

(2005) 07 DEL CK 0122

Delhi High Court

Case No: Regular First Appeal 432 of 2005 and CM 8606 of 2005

Anis Ahmad

APPELLANT

Vs

Hongkong and
Shanghai Banking
Corporation

RESPONDENT

Date of Decision: July 15, 2005

Acts Referred:

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

Citation: (2005) 3 ARBLR 137 : (2006) 1 BC 199 : (2006) 4 CivCC 98 : (2005) 122 DLT 123 : (2005) 83 DRJ 122

Hon'ble Judges: V.K. Jain, J; Manju Goel, J

Bench: Division Bench

Advocate: Sudarshan Rajan, for the Appellant;

Final Decision: Dismissed

Judgement

Manju Goel, J.

1.The present appeal is directed against the decree and order dated 3rd March, 2005 whereby the Additional District Judge dismissed an application for leave to defend in a suit filed under Order xxxvII of the Code of Civil Procedure(for short `CPC") and passed a decree for Rs.9,89,425.25 paise with cost and interest. The appellant filed the application for leave to defend pleading the following grounds:-

"3.That it is submitted that the deponent received summons of the above noted case on 9.2.2003, however the representative of the plaintiff bank, Shri Amit approached the deponent and offered for a compromise and assured that the above case shall be withdrawn.

4. That though the deponent was to pay nothing to the plaintiff but in order to avoid litigation and buy peace, the said offer of compromise was accepted by the deponent and issued cheques with the conditions that the representative of the plaintiff bank should first of all withdraw the above case and intimate the same to the deponent and then present the cheque and the same was also assured by the said representative of the plaintiff bank. It was also assured by the representative of the plaintiff bank that they will withdraw the present case and supply a copy of order of withdrawal of case to the deponent.

5. That in pursuance to the compromise between the parties, the deponent, in order to avoid litigations, issued cheques in favor of the plaintiff bank but the plaintiff bank intentionally avoided to adhere to its offer and did not withdraw or supply any copy of order of withdrawal of the case against the deponent and in this way plaintiff violated the terms of compromise between the parties.

6. That after the said compromise between the parties there remained no cause of action in favor of the plaintiff and against the deponent regarding the previous dispute and cause of action, if any was a new cause of action and the suit of the plaintiff is not maintainable on the basis of previous cause of action in the facts and circumstances of the case."

2. After considering the ground as mentioned above, the trial court returned a finding that the appellant was not able to raise a triable issue and passed a decree as mentioned above along with interest @ 12% from the date of filing of the suit i.e. 30th November, 2002 till realisation.

3. Before us, the learned counsel appearing for the appellant contends that pursuant to the compromise entered into between the parties, there was an arbitration agreement and, Therefore, the trial court did not have the jurisdiction to decide the suit.

In support of his contention, the learned counsel appearing for the appellant relies upon the judgment of [Hindustan Petroleum Corpn. Ltd. Vs. Pinkcity Midway Petroleums](#), and Section 8 of the Arbitration Act.

4. The question of applicability of an arbitration agreement in a suit for recovery of money does not call for any discussion. But in a suit filed under the provisions of Order xxxvII CPC when there is no whisper of there being any arbitration clause in the application for leave to defend, the defendant can hardly be allowed to agitate in an appeal filed by him that his alleged arbitration agreement should be given effect to and for this purpose the decree passed be set aside. The substance of the application for leave to defend has been reproduced above in order to emphasize the absence of the arbitration clause in the pleas adopted by the appellant/defendant. The defendant cannot be allowed at this stage to agitate the point. If there was an arbitration agreement between the parties, the same should have been raised in the application under Order xxxvII Rule 3 CPC for leave to defend the suit.

5. Section 8 of the Arbitration and Conciliation Act, 1996 is important to read in this context which is extracted below:-

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.

6. It is clear from a plain reading of this Section that application for referring a dispute to arbitration should be made by the defendant not later than when submitting his first statement of substance of the dispute. Further, whenever such a prayer is made the original arbitration agreement or a duly certified copy thereof has to be presented in the Court. The first submission of the defendant of the statement of substance of the dispute, in a suit under Order xxxvII CPC takes place when the application for leave to defend is filed by the defendant. If the defendant has not raised the issue of an arbitration agreement between the parties in that application he cannot be allowed to agitate his plea of an arbitration agreement after the suit has made substantial progress thereafter. In this case, the appellant has raised the issue too late.

7. No ground has been made out to interfere with the impugned judgment. Dismissed.