in the following judgments:-

1. Bhatia International (supra).

2. Naveen Kedia 1998(4) CLJ 205.

3. Renu Sagar (supra).

4. State of Orissa v. Klockner & Co. (supra).

28. With regard to pendency of similar matter before Hon''ble Supreme Court, learned counsel for the respondent submits that argument of the petitioner is absolutely false and frivolous. The trial Court has not only considered the-application u/s 45, but has also given the finding that there was no material on record by the petitioner to prove that the arbitration agreement was null and void, inoperative or incapable of being performed. In the light of the said finding the Trial Court referred the matter to the arbitration and having the similar agreement of arbitration clause cannot make the two matters identical, legal matters are entirely different.

29. Heard rival submissions of the respective parties and perused the relevant provisions of the Arbitration and Conciliation Act, 1996 as well as the judgments referred by the parties.

30. It is not disputed by the respective parties that on 10.6.1958, convention on the recognition and enforcement of Foreign Arbitral Awards was held in New York and was signed by various countries including India. This convention contained various provisions relating to the recognition and Enforcement of Foreign Arbitral Awards made in the signatory countries. This convention also made provisions with regard to the roles and powers of National Courts of the Contracting State is the mailers in respect of which the parties have made an agreement relating to arbitration.

31. On 13.7.1990, India ratified the said New York Convention by legislating the Foreign Awards (Recognition & Enforcement) Act, 1961. Similarly, Japan also rectified the New York Convention on 20.6.1961 and vide Notification dated 17.8.1967, Japan declared India as a reciprocal territory under the New York Convention. The Government of India also issued a notification on 24.11.1972 declaring the Japan to be the territory to which the said convention applies after being satisfied that reciprocal provisions have already been made by Japan.

32. It is also not disputed that the petitioner filed a suit for declaration and mandatory and permanent injunction before the Court of Civil Judge, Tizara against the respondent on 27.2.2003. On 9.6.2003, the respondent No. 1 filed a request for arbitration before the ICC, Paris during the pendency of the civil suit. The respondent No. 1 also filed two applications under Order VII Rule 11 and u/s 8 respectively praying therein that the suit be dismissed since the suit is barred u/s 5 & 8 of the said Act and seeking reference of parties to arbitration.

33. On 29.9.2003, the Court of Civil Judge, Tizara allowed the application of the respondent No. 1 while holding that Section 45 of the Act does not apply to the instant

case as Section 45 is in Part 11 of the Act which relates to the enforcement of the Foreign Awards and in this case no award has been passed so far.

34. I have also perused the provisions of Section 45 of the Arbitration & Conciliation Act, 1996 which reads as under:-

45. Power of judicial authority to refer parties to arbitration:

Notwithstanding anything contained in Part I or in the CPC 1908, a judicial authority, when seized of an action in a matter in respect of which the parties have made an agreement referred to in Section 44, shall, at the request of one of the parties or any person claiming through or under him, refer the parties to arbitration unless it find that the said agreement is null and void inoperative or incapable of being performed.

35. Upon perusal of Section 45, it reveals that judicial authority on request of one of the parties, may refer the parties to arbitration unless it find that the said agreement is null and void, inoperative or incapable of being performed.

36. By bare perusal of Section 8 it reveals that u/s 8, the judicial authority has power to refer the parties to the arbitration where there is an arbitration agreement. In case the parties make a reference of the dispute to the arbitration, it was the duty of the court to provide an opportunity to the parties so that these disputes are resolved by arbitration rather than by judicial adjudication. But now under the Act of 1996 the position is that in case of presenting a matter before the judicial authority and the matter is such as is subject to the arbitration agreement, the authority may refer the parties to arbitration provided the parties so apply.

37. Section 16 which deals with the competence of arbitral tribunal to rule on its jurisdiction is reproduced hereunder:-

16. Competence of arbitral tribunal to rule on its jurisdiction:-

(1) The arbitral tribunal may rule on its own jurisdiction, including ruling on any objections, with respect to the existence or validity of the arbitration agreement, and for that purpose.

(a) an arbitration clause which forms part of a contract shall be treated as an agreement independent of the terms of the contract; and

(b) a decision by the arbitral tribunal that the contract is null and void shall not entail ipso jure the invalidity of the arbitration clause.

