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(2012) 09 CAL CK 0109

Calcutta High Court

Case No: AP No. 129 of 2012

Gopal Prasad Kanoria and Others	APPELLANT
Vs	
Trade Swift Developers Private Limited	RESPONDENT

Date of Decision: Sept. 14, 2012

Acts Referred:

- Arbitration and Conciliation Act, 1996 - Section 11, 11(12)(b), 11(5), 2, 2(1)(e)
- Constitution of India, 1950 - Article 235

Citation: (2013) 2 ARBLR 349 : (2012) 4 CALLT 507

Hon'ble Judges: Sanjib Banerjee, J

Bench: Single Bench

Advocate: Hirak Mitra and Mr. Jishnu Saha, for the Appellant;Manju Agarwal, for the Respondent

Judgement

Sanjib Banerjee, J.
The arbitration agreement is not in dispute. That there are live claims to be carried to a reference under such arbitration agreement is evident and is also admitted. The respondent has only questioned the propriety of the Chief Justice of this Court or his designate to receive this request u/s 11 of the Arbitration and Conciliation Act, 1996. A squabble over who is the more appropriate Chief Justice to receive a request u/s 11 of the 1996 Act is, at best, needless and a waste of time. For, unlike in a suit or other proceedings where the situs of an action may confer some benefit on a party and cause inconvenience to another, the extent of authority exercised u/s 11 of the Act is so limited that the need to urge such ground cannot be appreciated. Since, however, the objection has been raised, it needs to be dealt with.

2. The petitioners are the owners, and in possession, of a piece of land or an immovable property in Jaipur; in respect whereof the parties have executed an unregistered

memorandum of understanding on October 19, 2007 which contemplates the ultimate sale of the property by the petitioners to the respondent on the terms and conditions which are completely irrelevant for the present purpose. The document of October 19, 2007 contains the following arbitration clause:

18. That the parties hereto have specifically agreed that any dispute or difference of opinion on any of the issues pertaining to the terms and conditions of this MOU to solve the same by resort to the provisions of the Arbitration and Reconciliation Act, 1996 at Kolkata and also subject to the Kolkata jurisdiction.

3. Disputes and differences have arisen between the parties in respect of the said memorandum of understanding as will appear from the correspondence exchanged between them and referred to in course of the present proceedings. The arbitration clause in the memorandum was, however, invoked by the respondent by a letter dated January 7, 2012 issued on its behalf. Such letter recorded that against the agreed consideration of Rs. 47.25 crore for sale of the property, the respondent had paid an advance of Rs. 4 crore and a further sum of Rs. 2.20 crore, but the petitioners had sought to illegally cancel the memorandum by a notice of February 24, 2010. The arbitration clause was referred to in the letter and invoked and the respondent suggested three persons as possible arbitrators to adjudicate upon the disputes covered by the arbitration agreement and called upon the petitioners "to give your consent within a period of 30 days from the date of receipt of the notice on the appointment of either (sic, any) one of the aforesaid retired Judges to be an arbitrator to resolve the disputes and differences ..."

4. It is of some significance that the petitioners have not invoked the arbitration agreement but have carried this present request u/s 11 of the 1996 Act on their assertion that they have not agreed to any of the persons named in the letter of January 7, 2012 to take up the reference and the following further averment at paragraph 17 of the petition:

17) Inasmuch as the parties have failed to agree on the arbitrator within 30 days of receipt of request dated 7th January, 2012 from the respondent to agree to the appointment of one of the three persons named therein as arbitrator, the petitioners have become entitled to make a request for appointment of such arbitrator under the provisions of Section 11(5) of the Arbitration and Conciliation Act, 1996.

