

(2012) 07 MAD CK 0105

Madras High Court

Case No: CRP (NPD) No. 144 of 2010; MP No. 1 of 2010

G. Rajarajan

APPELLANT

Vs

AIG Consumer Financial Services
(India) Ltd.RESPONDENT

Date of Decision: July 20, 2012**Acts Referred:**

- Arbitration and Conciliation Act, 1996 - Section 8
- Civil Procedure Code, 1908 (CPC) - Order 37 Rule 1, Order 37 Rule 3(5), Order 37 Rule 4

Citation: (2013) 2 ARBLR 438**Hon'ble Judges:** K. Ravichandra Baabu, J**Bench:** Single Bench**Advocate:** K.N. Nataraj, for the Appellant;**Final Decision:** Allowed

Judgement

K. Ravichandra Baabu, J.

The defendant in a suit for recovery of money is the petitioner before this court. He is aggrieved against the order passed by the trial court in dismissing the application filed under Order 37 Rule 3(5) of the Code of Civil Procedure, 1908. The trial court in and by the said order refused to grant leave to the petitioner to defend the suit claim of the respondent/plaintiff. The short facts of the case culled out from the pleadings of the respective parties are as follows:

The respondent herein filed a suit against the petitioner in OS No. 2209 of 2009 on the file of the 15th Assistant City Civil Court, Chennai for recovery of a sum of Rs. 2,40,596 with interest based on a personal loan availed by the petitioner from the respondent to the tune of Rs. Two lakhs. According to the respondent as the plaintiff, a loan agreement was executed on 04.07.2006 by the petitioner, stipulating various terms and conditions for repayment of the said loan amount in instalments

as well as the rate of interest payable on the principal amount. It is the case of the respondent that after the borrowal of the said loan amount, the petitioner herein did not pay the instalments regularly in terms of the said agreement dated 04.07.2006 which had resulted the suit claim. Therefore, the respondent had filed the said suit, as summary suit, under Order 37 Rule 1 of CPC seeking for recovery of the said sum with interest as stated supra.

2. The petitioner on receipt of the summons from the court, filed LA No. 9583 of 2009 under Order 37 Rule 3(5), CPC seeking unconditional leave to defend the claim of the respondent/plaintiff. An affidavit was filed in support of the said application by the petitioner. From the perusal of the said affidavit, it is seen that the petitioner has raised a plea of questioning the very maintainability of the said suit on the ground that the dispute between the parties must be referred to arbitration, in view of the presence of an arbitration clause in the agreement dated 04.07.2006. Thus, apart from raising a preliminary objection with regard to the maintainability of the suit, the petitioner without prejudice to such objection also stated that the plaintiff had come to the court with inconsistent pleas as could be seen from his notices issued on 29.11.2007, 22.12.2008 and 06.02.2009. It is also stated by the petitioner that he had made payments on 14.11.2006, 19.12.2006, 18.01.2007, 14.03.2007 and 11.05.2007 by Cheque Nos. 260559, 260560, 260562, 260564, 260566 respectively each for Rs. 12,833 which have not been given due credit to by the respondent. Therefore, according to the petitioner, apart from the fact that the suit itself is not maintainable in view of the existence of an arbitration clause in the said agreement, even on merits, the facts narrated in the affidavit filed in support of the application filed under Order 37 Rule 3(5) disclose that there are triable issues to be gone into in detail. Accordingly, the petitioner sought for grant of unconditional leave to defend the claim of the plaintiff/respondent.

3. The respondent herein as the plaintiff contested the said application filed by the petitioner by filing a counter-affidavit. The respondent apart from stating that the payments made by the petitioner were duly credited in his loan account, has not stated anything about the arbitration clause in the agreement dated 04.07.2006. In other words, a specific plea raised by the petitioner at paragraph 3 of his affidavit with regard to arbitration clause in the agreement dated 04.07.2006 and his claim that the dispute must be resolved by referring the same to arbitration, has not been denied by the respondent specifically.

4. The trial court, after hearing both parties, rejected the application by its order dated 24.07.2009 by holding that the petitioner has not made any application for referring the matter to the arbitration and that the petitioner did not respond to the notices issued by the respondent before filing the suit. The court below has also found that the respondent has admitted about the part-payments made by the petitioner through five cheques and, therefore, there are no triable issues available based on the plea raised by the petitioner in his application filed under Order 37

Rule 3(5) of CPC. The court below has further observed that by rejecting the application, the petitioner is not going to be prejudiced or affected in any manner and on the other hand, if it is allowed, it would cause great loss and prejudice to the respondent. Aggrieved against the said order passed by the court below the present civil revision petition has been filed by the petitioner.

