

(2014) 12 CAL CK 0065

Calcutta High Court

Case No: G.A. Nos. 2824 and 3306 of 2014 and C.S. No. 324 of 2014

Utkarsh Tubes and Pipes Limited

APPELLANT

Vs

Simplex Infrastructure Limited

RESPONDENT

Date of Decision: Dec. 9, 2014**Acts Referred:**

- Arbitration and Conciliation Act, 1996 - Section 11, 2(1)(b), 45, 5, 7

Citation: (2015) 2 ARBLR 27 : (2015) 3 WBLR 215**Hon'ble Judges:** Soumen Sen, J**Bench:** Single Bench

Advocate: Abhrajit Mitra, Samrat Sen, Sr. Advs., J. Chowdhury, R. Ghosh, C. Gupta and Dwipraj Basu, Advocate for the Appellant; Pratap Chatterjee, Sr. Adv., Anirban Ray, Sourav Ghosh, P. Sinha and A.B. Mullick, Advocate for the Respondent

Judgement

Soumen Sen, J.

The plaintiff has instituted the suit against the defendant for recovery of a sum of Rs. 52,45,258/- on account of price of goods sold and delivered. The plaintiff states that between 14th November, 2011 and 9th October, 2013, the defendant has issued diverse purchase orders on the petitioner for supply of pipes of diverse specifications and quantities in connection with an ongoing project of civil works for their Swastik Metro Project (Metro Station Commercial Tower and Residential Tower). The plaintiff has given the details of eight purchase orders on the basis of which the plaintiff had sold, supplied and delivered the goods specified in such purchase orders to the defendant. The defendant had duly received and accepted the said goods but did not pay the price of such goods sold and delivered.

2. The plaintiff has also taken out an interlocutory application in the suit praying, inter alia, for a judgment upon admission for a sum of Rs. 52,45,258/-. It is stated that the petitioner has unconditionally and unequivocally admitted, confirmed and acknowledged its indebtedness to the plaintiff for the aforesaid sum which would

appear from letters both dated 27th March, 2014. When this interlocutory application was moved, the defendant came up with an application being G.A. No. 3306 of 2014 for stay of the suit on the ground that the subject matter of the suit is covered by an Arbitration Agreement. It is stated in the said petition that the purchase orders referred to in the plaint contains a dispute resolution clause which states:--

"Arbitration: In the event of any difference or dispute arising out of or in connection with this purchase order, the same shall be first amicably settled by mutual dialogue. If the parties fail to settle their difference or dispute arising out of or in connection with this work order (including interpretation of the terms thereof,), the same shall be referred to arbitration. The Arbitration proceedings shall be by a Single Arbitrator appointed by the Company Secretary of Simplex Infrastructure Limited and the award/decision of such arbitrator shall be final and binding upon both the parties. The venue of the Arbitration shall be Kolkata. However the work shall not be stopped during the pendency of the proceedings and it shall be ensured that such work is proceeded uninterruptedly."

3. The applicant-defendant has annexed a true copy of one of such invoices entered into and between the parties containing the arbitration clause.

4. Mr. Pratap Chatterjee, learned senior Counsel appearing on behalf of the defendant in support of the said application contends that there is a valid and enforceable arbitration agreement within the meaning of Section 2(1)(b) read with Section 7 of the arbitration Act. It is submitted that the purchase order contains the said arbitration clause and in view of such arbitration clause, all disputes and differences are required to be resolved by the mechanism of arbitration. It is submitted that after execution of the aforesaid work orders, disputes and differences had arisen between the parties regarding payments thereof. The plaintiff instead of carrying out the works, in terms of the said work orders and in utter disregard of the arbitration clause contained in the said agreement has instituted this suit against the defendants. It is submitted that the subject matter of the suit is squarely covered by the arbitration agreement and in view thereof the parties are required to refer to arbitration.

5. Per contra Mr. Abhrajit Mitra, the learned Senior Counsel appearing on behalf of the plaintiff submits that the application for stay of suit is required to be rejected, inter alia, on the grounds stated hereinafter.