(2) A plea that the arbitral tribunal does not have jurisdiction shall be raised not later than the submission of the statement of defence; however, a party shall not be precluded from raising such a plea merely because that he has appointed, or participated in the appointment of, an arbitrator.

(3) A plea that the arbitral tribunal is exceeding the scope of its authority shall be raised as soon as the matter alleged to be beyond the scope of its authority is raised during the arbitral proceedings.

(4) The arbitral tribunal may, in either of the cases referred to in Sub-section (2) or Sub-section (3), admit a later plea if it considers the delay justified.

(5) The arbitral tribunal shall decide on a plea referred to in Sub-section (2) of Sub-section (3) and, where the arbitral tribunal takes a decision rejecting the plea, continue with the arbitral proceedings and make an arbitral award.

(6) A party aggrieved by such an arbitral award may make an application for setting aside such an arbitral award in accordance with Section 34.

38. Part II of the Act is with relation to the enforcement of certain Foreign Awards and Part I deals with the New York Convention Awards. Section 44 defines that in this chapter, unless the context otherwise requires, "foreign award" means an arbitral award on differences between persons arising out of legal relationships, whether contractual or not, considered as commercial under the law in force in India, made on or after the 11th day of October, 1960.

(a) in pursuance of an agreement in writing for arbitration to which the Convention set forth in First Schedule applies, and

(b) in one of such territories as the Central Government, being satisfied that reciprocal provisions have been make may, by Notification in the Official Gazette, declare to be territories to which the said Convention applies.

39. So far as application of Section 45 is concerned, the respondent No. 1 has tightly moved the application u/s 8 as both sections are applicable to the instant case and the civil court has not committed any error in considering the matter for reference to arbitration after application of Section 45.

40. Now this Court has to examine whether the provisions of Section 45 have been applied in true prospective or not as held by the Hon"ble Supreme Court in the case of Renu Sagar (supra), wherein it was observed as under: -

"Here we are concerned with Section 3 which makes it obligatory upon the Court to stay the legal proceedings if the conditions of the section are satisfied and what is more the section itself requires that before any stay is granted the Court should be satisfied that the arbitration agreement is valid, operative and capable of being performed and there are disputes between the parties with regard to the matter agreed to be referred to arbitration (conditions (v) and (vi) mentioned earlier). In other words, the section itself indicates that the proper stage at which the Court has to be fully satisfied about these conditions is before granting the relief of stay in a Section 3 petition and there is no question of the

Court getting satisfied about these conditions on any prima facie view or a pro tanti finding thereon. Parties have to put their entire material before the Court on these issue (whichever may be raised) an the Court has to record its finding thereon after considering such material."

41. The same view has been taken in the following judgments:-

1 Commissioner of Income Tax, Mumbai Vs. Anjum M.H. Ghaswala and Others,

2. 1984 Supp. SCC 196

3. 1986 (4) SCC 477

4. 2003 (9) SCC 79

5. 2002 (4) SCC 105

6. 2003 (6) 675

42. Considering the ratio decided by Hon''ble Supreme Court, it reveals that if there is a procedure has been laid down under the statues, is to be followed in a particular manner that is by way of issuance of order, instruction and direction. It is normal rule of constitution that when a statute vests power in an authority, to be exercised in a particular manner. In view of this, the civil court ought to have proceeded with the manner provided in the statutes u/s 45.

43. In view of the aforesaid observation, I am not convinced with the submissions made on behalf of the respondents and the judgment referred by the respondents are also not applicable to the present controversy. I am of the considered opinion that the Civil Court has not proceeded in the manner prescribed u/s 45. Without entering into the merit of the case and other legal question raised by both the parties, I am of the view that the matter required fresh adjudication after application of provisions of Section 45 in true prospective. Accordingly the impugned order dated 29.9.2003 is herewith quashed and set aside and the matter is remanded back to the Civil Judge (JD), Tijara with the direction to decide the same afresh after following the procedure as laid down under the provisions of Section 45 of the Act.

44. With the aforesaid observation, the writ petition stands disposed of.