Ardy International (P) Ltd. and Another Vs Inspiration Clothes and U and Another

Court: Calcutta High Court

Date of Decision: Nov. 29, 2007

Acts Referred: Arbitration and Conciliation Act, 1996 â€" Section 7

Citation: (2010) 4 CompLJ 433

Hon'ble Judges: S.P. Talukdar, J

Bench: Single Bench

Advocate: Sunil Tibrewal, N.L. Singhania, Sakya Sen, S. Singhania, for the Appellant; Usha Nath Banerjee, Jaydeep Kar, Amitesh Banerjee, B. Boral, A. Banerjee, Anirban Guin, Advocates, for the opposite party 1, for the Respondent

Final Decision: Dismissed

Judgement

@JUDGMENTTAG-ORDER

S.P. Talukdar, J.
Inspiration Clothes and U, as plaintiff, being opposite party No. 1 herein, filed a money suit being MS No. 397 of 2003

before the learned 5th Bench of the City Civil Court at Calcutta against Ardy International (P) Ltd and another. In the said suit, the plaintiff claimed

that it carries on business of manufacturing and trading of garments. The products are mostly exported to different countries. It was in the first

week of February, 2000, the defendant No. 2 approached the plaintiff and proposed to buy the products of the plaintiff far export and procure

buyers in a continuous manner. A contract was accordingly entered into between the plaintiff and the defendant No. 2, who also represented

defendant Nos. 1 and 3. Plaintiff alleged that in course of various transactions, the defendants failed and neglected to discharge their obligations as

per the terms and conditions of the agreement, thereby causing loss and prejudice. Being left with no option, plaintiff filed the suit praying for a

decree for Rs. 9,48,143.45 against the defendants as well as other reliefs.

2. During pendency of the said suit, plaintiff received a notice from the arbitral tribunal of Bombay asking it to participate in an arbitration

proceeding initiated by the defendants. Plaintiff then filed an application for injunction thereby praying for restraining the defendants from

proceeding with the arbitration proceeding. Learned trial court rejected the said application for injunction holding, inter alia, that there was a valid

arbitration agreement between the parties. An appeal was moved by the plaintiff in which the appeal court took the view that the application made

under order 39 rule 1 and 2, CPC should be treated as one u/s 8 of the Arbitration and Conciliation Act, 1996, and directed disposal of the same

within a specified time.

3. The matter then went back to the learned trial court and the court made order dismissing the application holding that there existed a valid

arbitration agreement u/s 7 of the Act of 1996 and, thus, the parties are required to go for arbitration. The said order was again challenged and the

High Court allowed the appeal thereby holding that the endorsement at the foot of the invoice could not have been construed to be an arbitration

agreement within the meaning of 1996 Act.

4. The order dated 2.12.2004 passed by the learned division bench was this assailed by filing SLP. The Hon"ble apex court, by an order dated

8.12.2005, (sic) aside the judgment and order dated 2.12.2004 and gave liberty to the petitioner (sic) file appropriate application u/s 8 of the

Arbitration and Conciliation Act, 1996 (hereinafter referred to as "the Act").

5. The petitioner then filed an application u/s 8 of the said Act contending inter alia, that the subject matter of the money suit filed by the plaintiff is

covered by the scope and ambit of the arbitration agreement contained in the form of an arbitration clause incorporated in the invoice raised by the

petitioner upon the plaintiff. The text of the same is set as follows:

All disputes pertaining to this transaction, if any, will be subject to arbitration rules and regulations of Bharat Merchants Chamber.

6. The relevant invoices containing the said arbitration clause dated 2 November, 1999, 22 June, 2001, and 11 February, 2003, which are duly

signed by defendant No. 2, as authorized representative of defendant No. land at all materials times were duly accepted by the plaintiffs who acted

upon the same without any demur or protest. Plaintiffs, thus, accepted and/or admitted the existence of the arbitration clause contained therein.

