

(2013) 11 CAL CK 0013

Calcutta High Court

Case No: C.O. No. 2541 of 2013

Ajoy Sankar Roy

APPELLANT

Vs

Sonar Bangla Developers Pvt.
Ltd. and Others

RESPONDENT

Date of Decision: Nov. 26, 2013

Citation: (2014) 2 ARBLR 293 : (2014) 2 CALLT 59 : (2014) 1 CALLT 202 : (2014) 1 CHN 627

Hon'ble Judges: P. Mandal, J

Bench: Single Bench

Advocate: Saptangshu Basu, Ms. Kabita Mukherjee and Mr. Manas Dasgupta, for the Appellant; Abhrajit Mitra, Jishnu Chowdhury and Mr. Arif Ali, for the Respondent

Final Decision: Dismissed

Judgement

P. Mandal, J.

This application is at the instance of the defendant No. 1 and is directed against the order dated May 14, 2013 passed by the learned Civil Judge (Senior Division), 10th Court, Alipore in Title Suit No. 21945 of 2012 thereby rejecting an application u/s 8 of the Arbitration and Conciliation Act, 1996 filed by the defendant No. 1/petitioner herein. The plaintiff/opposite party herein instituted the aforesaid suit for specific performance of contract and permanent injunction contending, inter alia, that the plaintiff and the defendant No. 1 had entered into a joint venture for the purpose of development of the suit premises as described in the schedule to the plaint on various terms and conditions including the terms that the plaintiffs contribution would be the funds for development, expertise and overseeing the actual work of development and the defendant No. 1's contribution would be the land and accordingly, a Memorandum of Understanding dated September 7, 2011 had been executed between the parties.

2. Pursuant to further negotiations between the parties on the terms of joint venture, an agreement dated September 30, 2011 was entered into between the parties. As per terms of the Agreement dated September 30, 2011, the plaintiff had

made payments to the defendant and he incurred various expenses for the development of the land of the defendant No. 1. The defendant No. 1 also executed two Powers of Attorney in favour of the plaintiff. But, subsequently, the plaintiff was surprised when he received a letter dated February" 17, 2012 from the defendant No. 1 terminating the Powers of Attorney and the agreement. Thereafter, the plaintiff was informed subsequently that the defendant No. 1 had transferred the suit property in favour of the defendant Nos. 2 & 3 who are his wife and daughter and the defendant Nos. 2 & 3 entered into an agreement with a property broker, namely, Sandip Agarwala. Thereafter, the plaintiff filed the suit for the reliefs already stated.

3. The defendants are contesting the said suit and they filed an application u/s 8 of the Arbitration and Conciliation Act, 1996 praying for dismissal of the suit on the ground that there is an arbitration clause in the agreement dated September 30, 2011 and as such, the suit is not maintainable. That application was rejected by the impugned order. Being aggrieved, this application has been preferred.

4. Now, the question is whether the impugned order should be sustained.

5. Upon hearing the learned Advocates of both the sides and on perusal of the materials on record, I find that it is an admitted fact that an agreement dated September 30, 2011 was executed between the plaintiff and the defendant No. 1 for development of the land of the defendant No. 1 which is the suit property. In this suit, the plaintiff has prayed for the following reliefs:--

(a) Perpetual injunction restraining the defendants from acting in a manner contrary to or inconsistent with the agreement dated 30th September, 2011 and in particular the negative covenant contained therein in any manner whatsoever;

(b) Decree for specific performance of the agreement of joint venture between the plaintiff and the defendant No. 1 and/or successors in interest of the defendant No. 1 being the defendant Nos. 2 and 3 in the following manner:--

(i) The defendants do not obstruct or come in the way of the plaintiff s performing its part of the venture i.e. developing and/or constructing the structures at the said premises and doing all acts necessary thereto including obtaining sanction of building plan and the like;

(ii) The defendants take possession of their 50% allocation in the construction areas of the said premises;

(iii) The defendants cause documents of transfer to be executed and registered in favour of the plaintiff and/or its nominees.

(c) Alternatively and if found necessary, the Deed of Gift which has been executed by the defendant No. 1 in favour of the defendant Nos. 2 and 3 be adjudged null and void and be delivered and cancelled;

- (d) Decree that the letter dated 17.02.2012 or any other document to the same effect purporting to terminate or acting contrary to the Powers of Attorney be adjudged null, void and delivered up and cancelled;
- (e) Receiver;
- (f) Injunction;
- (g) Attachment;
- (h) Costs; and
- (i) Such further and/or other relief or reliefs.

