

M/S. AGRI GOLD EXIMS LTD.

v.

M/S. SRI LAKSHMI KNITS & WOVENS AND ORS.

JANUARY 23, 2007

[S.B. SINHA AND MARKANDEY KATJU, JJ.]

Arbitration and Conciliation Act, 1996—S.8—Held, is pre-emptory in nature—Where arbitration agreement exists, Court under obligation to refer parties to arbitration in terms of arbitration agreement—In such case civil suit would not be maintainable—Arbitration Act, 1940—Section 34.

The Appellant and the Respondents had entered into a Memorandum of Understanding (MOU) which contained an arbitration clause. Respondents issued five post-dated cheques in relation to the amount due to Appellant. However two cheques were dishonoured, pursuant to which Respondents made certain payments vide demand draft. Before receipt of the said payments, Appellant filed suit for money decree before the District Court. Respondents challenged maintainability of the suit and filed application praying for reference of the disputes to the arbitral tribunal in terms of the arbitration clause contained in the said MOU. The application was dismissed. On revision, however, the High Court held that the suit filed by the Appellant was not maintainable and accordingly directed the parties to take recourse to the provisions of the Arbitration and Conciliation Act, 1996. Hence the present appeal.

Dismissing the appeal, the Court

HELD: 1. The 1996 Act was enacted in the light of UNCITRAL Model Rules. Section 8 of the 1996 Act makes a radical departure from Section 34 of the Arbitration Act, 1940. Difference between Section 34 of the 1940 Act and Section 8 of the 1996 Act is distinct and apparent.

[Para 16] [1166-B-C]

Rashtriya Ispat Nigam Limited v. M/s. Verma Transport Company (2006) 7 SCALE 565, referred to.

2.1. Respondents had not filed any written statement in the suit. They had not disclosed their defence. They indisputably had raised a dispute in

A regard to the claim of the appellant. The arbitration agreement entered into by and between the parties is of wide amplitude. The arbitration agreement brings within its fold dispute of any nature whatsoever. It is in broadest term. The term 'dispute' must be given its general meaning under the 1996 Act. [Paras 18 & 19] [1167-A-B, D]

B *P. Ramanatha Aiyar's Advanced Law Lexicon*, 3rd Edition, p.1431, referred to.

C 2.2. Admittedly, the appellant's claim is not confined to the question regarding non-payment of the amount under the two dishonoured cheques. Thus, there existed a dispute between the parties. [Para 21] [1167-F]

D 3. Appellant evidently has taken before this Court an inconsistent stand. If he was satisfied with the payment of the said demand drafts, he need not pursue the suit. It could have said so explicitly before the High Court. It cannot, therefore, be permitted to approbate and reprobate. [Para 22] [1167-G]

E 4. Section 8 of the 1996 Act is pre-emptory in nature. In a case where there exists an arbitration agreement, the Court is under obligation to refer the parties to arbitration in terms of the arbitration agreement. No issue, therefore, would remain to be decided in a suit. Existence of arbitration agreement is not disputed. The High Court, therefore, was right in referring the dispute between the parties to arbitration. [Para 23] [1167-H, 1168-A-B]

F *Hindustan Petroleum Corpn. Ltd. v. Pinkcity Midway Petroleums*, [2003] 6 SCC 503 and *Rashtriya Ispat Nigam Limited v. M/s. Verma Transport Company*, [2006] 7 SCALE 565, relied on.

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 326 of 2007.

G From the Final Judgment and Order dated 16.12.2005 of the High Court of Judicature, Andhra Pradesh at Hyderabad in C.R.P. No. 5241/2004.

Annam D.N. Rao and D. Pawan Kumar for the Appellant.

H Anupam Lal Das and Amit Sharma for the Respondents.

The Judgment of the Court was delivered by

A

S.B. SINHA, J. : 1. Leave granted.

2. An order of the Andhra Pradesh High Court dated 16th December, 2005 passed in Civil Revision Petition No. 5241 of 2004 directing the parties to take recourse to the provisions of the Arbitration and Conciliation Act, 1996 (for short "the 1996 Act") opining that the suit filed by the appellant herein was not maintainable, is in question before us.

B

3. Appellant and the predecessor-in-interest of the respondents entered into a Memorandum of Understanding on 8.05.2002 in relation to their businesses of export. The same Memorandum of Understanding contained an arbitration clause in the following terms:

C

"In case of any dispute between the two parties, the same shall be referred to Arbitration, by two Arbitrators, nominated by each of the parties. The Award of the Arbitrators shall be binding on both the parties."

