

A M/S. SUNDARAM FINANCE LIMITED AND ANOTHER

v.

T. THANKAM

(Civil Appeal No. 2079 of 2015)

FEBRUARY 20, 2015

B

[M.Y. EQBAL AND KURIAN JOSEPH, JJ.]

C *Arbitration and Conciliation Act, 1996 – s. 8 – Application under – Maintainability of – Pending suit for injunction, application u/s. 8 seeking the direction of the case to the arbitral tribunal on the ground that in view of the arbitration agreement, the suit was not maintainable – Courts below rejected the plea – On appeal, held: If a party approaches a civil court ignoring the arbitration clause and another party moves the court for referring the matter for arbitration, it is obligatory for the court to refer the parties for arbitration – Trial Court directed to pass fresh orders on the application.*

D *Maxim – ‘generalia specialibus non derogant’ – Applicability of.*

E **Disposing of the appeal, the Court**

F **HELD: 1. Once there is an agreement between the parties to refer the disputes or differences arising out of the agreement to arbitration, and in case either party, ignoring the terms of the agreement, approaches the civil court and the other party, in terms of the Section 8 of the Arbitration Act, moves the court for referring the parties to arbitration before the first statement on the substance of the dispute is filed, in view of the peremptory language of Section 8 of the Arbitration Act, it is obligatory for the court to refer the parties to arbitration in terms of the agreement. [Para 10] [232-G-H; 233-A]**

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2. Once an application in due compliance of Section 8 of the Arbitration Act is filed, the approach of the civil court should be not to see whether the court has jurisdiction. Once it is brought to the notice of the court that its jurisdiction has been taken away in terms of the procedure prescribed under a special statute, the civil court should first see whether there is ouster of jurisdiction in terms or compliance of the procedure under the special statute. The general law should yield to the special law – *generalia specialibus non derogant*. The trial court is directed to pass fresh orders on the application filed by the appellant-defendant u/s 8 of the Arbitration Act. [Paras 15 and 16] [235-C-D, F-G]

P. Anand Gajapathi Raju and Ors. v. P.V.G. Raju (Dead) and Ors. 2000 (2) SCR 684 = 2000 (4) SCC 539; *Hindustan Petroleum Corporation Limited v. Pinkcity Midway Petroleums* 2009 (14) SCR 815 = 2003 (6) SCC 503; *Branch Manager, Magma Leasing and Finance Limited and Anr. v. Potluri Madhvilata and Anr.* (2009) 10 SCC 103; *Sukanya Holdings (P) Limited v. Jayesh Pandya and Anr.* 2003 (3) SCR 558 = (2003) 5 SCC 531 – relied on.

Orix Auto Finance (India) Limited v. Jagminder Singh and Anr. 2006 (2) SCR 169 = (2006) 2 SCC 598–referred to.

Case Law Reference

2000 (2) SCR 684	relied on	para 10
2003 (6) SCC 503	relied on	para 11
2009 (14) SCR 815	relied on	para 12
2003 (3) SCR 558	relied on	para 13
2006 (2) SCR 169	referred to	para 14

A From the Judgment and Order dated 17.03.2014 of the High Court of Kerala at Ernakulam in Writ Petition (C) No. 21076 of 2010

B Dhruv Mehta, Balaji Srinivasan, J. Thilak, Mayank Kshirsagar, Anupam Dhruve, Vaishnavi Subrahmanya, Srishti Govil, Vaishali Dixit for the Appellants.

The Judgment of the Court was delivered by

KURIAN, J. 1. Leave granted.

C 2. Once an application is duly filed in terms of Section 8 of The Arbitration and Conciliation Act, 1996 (hereinafter referred to as 'Arbitration Act') before the civil court, what should be the approach of the court, is the short question arising for consideration in this case.

D 3. In a suit for injunction filed by the respondent, the prayer made was to restrain the first and second defendant institutions and their men from illegally taking away from the possession of plaintiff or her employee, or interfering with the use and enjoyment of ambassador or causing damage to the car bearing registration number KL-11-AA-1473 in the ownership and possession of the plaintiff by way of a decree of injunction. E The car was purchased on loan granted by the appellant.