6. Even if the purchase orders constitute a valid contract between the plaintiff and the defendant No. 1, the arbitration clause contained therein will not be an arbitration agreement within the meaning of Section 7 of the Arbitration & Conciliation Act, 1996. The plaintiff is not a signatory to the purchase orders.

7. In order to be an arbitration agreement within the meaning of Section 7(4) of the said Act, the document must be signed by both sides. In this regard, reference is

made to [Keshan Mimani Vs. Indu Kocher,](#).

8. It is submitted that in the said decision, it is stated that the arbitration agreement is binding upon those persons who are parties to the same. In other words the arbitration agreement cannot bind any person other than who are signatories to the same.

9. Inasmuch as the defendant No. 2 is not a party to the arbitration agreement and in the instant case, the guarantor has been impleaded as a party, the subject matter of the suit and the subject matter of arbitration cannot be the same. The sine quo non for reference under Section 8 of the Act postulates that there has to be identity of the subject matter of the suit and the arbitration agreement. The learned Counsel has referred to [Garden Finance Ltd. Vs. Prakash Inds. Ltd. and Another,](#); AIR 2002 Bom 8 and submitted that in the said decision, it is held that where the guarantor was impleaded in a suit for recovery of money against the principal debtor and the arbitration clause is only restricted to the claim of the principal debtor, the subject matter of the suit cannot be referred to arbitration. In this regard he has relied upon Paragraph 9 of the said report which states:--

"Thus, according to the Supreme Court in order that under Section 8 matter can be referred to arbitration, there has to be identity of the subject matter of the suit and the arbitration agreement. As pointed out above, the subject matter of the suit is two agreements, namely the agreement of lease of equipment between the plaintiff and the defendant No. 1 as also the agreement of guarantee between the plaintiff and the defendant No. 2, whereas, the subject matter of the arbitration agreement is only the lease agreement and not the guarantee agreement. Therefore, it cannot be said that there is an identity of subject matter of the suit and the arbitration agreement. In this view of the matter, in my opinion, Section 5 of the Arbitration Act would also not come in the way of this Court entertaining the present suit."

10. In the same vein, reference is made to [Chloro Controls \(I\) P. Ltd. Vs. Severn Trent Water Purification Inc. and Others,](#). It is submitted in Chloro Controls (supra) the Hon"ble Supreme Court held:--

"We have already noticed that the language of Section 45 is at a substantial variance to the language of Section 8 in this regard. In Section 45, the expression "any person" clearly refers to the legislative intent of enlarging the scope of the words beyond "the parties" who are signatory to the arbitration agreement.....".

11. Even in terms of Section 7(5) of the said Act, the arbitration clause in the purchase order will not constitute an arbitration agreement. Indeed, in some of the plaintiff's invoices there is reference to the purchase order, but to constitute an arbitration agreement within the meaning of Section 7(5) of the said Act, there has to be clear reference not only just to the purchase orders but also to clearly indicate an intention of the plaintiff to "incorporate the arbitration clause into the contract".

12. In this regard, the learned Counsel has referred to the following decisions:--

"i) [M.R. Engineers and Contractors Pvt. Ltd. Vs. Som Datt Builders Ltd.,](#) .

ii) [Ghanshyam Sharma Vs. South City Projects \(Kolkata\) Limited,](#) ."

13. It is, thus, submitted that it goes without saying that a decision on the existence of a valid arbitration agreement and/or whether the subject matter of the suit is covered by the arbitration agreement has to be in the nature of a final and conclusive decision. Unlike in Section 11, in a Section 8 application, a prima facie view cannot be taken since Section 8 of the 1996 Act contemplates termination of an action before a judicial authority. In this regard reference has been made to [Great Eastern Energy Corporation Limited Vs. Jain Irrigation Systems Limited,](#) .