5. The petitioners refer to Section 11 of the 1996 Act to suggest that sub-section (5) thereof would be applicable in this case and such provision would permit any party to the arbitration agreement to bring a request for the Chief Justice of this Court or his designate to constitute the arbitral tribunal to adjudicate upon the disputes that have arisen under the subject arbitration agreement. The petitioners submit that the three pre-conditions to invoking Section 11(5) of the 1996 Act have been complied with and the present request is competent. They say that since there is no agreed procedure indicated in the arbitration agreement for the appointment of arbitrator or arbitrators thereunder, Section 11(5) of the 1996 Act would apply as it is the common understanding of both sets of parties that the

arbitration has to be conducted by a sole arbitrator. This, the petitioners say, is borne out by the respondent''s letter of invocation of January 7, 2012 and the petitioners'' tacit acceptance thereof that a sole arbitrator will take up the reference by invoking Section 11(5) of the 1996 Act. The petitioners claim that the parties to the arbitration agreement have failed to agree on the arbitrator within thirty days from the date of receipt of a request for the constitution of the arbitral tribunal. The petitioners point out that nothing in the relevant provision precludes a party to the arbitration agreement who has not invoked the same from applying thereunder for the appointment of an arbitrator and Section 11(5) of the 1996 Act does not reserve the right to apply thereunder to only the party invoking the arbitration agreement. They say that the present request was brought before the Chief Justice of this Court or his designate after the expiry of thirty days of the petitioners'' receipt of the request from the respondent; and, the fact that the petitioners did not respond to the request would demonstrate that they did not concur in the suggestion made therein and the parties have, thus been unable to concur on the personnel of the arbitrator within the meaning of the expression "fail to agree on the arbitrator" as it appears in the sub-section.

6. The petitioners have referred to a Single Bench judgment of this Court reported at Texmaco Ltd. Vs. Tirupati Buildestates Pvt. Ltd., where it was held, at paragraph 17 of the report, that any party to an arbitration agreement could carry a request u/s 11(5) of the Act to the appropriate Chief Justice if the parties had otherwise failed to secure the constitution of the arbitral tribunal. The following passage is apposite in the present context:

17. ... Section 11(5) of the Act permits either party to the arbitration agreement to carry a request u/s 11 of the Act to the appropriate Chief Justice, provided it is evident that the agreed machinery for constituting the arbitral tribunal has failed, or the arbitration agreement does not provide a procedure for the setting up of the arbitral tribunal and the parties have been unable to agree on the constitution of the tribunal. Sub-section (5) does not confer the right to make a request u/s 11 of the Act to only the party which has made a request to the other party to the arbitration agreement to set up an arbitral tribunal; it gives both parties the same right.

7. The respondent contends that since the respondent''s claim is in respect of an immovable property not in the possession of the respondent, any suit founded on the respondent''s cause of action relating to the October 19, 2007 memorandum would be a suit for land. The respondent asserts that since the land in question is not in this State, no court in this State would have been competent to receive a suit lodged by the respondent in furtherance of its claim, if there were no arbitration agreement between the parties hereto governing the memorandum. The respondent has also relied on the aspect of territorial jurisdiction covered in the Texmaco Ltd judgment cited by the petitioners. The respondent proclaims that the apparent forum selection clause evident from the arbitration agreement between the parties would be irrelevant in case of a suit for land as the law mandates that a suit for land be carried only to such court within whose

jurisdiction a part of the land is situate; and, any agreement between the parties contrary to such legal mandate would be void and unenforceable. As to the efficacy of the forum selection clause, a judgment reported at Indian Oil Corporation Ltd. and Others Vs. Raja Transport (P) Ltd., has been carried by the respondent. Paragraph 48(iv) of the report has been cited but the observation therein does not further the respondent"s case. The respondent has also relied on another judgment reported at Northern Railway Administration, Ministry of Railway, New Delhi Vs. Patel Engineering Company Ltd.,) for the view expressed therein that u/s 11 of the 1996 Act the Chief Justice or his designate steps in, if the authority is summoned, when a person required to perform an act for the commencement of the reference has failed to act with within a reasonable time.