This accordingly amounted lip a valid and binding arbitration agreement within the meaning of the section 7 of the Arbitration and Conciliation Act,

1996. The petitioners in accordance with the right arising out of the arbitration agreement issued a notice to the plaintiffs in writing on 19.8.2003

invoking the said arbitration agreement, which was replied by the advocate of the plaintiffs on 11.9.2003. Suppressing such fact, the plaintiffs filed

a suit praying, inter alia, for a decree for a sum of Rs. 9,48,143.45 as well as other reliefs. The alleged claim is on the basis of the transactions by

and between the parties in connection with which the said invoices containing the arbitration clause were raised by the petitioners and were duly

accepted by the plaintiffs. The disputes which have been raised for adjudication in the plaint, are, thus, entirely covered by the scope and ambit of

the arbitration agreement deemed to be in existence within the meaning of section 7 of the Arbitration and Conciliation Act, 1996 (hereinafter

referred to as the ''Act of 1996'').

7. In view of the existence of a valid and binding arbitration agreement within the meaning of section 7 of the said Act and complete identity of the

subject matter of the suit and the arbitration agreement, it is necessary and imperative that the said disputes raised in the suit filed by the plaintiffs be

referred to arbitration in terms of the provisions of section 8 of the Act, 1996. The instant application was filed pursuant to the liberty granted by

order dated 8.12.2005 passed by the Hon''ble Supreme Court in Civil Appeal No. 3040 of 2005 from the order dated 2.12.2004 passed by the

division bench of this court. Such application was filed prior to submitting the first statement on the substance of the disputes.

8. In the circumstances, the petitioners in respect of the said application u/s 8 of the Act, 1996 prayed for referring the disputes raised in the suit

being Money Suit No. 397 of 2003 to arbitration in terms of the arbitration agreement by and between the parties consequently dismissing the said

Money Suit No. 397 of 2003.

9. In response to this, a written objection was filed by the plaintiffs thereby challenging, inter alia, the maintainability of the application. It was

specifically claimed that there is no valid and binding arbitration clause; by and between the parties as specified in section 7 of the Act, 1996. It

was also claimed that mere unilateral reference in an invoice of sale of a party that the subject matter shall be subjected to arbitration, is not a

mutual arbitration agreement between the parties as expressly provided u/s 7 of the Act, 1996, and there is no agreed independent agreement

between the parties in writing.

10. In absence of any subsisting agreement, the application u/s 8 of the Act, 1996, is not maintainable and is, thus, liable to be dismissed. It was

also claimed that an agreement was entered into between the parties. The same was duly acknowledged and countersigned by the plaintiffs. There

is no arbitration clause in the same. By inserting an arbitration clause in the invoices, the defendants cannot claim the benefit of arbitration clause

within the meaning oil section 7 of the Act, 1996.

11. The said application was taken up for hearing on 25 January, 2006, when the learned trial court was pleased to reject the same. Being

aggrieved by such order of dismissal of the application u/s 8 of the Arbitration and Conciliation Act, 1996, the petitioner approached this court

with such application under Article 227 of the Constitution.

12. Learned counsel for the petitioner submitted that the order under challenge reflects misappreciation of the facts and materials on record by the

learned trial court. According to Mr. Tibrewal, the learned trial court was not justified in holding that the invoices containing the arbitration clause

cannot give any benefit to the defendant so as to justify referring the dispute to the learned arbitrator.

13. It was further submitted that it was not proper for the learned trial court to hold that the arbitration clause, admittedly contained in the invoices,

does not constitute an arbitration agreement only on the ground that the same does not bear the signature of the plaintiff without appreciating,

however, that the invoices, containing the arbitration clause and bearing the signature of the petitioner, were duly accepted by the plaintiff and acted

upon at all material times.

14. Before proceeding farther, it is, perhaps, necessary to refer to section 7 of the Act, 1996 which reads as follows:

7. Arbitration Agreement.-(1) In this Part, ''arbitration agreement'' (sic) an agreement by the parties to submit to arbitration all or certain disputes

which have arisen or which may rise between them in respect of a defined legal relationship, whether contractual or not.