5. When the matter was taken up for hearing on 28.03.2012 and again on 02.07.2012 and 03.07.2012, there was no representation on behalf of the respondent continuously and, therefore, this court proceeded to hear the learned counsel for the petitioner and to pass orders on merits.

6. The learned counsel for the petitioner would argue that the suit itself is laid as a summary suit under Order 37 Rule 1, CPC and, therefore, the petitioner, as the defendant, has to seek leave to defend the suit as contemplated under Order 37 Rule 3(5) of the CPC which he has rightly resorted to as first instance. According to the learned counsel, the question of filing an application u/s 8 of the Arbitration and Conciliation Act, 1996, would arise only after such leave is granted by the court below. The learned counsel would further argue that as the petitioner had specifically raised a plea with regard to the maintainability of the suit, in view of the presence of the arbitration clause in the agreement dated 04.07.2006, the court below ought to have granted unconditional leave to the petitioner to defend the suit. It is also contended by the learned counsel that apart from the said preliminary objection, the petitioner has also made out a case and established before the court below by placing material facts in the affidavit filed in support of his application that there are triable issues which warrant grant of leave to defend unconditionally. The learned counsel in support of his contention relied on the decisions reported in [P. Anand Gajapathi Raju and Others Vs. P.V.G. Raju \(Died\) and Others](#), and [Ravi Prakash Goel Vs. Chandra Prakash Goel and Another](#),

7. The learned counsel further contended that the present civil revision petition is maintainable as against the order passed by the court below under Order 37 Rule 3(5) of CPC. In support of the said contention he relied on the decision of the Hon'ble Supreme Court reported in [Wada Arun Asbestos \(P\) Ltd. Vs. Gujarat Water Supply and Sewerage Board](#),

8. Heard the learned counsel for the petitioner and perused the records placed before this court in the typed set of papers.

9. The point for consideration in this case is as to whether the civil revision petition filed against an order passed under Order 37 Rule 3(5), CPC is maintainable and if so whether the order passed by the court below rejecting the said application seeking for grant of leave to defend the suit is justifiable based on the facts and circumstances pleaded by the respective parties.

10. Before going into the merits of the matter, let me consider the question with regard to the maintainability of the civil revision petition. The said question is

answered by the Hon"ble Supreme Court in the decision in Wada Arun Asbestos (P) Ltd. vs. Gujarat Water Supply & Sewerage Board (supra). In that case the Hon"ble Supreme Court has considered the question as to whether a revision petition was maintainable against an order granting conditional leave under Order 37 Rule 3(5). After considering the various case-laws and the facts and circumstances of the case it was held by the Hon"ble Supreme Court at paragraph 18 as follows:

18. A statutory right conferred on a litigant cannot ordinarily be taken away. A civil revision application might have been maintainable as against the order dated 27.11.2002 granting conditional leave. The said remedy was also available where leave to defend a suit is refused.

Thus, from the reading of the above said judgment of the Hon"ble Supreme Court, I am of the view that the present civil revision petition is maintainable as against the order refusing to grant leave to defend the suit.

11. While coming to the next question with regard to the sustainability of the order passed by the court below, certain admitted facts are to be restated, which are as follows:

(i) The respondent as the plaintiff filed the suit for recovery of money based on a loan agreement entered into between the petitioner and the respondent on 04.07.2006. A copy of the loan agreement available in the typed set of papers filed before this court also reveals that Clause 11 of the said agreement deals with an arbitration clause which is reproduced hereunder:

11. If any dispute in respect of the claim arising out of this agreement, or any dispute in relation to or arising out of or in connection with this agreement, such claims and disputes shall be referred to sole arbitrator nominated by the Managing Director of the lender. In the absence of the Managing Director of lender by a resolution by the Board of Directors of the lender and such arbitration shall be conducted in accordance with the provisions of the Arbitration and Conciliation Act, 1996 and the venue of the arbitration shall be at Chennai. The arbitration proceedings shall be conducted in English language. The award given by such an arbitrator shall be final and conclusive and binding on all the parties to the agreement.