F 4. Duly complying with the procedure under Section 8 of the Arbitration Act, the appellant filed an application bringing to the notice of the trial court that in view of the agreement for arbitration between the parties regarding resolution of the disputes, the court did not have jurisdiction to try the case and the parties were to be directed to the process of arbitration in terms of the agreement. G The trial court, by order dated 21.06.2010, declined the relief holding that:

H "... Even though clause 22 of the Ext.A1 agreement provides that of disputes should be referred to arbitration this will not prevent the plaintiff from

approaching this court especially when one of the parties to the agreement are trying to commit an act opposed to public policy and *per se* illegal. The arbitration clause in the agreement cannot be put forward as a shield when one of the parties to the agreement commit an act opposed to public policy. In such circumstances the plaintiff can seek protection under the common civil law. In this matter what the respondent alleged that the petitioners are trying to take forcible possession of the vehicle which is being run by her. Her relief sought for in the plaint is only against the illegal acts of the defendants. The apprehended acts of the plaintiff are against the public policy and *per se* illegal and hence this suit is maintainable. ...”

5. The appellant pursued the matter before the High Court. By the impugned order dated 17.03.2014, it was held as follows:

“...Going by Section 8 of the Arbitration and Conciliation Act, I am of the opinion that mere inclusion of an arbitration clause in the agreement does not bar or cause to oust the jurisdiction of the civil court provided under Section 9 of the Code of Civil Procedure. The above view is further supported by Section 5 of the Arbitration and Conciliation Act, which says that “in the matters governed by first part of the Arbitration and Conciliation Act, no judicial authority shall intervene except where so provided in the first part”. It means that jurisdiction of the Civil Court is not completely ousted by Section 8 of the Arbitration and Conciliation Act. Section 5 of the Arbitration and Conciliation Act does not bar the exercise of general power of the civil court to grant interim relief including specific injunctive relief under Order

A XXXIX of the CPC and the Specific Relief Act. ...”

6. Aggrieved, the appeal.

7. Heard the learned counsel appearing for the appellants. None appeared for the respondent.

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8. Two clauses of Annexure-P1-Loan Agreement between the parties, executed on 29.06.1997, are relevant for the consideration of the disputes. Clause 14.6 reads as follows:

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“14.6. Notwithstanding anything contained in this Agreement, the Lender shall be entitled to repossess the hypothecated Asset, whether the entire Loan Amount has been recalled or not, whenever, in the absolute discretion of the Lender, there is likelihood of the dues of the Lender not being paid by the borrower and or/the Asset is likely to be transferred by the Borrower to defeat the security and or payment of the due any units of the Lender.”

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9. Clause 22(a), as to the extent relevant, reads as follows:

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“22. (a) All disputes, differences of any claim arising out of this Agreement whether during its subsistence or thereafter shall be settled by arbitration in accordance with the provisions of the Arbitration and Conciliation Act, 1996, or any statutory amendments thereof and shall be referred to the sole Arbitration of an Arbitrator nominated by the Managing Director/ Joint Managing Director of the Lender. The award given by such an Arbitrator shall be final and binding on the Borrower to the agreement.”

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10. Once there is an agreement between the parties to refer the disputes or differences arising out of the agreement to arbitration, and in case either party, ignoring the terms of the agreement, approaches the civil court and the other party, in terms of the Section 8 of the Arbitration Act, moves the court

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for referring the parties to arbitration before the first statement on the substance of the dispute is filed, in view of the peremptory language of Section 8 of the Arbitration Act, it is obligatory for the court to refer the parties to arbitration in terms of the agreement, as held by this Court in **P. Anand Gajapathi Raju and others v. P.V.G. Raju (Dead) and others**¹.