14. The appointing authority or its nominee would not be free from bias or impartiality and, accordingly, the petitioner should not be referred to an arbitration before an arbitrator to be appointed by either the Company Secretary or the Managing Director as the case may be. In other words, the clause giving unfettered discretion to one of the parties to the contract to appoint himself or to nominate an arbitrator would raise a serious apprehension of bias and impartiality of the person to be appointed as an arbitrator and this is a factor which is required to be taken into consideration while deciding an application under Section 8 of the said Act. It is argued that to be a valid arbitration agreement under the Arbitration & Conciliation Act, 1996 it has to be an arbitration agreement which would ensure constitution of an independent arbitral tribunal and not an arbitral tribunal where the arbitrator himself is a person interested in the outcome of the reference or nominee of such a person. An arbitration agreement whereby the arbitrator is the Managing Director or nominee of the Managing Director of one of the warring parties is not a valid arbitration agreement.

15. The learned Counsel has referred to [M/s. Castrol India Limited Vs. M/s. Apex Tooling Solutions and Others,](#) and submitted that an application under Section 8 was rejected on the ground that the Arbitrator would be the Managing Director or a nominee of Managing Director of one of the parties.

16. The aforesaid decision has been followed in [Denel \(Proprietary Limited\) Vs. Govt. of India, Ministry of Defence,](#) where even though the appointing authority in this case was a very senior civil servant, the Supreme Court appointed an independent arbitrator.

17. The learned Counsel has also referred to the decisions in [Bipromasz Bipron Trading SA Vs. Bharat Electronics Limited \(BEL\),](#) and [Indian Oil Corporation Ltd. and Others Vs. Raja Transport \(P\) Ltd.,](#) where also even though the appointing authority was the Chairman and Managing Director of a Public Sector Undertaking, the Supreme Court appointed an independent Arbitrator.

18. The application for appointment of an arbitrator is also not accompanied by the original arbitration agreement or a duly certified copy thereof. It is submitted that in [Atul Singh and Others Vs. Sunil Kumar Singh and Others,](#) the Hon"ble Supreme Court held that requirement of the application under Section 8 of the said Act to be accompanied by the original arbitration agreement or a duly certified copy thereof is mandatory and even if a copy thereof is on record the application cannot be entertained. Since neither the original agreement nor a duly certified copy thereof is not annexed to the petition, the said arbitration clause is not enforceable and the parties cannot be referred to arbitration.

19. On a plain reading of the plaint, it appears that the plaintiff has annexed the purchase order at Page 23 of the Petition which is the same purchase order relied upon by the defendant in its Section 8 application. The plaint does not show that the goods were supplied dehorse any agreement. The plaintiff has relied on the same purchase order to prove the transaction. In fact, in Paragraphs 3 and 4 of the Petition which is almost in verbatim of the plaint, the plaintiff has relied upon the very same purchase orders in order to support its claim. The relevant portion of Paragraphs 3 and 4 are set out hereinbelow:--

"3. At the request of the defendant, the petitioner agreed to supply and deliver to the defendant, the said goods of agreed specifications and quantities and at agreed rates. The terms and conditions of the contract by and between the parties will appear, inter alia, from and be evidenced from the purchase orders placed by the defendant on the petitioner, the tax invoices/bills raised by the petitioner on the defendant, the contemporaneous correspondence and the course of conduct of the parties as mentioned more fully and particularly hereinafter.

4. Between 14th November, 2011 and 9th October, 2013, the defendant has issued diverse purchase orders on the petitioner for supply of the said goods. A copy of one such Purchase Order and a copy of one of such Invoice are annexed hereto and collectively marked with the letter "A".

20. Thereafter in Paragraph 4, the plaintiff-petitioner has referred to 8 purchase orders and one set of complete purchase orders relied upon in the Petition would show in Clause 23, there is a specific reference to arbitration. In terms of the arbitration clause, the Company Secretary of the defendant is the appointing authority who shall appoint a single arbitrator in the event of any differences of dispute arising out of or in connection with the purchase order. On the basis of aforesaid pleadings, it is too late in the day to contend that the purchase orders each constitute an independent contract dehorse the terms and conditions forming part of Annexure "A" to the documents referred to in Paragraph 4 of the Petition.