(ii) The petitioner as the defendant on receipt of the notice in the suit, filed IA No. 9583 of 2009 seeking for unconditional leave to defend the suit. It is his first and foremost contention that the suit is not maintainable as the dispute between the parties must be resolved by referring the same to arbitration in view of the presence of the arbitration clause in the suit agreement dated 04.07.2006. Apart from raising the question with regard to maintainability of the suit, the petitioner has also stated that the respondent had not given credit to certain payments made by the petitioner through five cheques. It is also further stated by the petitioner that the respondent had come to the court with inconsistent pleas which is evident from his

own notices issued on three different dates with three different pleas. Thus, the petitioner has sought for leave to defend the suit based on those pleadings as they disclose triable issues. The counter filed by the respondent conveniently omitted to refer anything about the arbitration clause in the agreement dated 04.07.2006. On the other hand, the respondent has proceeded to oppose the said application only on the ground that there are no triable issues as the claim of certain payments made by the petitioner were given due credit in the loan account.

12. In this background of the case and the pleadings of the respective parties, let me consider as to whether the dismissal of the petitioner's application by the court below is sustainable in law. Undoubtedly, the suit is filed as a summary suit under Order 37 Rule 1, CPC. Therefore, as contemplated under Rule 3(5) of Order 37, CPC, the petitioner has rightly taken out an application, as a first step, seeking leave of the court to defend the suit. He has not sought for permission to contest the same on merits alone and on the other hand he has questioned the very maintainability of the suit itself on the ground that the dispute between the parties is to be referred to the arbitration in view of the presence of an arbitration clause in the agreement dated 04.07.2006. Thus, for effectively filing an application u/s 8 of the Arbitration and Conciliation Act, 1996, the petitioner should first be granted leave to defend the suit. It is to be noted at this juncture that a defence may include questioning the jurisdiction of the court or maintainability of the suit also. Thus, it is not necessarily to be construed that when a person seeks permission under Order 37 Rule 3(5) to defend the suit, he has submitted to the jurisdiction of the court and consequently had given up his right to refer the matter to the arbitration in spite of presence of an arbitration clause in the agreement. It is also to be noted that filing a petition under Order 37 Rule 3(5), CPC does not mean filing of statement as contemplated u/s 8 of the Arbitration and Conciliation Act, 1996.

13. At this juncture it is useful to refer to Section 8 of the Arbitration and Conciliation Act, 1996 which is as follows:

8. Power to refer parties to arbitration where there is an arbitration agreement--

(1) A judicial authority before which an action is brought in a matter which is the subject of an arbitration agreement shall, if a party so applies not later than when submitting his first statement on the substance of the dispute, refer the parties to arbitration.

(2) The application referred to in sub-section (1) shall not be entertained unless it is accompanied by the original arbitration agreement or a duly certified copy thereof.

(3) Notwithstanding that an application has been made under sub-section (1) and that the issue is pending before the judicial authority, an arbitration may be commenced or continued and an arbitral award made.

Thus from the reading of the said Section 8, it could be seen that the petitioner is entitled to file the application u/s 8 at any point of time before filing the written statement. If any such application is so filed by fulfilling the mandatory requirements as contemplated under sub-section (2) of Section 8, the courts are duty bound to refer the matter to the arbitration without resorting to proceed with the matter thereby compelling the parties to agitate the dispute within the civil court's jurisdiction.

14. It is useful to refer to a decision of the Hon"ble Supreme Court in Ravi Prakash Goel vs. Chandra Prakash Goel and another (supra) at this juncture in support of my view wherein Their Lordships have held at paragraph 29 (paragraph 27 of SCACTC and Arb. LR) as follows (at page 202 of SCACTC=page 11 of Arb. LR):

29...Moreover, the dispute referable to arbitration had already arisen during the lifetime of Dulari Devi which is also well settled that where a dispute is referable to arbitration, the parties cannot be compelled to take recourse to in the civil courts.

15. Further, in another decision rendered by the Hon"ble Supreme Court reported in [Ardy International \(P\) Ltd. and Another Vs. Inspiration Clothes and U and Another,](#)

4 We have extensively heard the learned counsel for both the sides and at the end of the day we are satisfied that the whole proceedings were started, continued and concluded under misconception of law. In the first place, Section 8 is not intended to restrain arbitration proceedings before an arbitral tribunal. The situation contemplated by Section 8 can arise only at the first instance of an opponent and defendant in a judicial proceeding, or, at the highest, suo motu at the instance of the judicial authority, when the judicial authority comes to know of the existence of an arbitration agreement. In either event, there is no question of the court u/s 8 of the 1996 Act restraining the arbitral proceedings from commencing or continuing. In fact, Section 8 is intended to achieve, so to say, the converse result....