(2) An arbitration agreement may be in the form of an arbitration clause in a contract or in the form of a separate agreement.

(3) An arbitration agreement shall be in writing.

(4) An arbitration agreement is in writing if it is contained inÃ¯Â¿Â½

(a) a document signed by the parties;

(b) an exchange of letters, telex, telegrams or other means of telecommunication which provide a record of the agreement; or

(c) an exchange of statements of claim and defence in which the existence of the agreement is alleged by one party and not denied by the other.

(5) The reference in a contract to a document containing an arbitration clause constitutes an arbitration agreement if the contract is in writing and

the reference is such as to make that arbitration clause part of the contract.

15. In course of hearing, learned counsel for the parties sought to derive (sic) from various judgments in support of the respective contention.

16. Before referring to the same, it is, perhaps, necessary to have a brief discussion on ''precedent''. Every court is bound to follow any case

decided by a court above it in the hierarchy, and appellate courts are bound by their previous decisions. It is not everything said by a judge when

giving a judgment that constitutes a precedent. The only part of a previous case, which is binding, is the (sic) decidendi (reason for deciding). Even

when the ratio decidendi of a previous case is merely a persuasive authority, it must be followed in later cases unless the Judge finds good reason

to disapprove of it. Lord Halsbury said in Quinn v. Leathem (1901) AC 495 (506):

Every judgment must be read as applicable to the particular facts proved or assumed to be proved, since the generality of the expressions which

may be found there are not intended to be expositions of the whole law, but governed land are qualified by the particular facts of the case in which

such expressions Rare to be found.

16.1 It was further observed that "a case is only authority for what it actually (sic) I entirely deny that it can be quoted for a proposition that may

seem to low logically from it". Various decisions as relied upon by the learned counsel for he parties, may, therefore, be analyzed in the aforesaid

context.

17. On behalf of the petitioners, Mr. Tibrewal submitted that it was not proper Ed just on the part of the learned court to hold that the invoices

which contain arbitration clause do not fall in any of the categories of the arbitration clause as mentioned in section 7. Mere absence of signature of

the plaintiff in such invoices not change the complexion, as the same were duly accepted by the plaintiff and acted upon. According to Mr.

Tibrewal, sub-sections (3), (4) and (5) of Section the Act of 1996 do not make it necessary for an arbitration agreement to be (sic) by both the

parties. There may very well be an arbitration agreement (sic) into existence from the conduct of the parties. In the case of Shree Subhlaxmi

Fabrics Pvt. Ltd. Vs. Chand Mal Baradia and Others, , the apex court, while dealing with the various provisions of the Act of 1996, observed that

the legislative intent, as reflected from section 5 of the said Act is to minimize supervisory role of courts to ensure that the intervention of the court

is minimal. Section 16 of the Act empowers the Arbitral Tribunal to rule on its own as well as on objections with respect to the existence or validity

of the arbitration agreement. Conferment of such power on the arbitrator under the 1996 Act indicates the intention of the legislature and its anxiety

to see mat the arbitral process is set in motion. Learned Single Bench of the Delhi High Court in the case of Bharat Steel Tubes v. State of Bihar,

reported in (1993) 2 ALR 120, observed that acceptance of goods against bills containing arbitration clause printed on their back implies

acceptance of the same by the purchaser subject to the clause and constitutes an arbitration agreement between the parties.

18. In the case of Divya Shivlaks Impex v. Shantilal Jamnadas Textiles (P) Ltd. reported in (2000) 1 RAJ 320 (Bom), the learned bench

expressed the view that printed condition on the invoice does not constitute an agreement to refer the dispute to the arbitrator. But such

observation was certainly in the context of the factual basis of the said case. It was observed that "we must hasten to add that this printed clause is

not intelligible to us...." "On a plain reading of the said printed clause, in the absence of any other material to explain the said printed clause, we

cannot come to the conclusion that the printed clause quoted above amounts to an agreement to refer the dispute to the arbitration of Mahajan".

