B.H. Enterprises Vs Techmesh Products India Pvt. Ltd.

Court: Delhi High Court

Date of Decision: Aug. 19, 2014

Acts Referred: Arbitration and Conciliation Act, 1996 â€" Section 21, 32, 32(2), 5, 8
Civil Procedure Code, 1908 (CPC) â€" Order 10 Rule 10, Order 7 Rule 11, Order 7 Rule 14, Order 7 Rule 14(2)

Hon'ble Judges: Najmi Waziri, J

Bench: Single Bench

Advocate: R.P. Sharma, Advocate for the Appellant

Final Decision: Dismissed

Judgement

Najmi Waziri, J.
This petition impugns an order dated 19.8.2013 whereby the petitioners application under Order 7 Rule 11 of the CPC

(hereinafter referred to as "the" Code) read with Section 5 of the Arbitration & Conciliation Act, 1996 (hereinafter referred to as "the" Arbitration

Act) was dismissed with costs of Rs.3,000/-. The petitioners aforesaid application had sought an identical relief which was dismissed on

17.4.2010 in the following facts:

In the respondents suit it was stated that Defendant Nos.2 to 5 were partners of defendant No.1 M/s. B.H. Enterprises which had been appointed

as the non-exclusive stockist of the plaintiffs/respondents products in Delhi vide an agreement dated 8.8.1996. For the goods supplied to the

defendants no sales tax was included in their price on the assurance that defendants would issue ST-35 Forms to the plaintiffs (suppliers) goods.

Since the defendants had failed to supply the said forms and the Sales Tax Department had raised a demand on the plaintiff the suit was filed for

recovery of statutory dues. Against the order dated 17.4.2010, the petitioner had approached this court in CRP No.91/2010, however, it was

dismissed as withdrawn on 10.8.2012, while granting them liberty to the extent that in the event the petitioner moved any fresh application, the

same will be dealt with in accordance with law, uninfluenced by any observations made in the order which was under challenge. In disposing off the

petitioners application under Order 7 Rule 11 of the Code, the Trial Court limited its reference only to the plaint and the documents filed with it and

did not extend it to the defence in the suit. The petitioners had contended that the agreement/letter dated 8.8.1996 had been forwarded to the

plaintiff and would be in their custody. They argued that relying on its arbitration clause i.e. Clause 31 A of the agreement, the plaintiff had already

referred the entire dispute to Federation of Indian Chambers of Commerce & Industry (FICCI) by a letter dated 20.7.2002. The petitioners

further argued that upon the invocation of the arbitration clause the proceedings had commenced u/s 21 of the Arbitration Act, hence the

jurisdiction of the civil court was barred, consequently the suit would not be maintainable without following the procedure prescribed u/s 32(2) of

the Arbitration Act. The petitioners had relied upon the established precedents to the effect that no civil court would have jurisdiction in respect of

a suit which is already subject matter which has been initiated under the Arbitration Act.

2. The plaintiff/present respondent had resisted the application on the ground that it was preferred almost a year after the liberty was granted by

this Court and the trial of the suit had already begun. They submitted that the applicant/defendant had already disowned and debunked the

agreement dated 8.8.1996 by terming it as ""unilateral and one-sided in nature"". The Trial Court noted that the application was filed on 18.10.2012

without any whisper of the delay of about 30 months from the order of 17.4.2010. Meanwhile, the suit proceedings, not having been stayed by the

High Court, continued and issues were settled on 5.8.2010. The plaintiffs sole witness had filed his examination-in-chief and was also partly cross-

examined by the applicants on 8.8.2012. The Trial Court held that the defendants having participated in the trial of the suit to that extent knowingly

due to their omission/negligence cannot turn the clock back by contending that the subject matter falls within the purview of the arbitrator as it

would be against the tenets of Section 8 of the Arbitration Act. To come to this conclusion the Trial Court relied upon the ratio in Arti Jethani Vs.

Daehsan Trading (India) Pvt. Ltd. and Others, . The Trial Court referred to the applicants/defendants reply dated 8.3.2002 in which they had

contended that the terms & conditions of the agreement dated 8.8.1996 were wholly of unilateral nature and that the said ""unilateral agreement is

no more in existence as per its own nature"". Therefore, insofar as the applicants themselves had denied the existence of the arbitration agreement,

the matter could not be referred to arbitration, the Court relied upon the dicta in U.C. Aggarwal and Another Vs. Container Corpn. Ltd., as well

as on Conzerv Systems P. Ltd. Vs. T.K. Babu and Others, . The Trial Court was of the view that the petitioner having first denied the very

existence of the agreement dated 8.8.1996 could not then be permitted to approbate and reprobate. They have themselves chosen not to enforce

the arbitration clause by having participated in the suit proceedings up to the stage of part cross-examination of the plaintiffs sole witness.