(Emphasis supplied)

16. Further, in another decision in P. Anand Gajapathi Raju and others vs. P.V.G. Raju (Dead) and others (supra), the Hon"ble Supreme Court has held that the matter can be referred to arbitration even at the stage of appeal. The relevant paragraphs are extracted hereunder (at page 206 of Arb. LR):

5. The conditions which are required to be satisfied under sub-sections (1) and (2) of Section 8 before the court can exercise its powers 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 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. 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. But if the party, who wants the matter to be referred to arbitration applies to the court after submission of his statement and the party who has brought the action does not object, as is the case before us, there is no bar on the court referring the parties to arbitration.

6. In our view, the phrase "which is the subject of an arbitration agreement" does not, in the context, necessarily require that the agreement must be already in existence before the action is brought in the court. The phrase also connotes an arbitration agreement being brought into existence while the action is pending.....

17. The categorical observation of the Hon"ble Supreme Court in the above said decisions drives me to come to a conclusion that once the presence of the arbitration clause in an agreement is brought to the knowledge of the court, it is obligatory for the court to refer the parties to arbitration and nothing remains to be decided in the original action or the appeal arising therefrom. It is also to be seen from the above said decision of the Apex Court that all the rights, obligations and remedies of the parties would thereafter be governed by the new Arbitration and Conciliation Act only. By applying the law laid down by the Hon"ble Supreme Court in P. Anand Gajapathi Raju and others vs. P.V.G. Raju (Dead) and others (supra) as well as in Ardy International (P) Ltd. and another vs. Inspiration Clothes & U and another (supra), the order passed by the court below in rejecting the application simply on the ground that the petitioner had not made any application u/s 8 of the said Act is totally unsustainable.

18. The court below ought to have noted that even on merits the petitioner as the defendant is only called upon under Order 37 Rule 3(5), CPC to show or disclose some facts which are triable in nature and he is not even required at that stage to establish those facts. Defending a suit is a valuable right available to a defendant, which cannot be denied or brushed aside in a casual manner. That is why the language of Order 37 Rule 3(5) of CPC only contemplates that the defendant "may disclose such facts as may be deemed sufficient entitle him to defend". Therefore, whether the facts are true in nature and based on those facts whether the defendant is entitled to succeed in the suit is purely a matter for trial, which could be possibly gone into only when the defendant is granted leave to defend such suit. Therefore, the application filed under Order 37 Rule 3(5) seeking for grant of leave should be considered by the courts only by keeping it in mind that a defence, which is a valuable right cannot be taken away in a lighter and casual approach, simply because the suit is filed under Order 37 Rule 1, CPC. It is also to be noted, at this juncture, that if no such leave is granted, he is thrown out at the threshold and made to suffer a decree forthwith. Therefore, the courts must show utmost care and caution while considering the application under Order 37 Rule 3(5) and see as to whether the facts disclosed would lead to a valuable defence with triable issues and of course, such defence is not frivolous and vexatious.

19. In view of the above said discussion of the facts and circumstances and also in view of the case-laws cited supra, I am of the firm view that the order passed by the court below is totally unsustainable and consequently the same is liable to be set aside. Accordingly, the order made by the court below in IA No. 9583 of 2009 in OS No. 2209 of 2009 dated 24.07.2009 is set aside. It is seen that the court below has decreed the suit on the very same day, while dismissing the application filed by the petitioner seeking for grant of leave. Therefore, there is a decree passed against the petitioner herein, which has to be necessarily challenged by the petitioner separately, as his application seeking for grant of leave is allowed by this court in this civil revision petition. It should be noted that the decree passed by the court below does not get automatically set aside once the application filed by the petitioner seeking for leave is allowed on revision unless and until the same is challenged and set aside in a manner known to law. Order 37 Rule 4 of CPC provides for such procedure. Therefore, the petitioner is given liberty to make an application under Order 37 Rule 4, CPC before the trial court seeking for setting aside the decree passed by the court below in view of the order passed in this civil revision petition. Accordingly, the civil revision petition is allowed. Consequently, the connected MP is closed. No costs.