11. The position was further explained in **Hindustan Petroleum Corporation Limited v. Pinkcity Midway Petroleums**². To quote:

“14. This Court in the case of *P. Anand Gajapathi Raju v. P.V.G. Raju* has held that the language of Section 8 is peremptory in nature. Therefore, in cases where there is an arbitration clause in the agreement, it is obligatory for the court to refer the parties to arbitration in terms of their arbitration agreement and nothing remains to be decided in the original action after such an application is made except to refer the dispute to an arbitrator. Therefore, it is clear that if, as contended by a party in an agreement between the parties before the civil court, there is a clause for arbitration, it is mandatory for the civil court to refer the dispute to an arbitrator. In the instant case the existence of an arbitral clause in the Agreement is accepted by both the parties as also by the courts below but the applicability thereof is disputed by the respondent and the said dispute is accepted by the courts below. Be that as it may, at the cost of repetition, we may again state that the existence of the arbitration clause is admitted. If that be so, in view of the mandatory language of Section 8 of the Act, the courts below ought to have referred the dispute to arbitration.”

12. In **Branch Manager, Magma Leasing and Finance Limited and another v. Potluri Madhvilata and another**³,

¹ (2000) 4 SCC 539

² (2003) 6 SCC 503

³ (2009) 10 SCC 103

A the position has been restated holding that no option is left to the court, once the pre-requisite conditions of Section 8 are fully satisfied.

B 13. The attempt of the trial court and the approach made by the high court in bifurcating the cause of action, is fallacious. It would only lead to delaying and complicating the process. The said issue is also no more *res integra*. In **Sukanya Holdings (P) Limited v. Jayesh Pandya and another**⁴ at paragraphs-16 and 17, it was held as follows:

C “16. The next question which requires consideration is — even if there is no provision for partly referring the dispute to arbitration, whether such a course is possible under Section 8 of the Act. In our view, it would be difficult to give an interpretation to Section 8 under which bifurcation of the cause of action, that is to say, the subject-matter of the suit or in some cases bifurcation of the suit between parties who are parties to the arbitration agreement and others is possible. This would be laying down a totally new procedure not contemplated under the Act. If bifurcation of the subject-matter of a suit was contemplated, the legislature would have used appropriate language to permit such a course. Since there is no such indication in the language, it follows that bifurcation of the subject-matter of an action brought before a judicial authority is not allowed.

F “17. Secondly, such bifurcation of suit in two parts, one to be decided by the Arbitral Tribunal and the other to be decided by the civil court would inevitably delay the proceedings. The whole purpose of speedy disposal of dispute and decreasing the cost of litigation would be frustrated by such procedure. It would also increase the cost of litigation and harassment to the parties and on occasions there is possibility of conflicting judgments and orders by two different forums.”

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H ⁴ (2003) 5 SCC 531

14. In Orix Auto Finance (India) Limited v. Jagminder Singh and another⁵, referring to public policy, this Court has taken the view that if agreements permit the financier to take possession of the finances vehicles, there is no legal impediment on such possession being taken, unless the contract is held to be unconscionable or opposed to public policy”.

15. Once an application in due compliance of Section 8 of the Arbitration Act is filed, the approach of the civil court should be not to see whether the court has jurisdiction. It should be to see whether its jurisdiction has been ousted. There is a lot of difference between the two approaches. Once it is brought to the notice of the court that its jurisdiction has been taken away in terms of the procedure prescribed under a special statute, the civil court should first see whether there is ouster of jurisdiction in terms or compliance of the procedure under the special statute. The general law should yield to the special law – *generalia specialibus non derogant*. In such a situation, the approach shall not be to see whether there is still jurisdiction in the civil court under the general law. Such approaches would only delay the resolution of disputes and complicate the redressal of grievance and of course unnecessarily increase the pendency in the court.

16. The order dated 21.06.2010 passed by the trial court and order dated 17.03.2014 passed by the High Court, are set aside. The trial court is directed to pass fresh orders on the application filed by the appellant-defendant under Section 8 of the Arbitration Act. The needful shall be done within a period of two months from the date of receipt of this order.

17. The appeal is disposed of as above. There shall be no order as to costs.

Kalpana K. Tripathy

Appeal disposed of.

⁵ (2006) 2 SCC 598