D

4. Disputes and differences arose between the parties. However, the person who was managing the affairs of the respondents firms passed away. His daughter thereafter took over the business of the firms. By a letter dated 03.08.2003, it was stated:

E

"It is with great sorrow and regret that we write to inform you the said demise of our beloved Mr. R. Srivatsan, Managing Director of our Company on the 1 August, 2003 at 20-45 hrs after a brief illness. He suffered a massive heart attack and succumbed.

F

However the business interests of the company will be continued to fulfil his cherished goal and vision. Our company will strive to carry forward his legacy which will serve as a beacon light in all our future endeavours.

G

We wish to reiterate all our customers that business will be carried on a usual and all our commitments and obligations shall be made without any interruption.

H

A We seek your fullest co-operation at this juncture to achieve and end results and fulfill Mr. R. Srivatsan's cherished dreams."

5. They entered into a purported settlement of dispute in relation to the amount due and owing to the appellant. In terms of a letter dated 08.08.2003, it was stated:

B "We observe that you have charged interest of Rs.827755 which amount could kindly waive. Out of the principal balance amount of Rs.17.50 lakhs, we are in a position to pay at best Rs.5 lakhs only. We have arrived at this figure after thoroughly analyzing our situation. We are confident that such a large and prestigious Company like yours will definitely lend as your hand of friendship and bail us out of our current situation."

C 6. They asked for waiver of some interest, etc. which allegedly was accepted by it. The respondents issued five post dated cheques of Rs. 11,25,000 each, which were forwarded by a letter dated 9th January, 2003 stating:

D "We are enclosing herewith five post dated cheques Bearing Nos.: 574351 TO 574355 (5 Cheques) drawn ICICI Bank Ltd., Mount Road, Each R. 11,25,000 (Eleven Lakhs Twenty Five Thousand only) towards settlement of your outstanding calculated on approximate basis.

E Once the overseas bills are realized we shall arrive at the exact amount balance. And if anything to be paid, we shall pass it on the same to you by a separate cheque with in 30 days time."

F 7. The said cheques were presented to the bank. Payments in terms of three cheques bearing Nos. 574351 dated 21.4.2003, 574352 dated 21.5.2003 and 574353 dated 21.6.2003 were honoured whereas the fourth cheque bearing No. 574354 dated 21.7.2003 was dishonoured on 29.07.2003.

G 8. Admittedly, Respondents without prejudice to their rights and contentions sent a demand draft bearing number 028881 drawn on 18.08.2003 for a sum of Rs. 11,25,000 which was accepted by the appellant. Yet again on 12.09.2003, the respondents without prejudice to their rights sent another demand draft bearing number 029612 for a sum of Rs. 11,25,000.

H

9. Before receipt of the said payments, however, the appellant filed a suit in the District Court at Vijaywada for a decree for a sum of Rs. 36,14,887, the cause of action wherefor was stated as under:

“The cause of action has arisen on 08-05-2002 when the memorandum of Understanding was executed between the plaintiff and the Defendant, and on all subsequent dates when the various transactions took place and on 29-07-2003, when the Cheque dated 21-07-2003 issued by the 1st Defendant was dishonoured.”

10. Dishonour of the cheques was not put as a cause of action for the suit.

11. In the said suit, the following prayers were made:

“(a) For the Suit amount of Rs.36,14,887 (Rupees Thirty Six Lakhs Fourteen Thousand Eight Hundred and Eighty Seven only).

(b) For future interest @ 24% p.a. on Rs.53,79,149 (Rupees Fifty three Lakhs Seventy nine Thousand One Hundred and Forty Nine only) from the date of the suit till the date of realization.”

12. Respondents in the said suit filed an application praying for reference of the dispute to the arbitral tribunal in terms of the arbitration clause contained in the said Memorandum of Understanding and contended that the suit filed by the appellant was not maintainable. By reason of a letter dated 23.08.2004, the said application was dismissed opining that no dispute existed between the parties for reference to an arbitration.

13. On a revision application filed by the respondents herein, the High Court, however, reversed the said order by the impugned judgment.

14. Mr. Annam D.N. Rao, learned counsel appearing on behalf of the appellant, would submit that keeping in view of the fact that the respondents herein had accepted their liabilities, it cannot be said that there existed a dispute or dispute by and between the parties within the meaning of Clause 20 of the Memorandum of Understanding dated 8.05.2002. According to the learned counsel, as the respondents accepted their liability, pursuant where to and in furtherance whereof, they issued post dated cheques, a suit for realization of the amount under the said cheques would not attract the provisions of the 1996 Act.