21. Once the plaintiff has accepted that the goods were supplied under various purchase orders on the basis of the terms mentioned in the purchase order which contains an arbitration clause, the argument made as to the legality, validity and

existence of the arbitration agreement immediately falls to ground. The contractual documents containing arbitration clause disclosed by the plaintiff coupled with non-denial of execution of such documents clearly establish the existence and enforceability of the arbitration agreement.

22. Under Section 7 of the Arbitration and Conciliation Act, an agreement is required to be in writing. The signing of agreement by both the parties is not necessary. [Babaji Automotive Vs. Indian Oil Corporation Limited,](#)

23. The other principal ground of challenge appears to be with regard to the impartiality of the appointing authority. The arbitration clause reads that the arbitration proceeding under Clause 23 of the purchase order shall be conducted by the single arbitrator appointed by the Company Secretary of Simplex Ltd. In Indian Oil Corporation Ltd. (supra) in Paragraph 13, the Hon"ble Supreme Court held:--

"Arbitration is a binding voluntary alternative dispute resolution process by a private forum chosen by the parties. If a party, with open eyes and full knowledge and comprehension of the relevant provision enters into a contract with a Government/statutory corporation/public sector undertaking containing an arbitration agreement providing that one of its Secretaries/Directors shall be the arbitrator, he cannot subsequently turn around and contend that he is agreeable for settlement of the disputes by arbitration, but not by the named arbitrator who is an employee of the other party.

No party can say he will be bound by only one part of the agreement and not the other part, unless such other part is impossible of performance or is void being contrary to the provisions of the Act, and is severable from the remaining part of the agreement. A party to the contract cannot claim the benefit of arbitration under the arbitration clause, but ignore the appointment procedure relating to the named arbitrator contained in the arbitration clause."

24. In deciding an application under Section 8 of the Act, the Court is not exercising a power under Section 11 of the Act. Unlike Section 11, in an application under Section 8, the Court does not appoint an arbitrator but upon arriving at a finding that there is a valid arbitration clause and the subject matter of the suit is covered by such arbitration clause, the Court is obliged to refer the parties to arbitration.

25. In [Booz Allen and Hamilton Inc. Vs. SBI Home Finance Ltd. and Others,](#) the Hon"ble Supreme Court held that where a suit is filed by one of the parties to an arbitration agreement against the other parties to the arbitration agreement, and if the defendants file an application under Section 8 stating that the parties should be referred to arbitration, the court (judicial authority) will have to decide:

"(i) whether there is an arbitration agreement among the parties;

(ii) whether all the parties to the suit are parties to the arbitration agreement;

- (iii) whether the disputes which are the subject-matter of the suit fall within the scope of arbitration agreement;
- (iv) whether the defendant had applied under Section 8 of the Act before submitting his first statement on the substance of the dispute; and
- (v) whether the reliefs sought in the suit are those that can be adjudicated and granted in an arbitration."

26. The aforesaid decision also considered in [Sukanya Holdings Pvt. Ltd. Vs. Jayesh H. Pandya and Another](#), which decision appears to be the sheet anchor of the submission made on behalf of the petitioner to resist the application for stay of suit. A learned single Judge of this Court in [Niranjan Lal Todi and Another Vs. Nandlal Todi and Others](#), held that Sukanya Holdings is not an authority for the proposition that if some parties have been impleaded in an action with a view to avoiding the enforcement of the arbitration agreement, the judicial authority in seisin of the action has to reject the application under section 8 of the 1996 Act merely on such ground.

27. The real cause of action in the plaint is recovery of the price of goods sold and delivered. Under the said agreement, the plaintiff has furnished a bank guarantee. The said bank guarantee is still valid. The bank guarantee is a separate contract. The said contract has nothing to do with the underlying contract of supply of materials under the purchase order. It may have a connection in the sense that the said bank guarantee was furnished as a part of the agreement under which the goods were supplied, but for all intents and purposes, it is a separate contract. A contract of bank guarantee is to be seen as an independent of the underlying contract. In fact, the bank guarantee is required to be furnished to insulate the matter covered thereby from the disputes that may arise under the underlying contract.