Section 8 of the Act of 1996 clearly mandates that where arbitration clause exists, the court has a mandatory duty to refer dispute arising between

the contracting parties to arbitrator: Ref: Hindustan Petroleum Corpn. Ltd. Vs. Pinkcity Midway Petroleums, .

19. It is well settled that the extent of judicial intervention in arbitrations is limited by the non obstante provisions of section 5 of the 1996 Act,

which stipulate

5. Notwithstanding anything contained in any other law for the time being in force, in matters governed by this Part, no judicial authority shall

intervene except where so provided in this Part. (Ref: Secur Industries Ltd. v. Godrej & Boyce Mfg. Co. Ltd. and another, reported in (2004) 2

Comp LJ 1 (SC): (2004) 3 SCC 447).

20. In the case of Nimet Resources Inc. and Another Vs. Essar Steels Ltd., , the apex court held that in a matter where there has been some

transaction between the parties and the existence of the arbitration agreement is in challenge, the proper court for the parties is to thrash out such

question under diction 16 of the Act and not u/s 11 of the Act.

21. In the case of Babaji Automotive Vs. Indian Oil Corporation Limited, , the learned Single Bench of this court held that "written agreement

means an agreement in which the terms agreed by the parties are reduced into writing. It is, therefore, not necessary that the agreement must be

Signed by both parties".

22. Learned Single Bench of this court in another case Nissho Iwai Corporation Vs. Veejay Impex and Others, , held that "nowhere in this Part

any civil court is conferred with jurisdiction expressly to decide the question of factual existence or validity and legality of the arbitration

agreement".

23. The apex court in the case of M/s. Rickmers Verwaltung GMB H Vs. The Indian Oil Corporation Ltd., , held that "it is the duty of the court to

construe correspondence with a view to arrive at a conclusion whether there was any meeting of mind between the parties, which could create a

binding contract between them but the court is not empowered to create a contract for the parties by going outside the clear language used in the

correspondence, except in so far as there are some appropriate implications of law to be drawn".

24. Referring to the case of Wellington Associates Ltd. Vs. Mr. Kirit Mehta, , it was submitted that section 16 of the Act of 1996 leaves no scope

for any confusion regarding the power and authority of the arbitral tribunal to decide whether there is in ''existence'' an arbitration clause. Section

33 of the Arbitration Act, 1940 was significantly otherwise and any question as to the existence of the arbitration agreement was to be decided

only by application to the court and not by the arbitrator.

25. Mr. Usha Nath Banerjee, as learned counsel for the opposite party, categorically submitted that the underlying requirement u/s 7(4) is that (i)

there must be an agreement, and (ii) it must be in writing. The simplest form is covered by section 7(4)(a), namely, a document signed by both

parties. This would satisfy both requirement of co sensuality and a bilateral record of such consensus. He derived inspiration from the decision in

the case of P.T. Tirtamas Comexindo v. Delta International Ltd. and another, reported in (2001) 2 Arb LR 630 (Cal) (DB).

26. Referring to the decision in the case of Divya Shivlaks Impex v. Shantilal Jamnadas Textiles (P) Ltd., reported in (1999) Supp Arb LR 1

(Bom), it was contended by Mr. Banerjee that the printed condition on the invoice cannot be taken as arbitration agreement. It was submitted on

behalf of the opposite party that the judicial authority is entitled to, has to and is bound to decide the jurisdictional issue raised before it, before

making or declining to make a Reference. Reference was made to the decision in the case of S.B.P. and Co. Vs. Patel Engineering Ltd. and

Another, in this context. It was then contended that even mere participation in the proceedings would not tantamount to an acceptance of

jurisdiction of arbitrator to arbitrate dispute between the parties. (Ref : Travancore Devaswom Board v. Panchamy Pack (P) Ltd. reported in

(2005) Suppl Arb LR 1 (TC).

27. In course of hearing, issue relating to applicability of the principle of res judicata was also raised. It is true that the provisions of res judicata are

based on the principles that there shall be no multiplicity of proceedings and there shall be finality of proceedings. Such principle will be applicable

to the arbitration proceedings as well.