A 15. Mr. Anupam Lal Das, learned counsel appearing on behalf of the respondents, on the other hand, submitted that in view of the fact that the respondents had paid the balance amount of Rs. 22,50,000 by way of two demand drafts dated 18.08.2003 and 12.09.2003, on its own showing, the appellant has no subsisting cause of action and, thus, it should withdraw the suit.

B 16. Difference between Section 34 of the Arbitration Act, 1940 and Section 8 of the 1996 Act is distinct and apparent. Section 8 of the 1996 Act makes a radical departure from Section 34 of the 1940 Act. The 1996 Act was enacted in the light of UNCITRAL Model Rules.

C 17. We need not dilate on this issue as this aspect of the matter has been considered by this Court in *Rashtriya Ispat Nigam Limited & Anr. v. M/s. Verma Transport Company*, [2006] 7 SCALE 565, wherein this Court noticed:

D “Section 34 of the repealed 1940 Act employs the expression ‘steps in the proceedings’. Only in terms of Section 21 of the 1940 Act, the dispute could be referred to arbitration provided parties thereto agreed. Under the 1940 Act, the suit was not barred. The Court would not automatically refer the dispute to an arbitral tribunal. In the event, it having arrived at satisfaction that there is no sufficient reason that the dispute should not be referred and no step in relation thereto was taken by the applicant, it could stay the suit.

F Section 8 of the 1996 Act contemplates some departure from Section 34 of the 1940 Act. Whereas Section 34 of the 1940 Act contemplated stay of the suit; Section 8 of the 1996 Act mandates a reference. Exercise of discretion by the judicial authority, which was the hallmark of Section 34 of the 1940 Act, has been taken away under the 1996 Act. The direction to make reference is not only mandatory, but the arbitration proceedings to be commenced or continued and conclusion thereof by an arbitral award remain unhampered by such pendency. [See *O.P. Malhotra’s ‘The Law and Practice of Arbitration and Conciliation’*, 2nd Edition, pp. 346-347]”

H

18. Respondents had not filed any written statement in the suit. They had not disclosed their defence. They indisputably had raised a dispute in regard to the claim of the appellant. We have noticed the arbitration agreement entered into by and between the parties. It is of wide amplitude. The arbitration agreement brings within its fold dispute of any nature whatsoever. It is in broadest term. Respondents had made payments without prejudice to their rights and contentions. Payments were made keeping in view the ongoing business relationship between the parties. Out of the five post dated cheques, two were dishonoured. But, despite pendency of the suit, payments had been made to satisfy the claim of the appellant in respect of the cheques which were dishonoured. Sufficient explanation has been offered by the respondents therefor. Certain contingencies of events, as indicated hereinbefore, are not in dispute. If the suit was confined to the amount in respect of those two cheques, the contention of Mr. Rao could have been accepted. But it is not so.

19. The term 'dispute' must be given its general meaning under the 1996 Act.

20. In *P. Ramanatha Aiyar's Advanced Law Lexicon*, 3rd edition, page 1431, it is stated:

"In the context of an arbitration the words "disputes" and "differences" should be given their ordinary meanings. Because one man could be said to be indisputably right and the other indisputably wrong, that did not necessarily mean that there had never been any dispute between them..."

21. Admittedly, the appellant's claim is not confined to the question regarding non-payment of the amount under the two dishonoured cheques. Thus, there existed a dispute between the parties. Had the dispute between the parties been confined thereto only, the same had come to an end.

22. Appellant evidently has taken before us an inconsistent stand. If he was satisfied with the payment of the said demand drafts, he need not pursue the suit. It could have said so explicitly before the High Court. It cannot, therefore, be permitted to approbate and reprobate.

23. Section 8 of the 1996 Act is peremptory in nature. In a case where

- A there exists an arbitration agreement, the court is under obligation to refer the parties to arbitration in terms of the arbitration agreement. [See *Hindustan Petroleum Corpn. Ltd. v. Pinkcity Midway Petroleums*, (2003) 6 SCC 503 and *Rashtriya Ispat Nigam Limited* (supra)] No issue, therefore, would remain to be decided in a suit. Existence of arbitration agreement is not disputed. The High Court, therefore, in our opinion, was right in referring the dispute between the parties to arbitration.
- B

24. For the reasons aforementioned, there is no merit in this appeal which is dismissed accordingly with costs. Counsel's fee assessed at Rs. 25,000.

C

B.B.B.

Appeal dismissed.