28. The plaintiff can have a separate cause of action against the bank if the bank had acted in breach of the said guarantee or has committed any fraud. The Court has to see the real purpose in joining the bank in this proceeding. The cause of action against the plaintiff No. 1 and the cause of action against the plaintiff No. 2 are different. The Court can direct a separate trial. The joinder of cause of action or joinder of parties are only enabling provisions. The Court, in my view, having regard to the object of the Arbitration and Conciliation Act, 1996, in such a situation, is required to find out the real controversy between the parties and if the Court is of the view that the other party has been impleaded in order to avoid arbitration, the Court should ignore such addition and refer the parties to arbitration. In the instant case, I have already held that the real controversy is between the plaintiff and the defendant No. 1. The joinder of the defendant No. 2 is made obviously to avoid arbitration since the plaintiff perceived bias or impartiality in the appointment of an arbitrator under the arbitration clause.

29. In the instant case, it cannot be said that the arbitrator likely to be appointed by the Company Secretary could not be impartial. The Arbitration and Conciliation Act provides remedy in the event the arbitrator is found to be partial and bias. This Court is of the view that there is a valid arbitration clause which is enforceable in law. The parties are, accordingly, referred to arbitration. The defendant No. 2 is not represented. The views of defendant No. 2 are not known. The challenge to the invocation of bank guarantee is that having regard to the fact that the defendant No. 1 after having acknowledged its liability to pay for the price of goods sold and delivered could not have enforced the bank guarantee. The bank acting on the demand of the plaintiff to remit the money is fraudulent. In other words the invocation of bank guarantee by the defendant No. 1 is fraudulent. As stated in [Larsen and Toubro Ltd. Vs. Visa Power Ltd.](#), stated:--

"Not every perceived wrong can be exalted to the status of fraud. Irretrievable and unconditional bank guarantees are payable on demand without demur. That is the law."

30. It appears to me that the plaint does not disclose a real cause of action against the defendant No. 2. The bank guarantee is unconditional. However, the issue with regard to the enforcement of the bank guarantee is not required to be decided in considering the merits of this application.

31. It is needless to mention that the appointing authority shall exercise its power in good faith and shall appoint a person who is expected to function independently and impartially.

32. The argument made by the plaintiff with regard to the merits of the controversy is not required to be gone into at the stage having regard to the fact that the disputes are covered by the arbitration clause. However, it is submitted that in view of unequivocal admission of liability by the defendant some interim protection should be granted to the plaintiff till the arbitration proceeding commenced. This argument is, however, subject to the prejudice of the petitioner that there is no valid enforceable arbitration agreement.

33. I have already held that there is a valid enforceable arbitration agreement between the parties. In view thereof, the parties are referred to arbitration. In so far as interim relief is concerned, the argument is based on a decision of the Hon'ble Supreme Court in [Sameer Barar and Others Vs. Ratan Bhushan Jain and Others](#), that the application for interim relief can be considered as an application under Section 9 of the Arbitration and Conciliation Act and interim protections may be granted till the matter is being adjudicated by the arbitrator. Although the argument on behalf of the plaintiff for an interim relief, prima facie, appears to be of some substances but this Court has no jurisdiction to treat the said application under Section 9 of the Arbitration and Conciliation Act, 1996. The present determination of this Court does not permit conversion of the said interlocutory application into an application under

Section 9 of the Arbitration and Conciliation Act. Moreover, to be fair the defendant is required to be heard on merits before passing any interim order. However, this Court is unable to do because of lack of determination.

34. In view thereof G.A. No. 3306 of 2014 is allowed.

35. Since the suit is held to be not maintainable in view of the arbitration clause, C.S. No. 324 of 2014 and G.A. No. 2824 of 2014 are dismissed. This order of dismissal, however, shall not prevent the petitioner to take appropriate steps in accordance with law.

36. Urgent xerox certified copy of this judgment, if applied for, be given to the parties on usual undertaking.