28. Reference was also made to the decision in the case of Ashok Kumar Srivastav Vs. National Insurance Company Limited and Others, , in this

context.

29. But, in the instant case, the said principle does not seem to have any application whatsoever. It cannot be said that a party has been vexed

twice for the same cause. Reference was made to die decision in the case of T. Arivandandam Vs. T.V. Satyapal and Another, The apex court in

the said case held that "if on a meaningful - no formal - reading of the plaint it is manifestly vexatious and meritless in the sense of not disclosing a

clear right to sue, it should exercise its power under order VII, rule 11, CPC, taking care to see that the ground mentioned therein is fulfilled". The

apex court further held that if clever drafting has created the illusion of a cause of action, the Court must nip it in the bud at the first hearing by

examining the party searchingly under order X, CPC. An activist judge is the answer to irresponsible law suits. The trial courts would insist

imperatively on examining the party at the first hearing so that bogus litigation can be shot down at the earliest stage". It is a matter of great

satisfaction to refer to the said judgment, but the principle of law, as laid down therein, does not seem to have much relevance in the present

controversy.

30. Relying upon the decision in the case of State, through Special Cell, New Delhi Vs. Navjot Sandhu @ Afshan Guru and Others, , it was

contended by Mr. Banerjee that though the power under Article 227 is a discretionary power, it need be exercised sparingly and only to keep,

subordinate courts and tribunals within the bounds of their authority and not to correct mere errors. The apex court in the said case held that where

the statute bans the exercise of revisional powers it would require very exceptional circumstances to warrant interference under Article 227 of the

Constitution of. India since the power of superintendence was not meant to circumvent statutory law.

31. In the case of Alexander Brogden and others v. Directors & C. of the Metropolitan Railway Company, as reported in LR 1877 (AC) 666, it

was held that mere mental assent to the terms stated in a proposed contract would not be binding, but acting upon those terms could constitute it a

valid contract. The said principle is largely based on the actual conduct of the parties.

32. What emerges from the facts and circumstances of the present case and the decisions, as relied upon by the learned Counsel for the parties,

essentially relates to the controversy as to whether the three invoices'' could, by any stretch of imagination, construe an arbitration agreement.

33. Admittedly, the parties entangled in this long drawn out legal battle were having effective business deals. So long such harmonious relationship

does not urn sour, it is not ordinarily expected that the parties would do anything which can create any disturbance in the smooth running of the

business. At that stage, incorporating something in three out of many invoices cannot change the legal complexion. This by itself cannot suggest by

any stretch of imagination that both parties thereby agreed to refer disputes and differences to arbitration. It will certainly be not desirable to infer

that this could amount to conscious and wilful act of giving consent. It cannot also be said that the parties by their conduct agreed to such reference

to arbitration.

34. Arbitration and Conciliation Act, 1996 is based on the principle of autonomy of parties. It certainly does not encourage intervention of courts.

It minimizes the scope of such interference. But it does not necessarily lays down that such interference is illegal or unjust under any circumstances.

As discussed earlier, Article 227 of the Constitution empowers the High Court with the constitutional authority to have the power of

superintendence over all courts and inferior tribunals within its jurisdiction. The question is when and how such interference can be made. Exercise

of such power must, however, be made in an extremely discrete and cautious manner.

35. After anxious consideration of the facts and materials of the present case, this court finds it difficult to accept the contention made on behalf of

the petitioner. The learned trial court, in the impugned order, after dealing with the controversies raised before it, did not find any merit in the

grievance raised before it by filing an application u/s 8 of the Act of 1996. The said order does not seem to suffer from any such impropriety or

illegality so as to justify any interference by this Court in exercise of its power under Article 227 of the Constitution.

36. Considering all these circumstances, the present application being CO No. 1258 of 2006 be dismissed. No order as to costs.

37. Xerox certified copy of the order be supplied to the parties as expeditiously lip possible.