6. The defendants have contended that the Clause No. 36 of the agreement dated September 30, 2011 runs as follows:--

All disputes and differences between the parties hereto regarding the construction or interpretation of any of the terms and conditions herein contained or touching these presents and/or the said premises or determination of any liability either during subsistence of this agreement or after expiry thereof shall be referred to the arbitration of three Arbitrators, one each to be appointed by the parties hereto and the third to be appointed by such two Arbitrators (hereinafter referred to as "the Arbitrators") and the same shall be deemed to be a reference within the meaning of the Arbitration and Conciliation Act, 1996 or any other statutory modification or enactment for the time being thereto in force. The Arbitrators will have summary powers and will be entitled to set up their own procedure and the Arbitrators shall have power to give interim awards and/or directions. The place of arbitration shall be at Kolkata and the language will be English.

7. On the basis of such Clause No. 36, the defendants have prayed for the dismissal of the suit and to refer the subject matter of the instant suit to arbitration.

8. From the materials available as noted above, the defendant Nos. 2 & 3 who are the wife and the daughter of the defendant No. 1 are not the parties to the agreement dated September 30, 2011 and they are the subsequent transferees from the land owner, i.e., the defendant No. 1.

9. Mr. Saptangshu Basu, learned Advocate appearing for the petitioner, has contended that in two identical matters, this Bench delivered the judgment and order holding that though the transferees or other parties were not the parties to the agreement contending the arbitration clause, it would be fit and proper to settle the dispute through the arbitration as per terms of the agreement and the present case being similarly circumstanced, the said two decisions, i.e., unreported judgment and order dated November 20, 2012 in C.O. No. 1029 of 2012 and the judgment and order dated September 6, 2013 in C.O. No. 2576 of 2013 will be applicable and so, the subject matter of dispute should be referred to the arbitration.

10. Per contra, Mr. Abhrajit Mitra, learned Advocate appearing for the opposite parties has contended that the learned Trial Judge has rightly rejected the application u/s 8 of the 1996 Act and in support of his contention, he has relied on the unreported judgment and order dated December 23, 2011 of a Division Bench of this Hon'ble Court in A.P.O. No. 198 of 2011 and thus, the subject matter of dispute could be decided by the learned Trial Judge.

11. Mr. Mitra has also contended that the defendant Nos. 2 & 3 being the transferees from the defendant No. 1 are the necessary parties particularly when the relief has been sought for against them also by the plaintiff as recorded earlier and in support of his contention, Mr. Mitra has relied on the decision of [Kasturi Vs. Iyyamperumal and Others](#), particularly the paragraph No. 7 and [Thomson Press \(India\) Ltd. Vs. Nanak Builders and Investors P. Ltd. and Others](#), particularly the paragraph No. 43. Since the defendant Nos. 2 & 3 are the necessary parties for proper adjudication of the dispute and they are not the parties to the agreement dated September 30, 2011, the learned Trial Judge is quite justified in rejecting the application u/s 8 of the 1996 Act.

12. Mr. Mitra has also referred to the decision of [Chloro Controls \(I\) P. Ltd. Vs. Severn Trent Water Purification Inc. and Others](#), particularly the paragraph Nos. 93, 94, 95, 96, 132, 133 & 160 and thus, he has contended that in view of the decision of the Apex Court and of the Division Bench of this Hon'ble Court in the unreported decision referred to above, the matter cannot be referred to the arbitration and thus, he has supported the impugned order.

13. Having considered the submissions of the learned Advocates of both the sides and the aforesaid decisions, I find that this Bench disposed of the two revisional applications being C.O. No. 1029 of 2012 and C.O. No. 2576 of 2013 holding that there being an arbitration clause, it would be proper to refer the dispute before the arbitrator and accordingly, the applications u/s 8 of the 1996 Act were allowed.

14. I find that the C.O. No. 2576 of 2013 was disposed, of in consideration of the observations made in C.O. No. 1029 of 2012 wherein this Bench has observed that the defendant No. 2 of the concerned suit was an Advocate and no relief was sought for against him by the concerned plaintiff and relying on the decision of [Sukanya Holdings Pvt. Ltd. Vs. Jayesh H. Pandya and Another](#), bifurcation of cause of action cannot be allowed leaving the matter for decision by two Forums. It was also observed that in order to avoid the conflicting decision by two Forums, the matter shall be decided by the arbitrator. In the instant case, in consideration of the reliefs as sought for in the suit, I find that the plaintiff has also sought for reliefs against the defendant Nos. 2 & 3 who are supposed to be well-aware of the agreement dated September 30, 2011 entered into by their predecessor-in-interest and the plaintiff.