8. There can be no doubt that Section 11(5) of the 1996 Act does not limit the right to apply thereunder to only the party who has invoked the arbitration agreement. Ordinarily, a request u/s 11(5) of the 1996 Act would not throw up a legal issue as the one that has arisen in this case if the subject-matter of the matrix contract governed by the arbitration agreement is not an immovable property. The difference between the two sets of parties hereto as to which Chief Justice would be appropriate to receive a request u/s 11 of the Act pertaining to the subject arbitration agreement arises only by reason of the varying qualities of the possible rival claims. Section 11(12)(b) of the 1996 Act declares that the matters referred to, inter alia, in Section 11(5) of the 1996 Act, if arising in any arbitration not being an international commercial arbitration, "the reference to "Chief Justice" in those sub-sections shall be construed as a reference to the "Chief Justice" of the High Court within whose local limits the principal Civil Court referred to in clause (e) of sub-section (1) of Section 2 is situate and, where the High Court itself is the Court referred to in that clause to the "Chief Justice" of that High Court." The matter has been discussed at great length in Texmaco Ltd and does not warrant reiteration. It may only be recognised that the purport of Section 11(12)(b) read with Section 2(1)(e) of the 1996 Act is that the Chief Justice of a High Court would be authorised to receive a request under the relevant provisions of Section 11 thereof if that High Court exercises superintendence, within the meaning of that word in Article 235 of the Constitution of India, over the Civil Court which could have received a suit to decide the questions forming the subject-matter of the arbitration if the same had been the subject-matter of a suit; or if the High Court presided over by such Chief Justice could have received, on its Original Side, a suit to decide the questions forming the subject-matter of the arbitration if the same had been the subject-matter of the suit.

9. The expression in Section 2(1)(e) of the Act is "having jurisdiction to decide the questions forming the subject-matter of the arbitration if the same had been the subject-matter of a suit." The significance of the words, "to decide the questions forming the subject-matter of the arbitration", qualifying the word, "jurisdiction", in the relevant clause cannot be over-emphasised. Thus, if no court in this State, including the High Court on its Original Side, could have received a suit to decide the questions forming the subject-matter of the arbitration if the same had been the subject-matter of a suit, the

Chief Justice of this Court or his designate would not have the authority to entertain a request under the relevant provisions of Section 11 of the 1996 Act in respect of the arbitration agreement. It must be borne in mind that the character of a suit is not to be assessed merely by the general subject-matter thereof but specifically by the possible questions that would arise in the adjudication thereof. Without digressing and confining the discussion to the facts of the present matter, it is conceivable that suits arising out of the memorandum of October 19, 2007 could have been instituted both in Calcutta and in Jaipur if either there was no arbitration agreement contained therein or the defendants to such suit chose not to enforce the arbitration agreement. On a more generalised plain, in a matter pertaining to the sale of an immovable property, the character of the suit - as to whether it is a suit for land or not - is ascertained from the nature of the reliefs sought rather than by the agreement which is the subject-matter thereof. It is possible that two suits for varying reliefs under the same agreement may be instituted in two courts despite the matters directly and substantially in issue therein being similar or identical; as to whether such suits may be pursued simultaneously is an entirely different matter and is irrelevant in the present context.

10. Pecuniary considerations asides, in a suit founded on an agreement for sale of an immovable property, if specific performance of the agreement is sought by a party thereto not in possession of the immovable property and a claim for possession is also expressly carried or implied therein, the action would be regarded as a suit for land; and, it has necessarily to be brought before a civil court exercising territorial jurisdiction over the whole or a part of the land covered by the subject immovable property. If the same agreement for sale of the immovable property is the subject-matter of another civil action where possession is neither sought nor is it implied in the reliefs claimed therein, it would not be regarded as a suit for land and the civil court authorised to receive the action would be any one within whose jurisdiction the defendants or any of them voluntarily reside or carry on business or personally work for gain at the time of the institution of the suit; or the one within whose jurisdiction the whole or a part of the cause of action arises. There is only a marginal difference between the pertinent provisions of the CPC and the Letters Patent, which is applicable to this High Court in exercise of its ordinary original civil jurisdiction, on such aspect; and, in any event, such distinction is unnecessary to be gone into for the present purpose.

11. There is a minor legal issue which must be resolved before the above axiomatic legal proposition can be applied to unravel the perceived mystery surrounding the moot question in this matter. Though the respondent has made some murmurs as to the efficacy of what the petitioners proclaim to be a forum selection clause contained in the tail of the arbitration agreement, it may be assumed that the partly misinformed and somewhat inarticulate expression, "to solve the same by resort to the provisions of the Arbitration and Reconciliation Act, 1996 at Kolkata and also subject to the Kolkata jurisdiction", is valid and binding as a forum selection clause without embarking on a needless digression to assess its validity. The petitioners are right in their assertion that if