Furthermore the Trial Court reasoned that although the plaintiff had referred the matter to FICCI for initiation of the arbitration proceedings, the

matter had not progressed at all and neither party pursued the matter thereafter. In substance therefore, the arbitration proceedings had not

commenced in the real sense, for it to be terminated midway only by resorting to the procedure prescribed u/s 32 of the Arbitration Act. The Trial

Court accordingly dismissed the application.

3. The learned counsel for the respondent has relied upon the judgement of this Court in Bhushan Steel Ltd. Vs. Singapore International

Arbitration Centre and Another, which held that the power of the Court can be exercised under Order 7 Rule 11 of the Code at any stage of the

suit, i.e. at any time before the conclusion of the trial. The Court had relied upon Saleem Bhai and Others Vs. State of Maharashtra and Others, ,

which held that ""the Trial Court can exercise the power under Order 7 Rule 11 C.P.C. at any stage of the suit-before registering the plaint or after

issuing summons to the defendant at any time before the conclusion of the trial. For the purposes of deciding an application under clauses (a) and

(d) of Rule 11 of Order 7 of the Code the averments in the plaint are germane; the pleas taken by the defendant in the written statement would be

wholly irrelevant at that stage, therefore, a direction to file the written statement without deciding the application under Order 7 Rule 11 of the

Code cannot but be procedural irregularity touching the exercise of jurisdiction by the Trial Court.

4. Lastly the petitioner has relied upon the dicta of the Supreme Court in Ponniamman Educational Trust Vs. The Church of Christ Charitable Trust

and Educational Charitable Society which reiterated the principle of the power of the court to exercise its jurisdiction under Order 7 Rule 11 of the

Code at any time before conclusion of the trial. The rationale behind such power being that in instances where ""allegations are vexatious and

meritless and not disclosing a clear right or material(s) to sue, it is the duty of the trial Judge to exercise his power under Order VII Rule 11 of the

Code."" The Apex Court reiterated Justice Krishna Iyers observation that ""if clever drafting has created the illusion of a cause of action it should be

nipped in the bud at the first hearing by examining the parties under Order 10 of the Code."" The civil appeal was allowed by the Supreme Court in

the facts of that case. The case concerned the examination of whether a cause of action was disclosed in the plaint and that such cause does not

appear to be barred by any law. The Court observed that Order 7 Rule 14 of the Code mandates that the plaintiff has to produce the documents

on which the cause of action is based. Therefore, he has to produce the power of attorney. Therefore, in a case where the plaintiff has sought a

decree of specific performance he had to prove that there is a subsisting agreement in his favour. The case was related whether necessary authority

existed under the power of attorney and this could be proved only when the plaintiff presented it with the plaint. The Court found that there was no

explanation from the plaintiff for not filing a registered copy of the power of attorney. He was in non-compliance of Order 7 Rule 14(2) of the

Code. The Court found that neither were the documents nor were the terms thereof set out in the plaint; that the conduct of the plaintiff was bereft

of required materials as mandated by the statutory provisions. Therefore, the plaint was liable to be rejected since the cause of action pleaded in

the plaint was vitiated.

5. While the aforesaid principle of law is the settled, the facts of the present case are different inasmuch as the petitioners/applicants themselves

have rejected the existence of the agreement dated 8.8.1996 and have subsequently participated in the proceedings before the Trial Court, they

had voluntary subjected themselves to the jurisdiction of the civil court. For them to rely upon Clause 13(a) of the agreement/letter dated 8.8.1996

would not be permissible or tenable since by their own conduct they had themselves rejected the very existence of such the agreement. This Court

is of the view that the Trial Court rightly rejected the arguments and limited its focus to determining whether the plaint disclosed any cause of

action. Having seen that the cause of action for recovery of the dues was claimed on the non-issuance of Form ST-35, the suit was maintainable.

The only issue remaining to be determined was: whether the dispute was arbitrable? This issue too was found in favour of the plaintiff because the

petitioners by their own letter dated 8.3.2002 as well as their conduct of having cross-examined the sole witness of the plaintiff, subjected

themselves to the jurisdiction of the civil court.

6. This Court in Rajiv Puri Vs. Webneuron Services, has held that a claim in a matter which is not covered within the scope and ambit of the

arbitration agreement can only be assailed by way of a suit.

7. In view of the aforesaid discussion, this Court is of the view that there is no infirmity with the view taken by the Trial Court. The rights of the

respondent are not prejudiced, neither party has chosen to pursue the reference to FICCI for initiation of the arbitration proceedings instead both

of them subjected themselves to the jurisdiction of the civil court after a lapse of two (2) years. Almost a decade has passed since the institution of

the suit. The petitioners cannot resile from having subjected themselves to the jurisdiction of the civil court after having questioned the very

existence of the arbitration clause on which they now seek to rely upon.

8. There is no merit in the petition. It is accordingly dismissed.