15. So, in consideration of the reliefs sought for and the above situation, there is no dispute that the defendant Nos. 2 & 3 are the necessary parties to the suit for proper adjudication of the dispute and so, all the defendants of the suit are the necessary parties for proper adjudication of the subject matter in dispute.

16. For proper adjudication of the subject matter in dispute, section 8 of the 1996 Act is very much relevant and the said section is set out below:--

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.

17. Thus, though the section 9 of the CPC entitles the Court of competent jurisdiction to entertain and decide all the disputes of civil nature, save and except, there is a bar and the section 8 of the 1996 Act having circumscribed the jurisdiction of the Civil Court, this section 8 gets importance for proper adjudication of the subject matter of the suit. The defendant No. 1 having full knowledge of the agreement dated September 30, 2011 had taken steps for execution of a deed subsequent to the agreement dated September 30, 2011.

18. In such a situation, in order to dispose of the application u/s 8 of the 1996 Act, the Court must find that the following conditions have been fully satisfied for allowing the application u/s 8 of the 1996 Act:--

(i) Whether the plaintiff is a party to the agreement;

(ii) Whether the applicant is a party; and

(iii) Whether the suit is in respect of any matter agreed to be referred.

19. If the aforesaid three conditions are satisfied in the affirmative, the Court can allow the application u/s 8 of the Act. In the instant case, as pointed out in the prayer of the suit, the subject matter of the suit is not covered by the agreement dated September 30, 2011. It is the defendant No. 1 who has alienated the suit property in favour of his wife and daughter after cancelling the agreement dated September 30, 2011 and the powers of attorney. Therefore, the suit is not confined to the agreement dated September 30, 2011 only, but, it relates to other disputes. So, the Clause No. iii has not been satisfied in the instant case.

20. The decision of Chloro Controls India Pvt. Ltd. (supra) has described the ratio of the said decision in paragraph Nos. 165.1 and 165.2 wherein it has been clearly indicated that the Court may have to make reference to arbitration even if the disputes existing between the signatory or even non-signatory parties relates to mother agreement and other agreements which are ancillary to the mother agreement only. However, the discretion of the Court has to be exercised in exceptional, limiting, befitting and cases of necessity and very cautiously. So, even all the parties to the suit are not the parties to the agreement containing the clause of arbitration, Court has discretionary power to allow the application u/s 8 of the Act. In the instant case, the condition being No. iii having not been satisfied and the defendant Nos. 2 & 3 being the necessary parties for adjudication of the reliefs sought for in the plaint as indicated above, in my view, relying on the decision of Chloro Controls India Pvt. Ltd. (supra), the Court may exercise the discretionary power.

21. The other decision, i.e., the unreported decision of the Division Bench in A.P.O. No. 198 of 2011 being on a different facts and circumstances, in my view, cannot be considered in the instant case.

22. Anyway, in consideration of the reliefs sought for, in my view, the learned Trial Judge has rightly rejected the application u/s 8 of the 1996 Act. Though the present case has some sort of similarity with the case of C.O. No. 1029 of 2012, the situation is altogether different for the reasons recorded earlier, and as such, in my view, though this Bench allowed the application u/s 8 of the Act in C.O. No. 1029 of 2012, the said decision need not be followed in the instant case. So, relying on the decision of Sukanya Holdings Pvt. Ltd. (supra) and Chloro Controls India Pvt. Ltd. (supra) and the fact that Clause No. iii as indicated earlier having not been satisfied in the instant case, in my view, the learned Trial Judge is justified in rejecting the application u/s 8 of the 1996 Act. It is pertinent to mention that in Chloro Controls India Pvt. Ltd. (supra), the decision of [Deutsche Post Bank Home Finance Ltd. Vs. Taduri Sridhar and Another](#), has been relied where the Court had declined reference of multiple and multi-party agreement.

23. Accordingly, in my view, the impugned order should be sustained and there is no scope of interference with the impugned order.

24. So, the application is dismissed. Considering the circumstances, there will be no order as to costs.

Urgent xerox certified copy of this order, if applied for, be supplied to the learned Advocates for the parties on their usual undertaking.