such clause is valid, some civil court in this State - never mind which - would have the authority to receive an action founded on the memorandum of October 19, 2007. But that, in the context of the primary question that this matter has thrown up, is a dangerous half-truth. The otherwise absolute right of the parties to a contract to indicate a forum of their choice, where an action pertaining to the contract or specified matters may be carried, is tempered by the caveat that parties, by agreement, cannot confer jurisdiction on a court that it otherwise does not possess. The principle implies that the parties can choose, by agreement, one of the several courts that would have authority to receive an action pertaining to the matters specified if there was no such agreement; or, in other words, a forum selection clause would be meaningless and redundant in an action regarded as a suit for land unless the parties'' agreed choice of the forum is one of several courts within whose territorial limits the subject immovable property may extend. And, even in such a case, the choice is subject to the pecuniary considerations. Assuming without adjudging the forum selection clause in this case to be valid, it would still be of no consequence, in the context of the primary legal issue that has arisen herein, if the proposed reference has to be regarded as a suit for land by assessing that the questions likely to be decided therein would have rendered a civil suit, founded on the same cause action and seeking the same reliefs, a suit for land.

12. In the present case, the petitioners have not invoked the arbitration agreement by commencing the arbitration proceedings within the meaning of Section 21 of the 1996 Act. But the petitioners have applied u/s 11(5) of the 1996 Act on the ground that it is evident that the parties have failed to agree on the arbitrator ("within 30 days from receipt of a request by one party from the other party to so agree"). In such a case, where the party to the arbitration agreement making the request u/s 11(5) of the 1996 Act is not the party which had invoked the arbitration agreement, the character of the reference has to be assessed from the notice of invocation and not from the point of view of the party making the request for appointment to the Chief Justice or his designate. The questions likely to form the subject-matter of the arbitration have to be gauged, at this stage, on a projection thereof from the notice of invocation of the arbitration agreement and not on the basis of the questions likely to be raised by the party to the arbitration agreement which has not invoked the same; just as the character of a suit has to be seen from the cause of action of, and the reliefs claimed by, the plaintiff and not from the defendant''s perspective or how the defendant perceives the action to be. If the nature of the claim, as evident from the notice of invocation in such a case, would have made a suit founded thereon a suit for land, it will be such factor only that will count in the assessment of whether the request has been carried to the appropriate Chief Justice or his designate. It would then not do to say that the possible claim of the party invoking Section 11(5) of the 1996 Act in the reference would not render a suit on such claim to be regarded as suit for land if the claim had to be carried by way of a suit and not presented in a reference. Section 21 of the 1996 Act makes the commencement of the arbitration proceedings equivalent to the institution of the suit in a civil action. That is evident from Section 43(2) of the 1996 Act which provides that the clock relevant for limitation would stop upon the

commencement of arbitration proceedings; just as such clock would stop upon the institution of a suit. Since the nature of a suit has to be assessed from the plaint, and, particularly, the reliefs claimed therein, the questions forming the subject-matter of the arbitration within the meaning of that expression in Section 2(1)(e) of the 1996 Act have to be ascertained from the notice of invocation of the arbitration agreement for Section 11(12)(b) of the 1996 Act to be given its complete meaning.

13. The notice of invocation in this case of January 7, 2012 is a precursor for a claim for specific performance. The claim for specific performance would not be meaningful if possession is not sought by the respondent. It is the petitioners'' case that they are in possession of the immovable property. The claim which is indicated in the notice of invocation, if it were carried by way of a suit, could only have been brought before a court within whose local jurisdiction the whole or a part of the immovable property is situate. Such a court would only be in Jaipur. A request u/s 11(5) of the 1996 Act founded on the failure of the parties to agree to the appointment of an arbitrator on the basis of such notice of invocation may only be carried to the Chief Justice of the High Court within whose local limits the civil court or courts authorised to receive such suit is situate. The consideration would have been altogether different if the petitioners had invoked the arbitration agreement and the respondent had not; it may also have been otherwise if both sets of parties had invoked the arbitration agreement - but that issue has to be left for another day.

14. AP No. 129 of 2012 is dismissed as not maintainable before the Chief Justice of this High Court or his designate.

15. The petitioners will pay costs assessed that 1000 GM to the respondent. Urgent certified photocopies of this judgment, if applied for, be supplied to the parties subject to compliance with all requisite formalities.